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IDAHO CODE

CONTAINING THE

GENERAL LAWS OF IDAHO

ANNOTATED

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Idaho Code Commission

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TITLES 42-43



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PUBLISHER'S NOTE

Since the publication in 1996 of Replacement Titles 42-43, many laws have been amended or repealed and many new laws have been enacted. The resulting increase in the size of the cumulative supplement for Titles 42-43 has made it necessary to revise this volume. Accordingly, Replacement Titles 42-43 are issued with the approval and under the direction of the Idaho Code Commission.

To better serve our customers, by making our annotations more current, LexisNexis has changed the sources that are read to create annotations for this publication. Rather than waiting for cases to appear in printed reporters, court decisions are now being read as they are released by the courts. A consequence of this more current reading of cases, as they are posted on *lexis.com*, is that the most recent cases annotated may not yet have print reporter citations. These will be provided, as they become available, through later publications.

This publication contains contains annotations taken from decisions of the enacted by the Idaho Supreme Court and the Court of Appeals, and the appropriate federal courts, posted on *lexis.com* as of March 14, 2003. These cases will be printed in the following reports:

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American Law Reports, 5th Series, through Volume 103
American Law Reports, Federal Series, through Volume 181
Opinions of Attorney General, 2002-2

Following is an explanation of the abbreviations of the Court Rules used throughout the Idaho Code.

I.R.C.P.	Idaho Rules of Civil Procedure
I.R.E.	Idaho Rules of Evidence
I.C.R.	Idaho Criminal Rules
M.C.R.	Misdemeanor Criminal Rules
I.I.R.	Idaho Infraction Rules
I.J.R.	Idaho Juvenile Rules
I.C.A.R.	Idaho Court Administrative Rules
I.A.R.	Idaho Appellate Rules

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USER'S GUIDE

In order to assist both the legal profession and the layman in obtaining the maximum benefit from the Idaho Code, a User's Guide has been included herein. This guide contains comments and information on the many features found within the Idaho Code intended to increase the usefulness of this set of laws to the user. See the first volume of this set for the complete User's Guide.



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**ADJOURNMENT DATES OF SESSIONS OF
LEGISLATURE**

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1998	March 23, 1998
1999	March 19, 1999
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42-101. Nature of property in water. — Water being essential to the industrial prosperity of the state, and all agricultural development throughout the greater portion of the state depending upon its just apportionment to, and economical use by, those making a beneficial application of the same, its control shall be in the state, which, in providing for its use, shall equally guard all the various interests involved. All the waters of the state, when flowing in their natural channels, including the waters of all natural springs and lakes within the boundaries of the state are declared to be the property of the state, whose duty it shall be to supervise their appropriation and allotment to those diverting the same therefrom for any beneficial purpose, and the right to the use of any of the waters of the state for useful or beneficial purposes is recognized and confirmed; and the right to the use of any of the public waters which have heretofore been or may hereafter be allotted or beneficially applied, shall not be considered as being a property right in itself, but such right shall become the complement of, or one of the appurtenances of, the land or other thing to which, through necessity, said water is being applied; and the right to continue the use of any such water shall never be denied or prevented from any other cause than the failure on the part of the user thereof to pay the ordinary charges or assessments which may be made to cover the expenses for the delivery of such water. [1900, p. 191, § 9b; reen. R.C. & C.L., § 3240; C.S., § 5556; I.C.A., § 41-101.]

History of Irrigation Law.

Two acts passed in 1881 were the basis of the irrigation law of the state for a number of years. The act of Feb. 10, 1881 (Laws 1881, p. 267) regulated the appropriation of water, requiring the posting of notices at the point of diversion and the recording of the same as in the case of mining claims, and prescribing the manner of procuring rights of way by proceedings before the county commissioners. The act of Feb. 7 (Laws 1881, p. 273) regulated the distribution of water through watermasters

whose election and duties were therein provided for. The provisions of these two acts were substantially perpetuated in R.S., §§ 3155-3205.

A new act covering the appropriation of water and providing for fixing water rates by the district court was enacted in 1895 (Laws 1895, p. 174). This act was in part reenacted and in part repealed by the act of Feb. 25, 1899 (Laws 1899, p. 380) which added several new provisions to the law and gave to the county commissioners jurisdiction to fix water

rates. The appropriation provisions of the 1899 law were repealed by Laws 1903, p. 223, which, for the first time, departed from the old system of posting and recording notices of appropriation, placing the matter in the hands of the state engineer. The act of 1903, with such sections of the 1899 and earlier laws as are still in force, comprise the basis of this title, which has been frequently amended since the enactment of the R.C.

Compiler's notes. 1919, ch. 8, § 38, p. 65 (§ 67-3401 herein) abolished the office of state engineer, and § 37 of the same act (§ 67-3301 herein) vested his powers and duties in the department of reclamation. The substitutions of offices and officials authorized by that act have been made accordingly, the text of the preexisting law not being changed except insofar as necessary in making substitutions.

1970, ch. 12, § 2, p. 21 (§ 42-1801a herein) substituted the department of water administration for the department of reclamation. In 1974 such act was amended by 1974, ch. 20, § 28, p. 533 wherein the department of water resources was substituted for the department of water administration.

Cross ref. Canal companies: Annual report, § 30-806; general powers, § 42-2401.

Canals, reservoirs and ditches, power of eminent domain, § 7-701.

City irrigation systems, §§ 50-1801 — 50-1835.

Constitutional provisions relating to water rights, Const., Art. 15.

Dams restricting the free and uninterrupted passage of fish, building or maintaining unlawful, § 36-906.

Drainage districts, § 42-2901 et seq.

Interference with ditches, canals or reservoirs, §§ 18-4301 — 18-4310.

Irrigation companies: Annual report, § 30-806; general powers, § 42-2401.

Irrigation districts, tit. 43.

Preservation of Big Payette lake by appropriation by state of unappropriated waters thereof, § 67-4301.

Preservation of Box Canyon waters by appropriation by state of unappropriated waters thereof, § 67-4310.

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Preservation of Priest, Pend d'Oreille, and Coeur d'Alene lakes by appropriation by state of unappropriated waters thereof, § 67-4304.

Preservation of waters of Big Springs area by appropriation by state of unappropriated waters thereof, § 67-4309.

Preservation of waters of Niagara Springs by appropriation by state of unappropriated waters thereof, § 67-4308.

Preservation of waters of Thousand Springs area by appropriation by state of unappropriated

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Water companies for municipal water supply, §§ 30-801, 30-802.

Water power mills to have screens to prevent fish from entering, § 36-906.

Water users' associations: Exemption from taxes, § 30-804.

Water users' associations for maintenance of community lateral ditches, § 42-1301 et seq.

Sec. to sec. ref. This title is referred to in §§ 42-238a and 42-2041.

Cited in: Marshall v. Niagara Springs Orchard Co., 22 Idaho 144, 125 P. 208 (1912); Ramseyer v. Jamerson, 78 Idaho 504, 305 P.2d 1088 (1957); Bradshaw v. Milner Low Lift Irrigation Dist., 85 Idaho 528, 381 P.2d 440 (1963); Stevenson v. Steele, 93 Idaho 4, 453 P.2d 819 (1969); Baker v. Ore-Ida Foods, Inc., 95 Idaho 575, 513 P.2d 627 (1973); Southern Idaho Fish & Game Ass'n v. Picabo Livestock, Inc., 96 Idaho 360, 528 P.2d 1295 (1974); Nettleton v. Higginson, 98 Idaho 87, 558 P.2d 1048 (1977).

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Where owners of irrigation ditch continued to use ditch after owner of land where point of

diversion was located revoked license, dissolution of the injunction against interference with the use of the ditch was sufficient notice to owner of land of adverse use by owners of ditch to start the prescriptive period. *Bachman v. Reynolds Irrigation Dist.*, 56 Idaho 507, 55 P.2d 1314 (1936).

To perfect an adverse claim for water ripening into title, claimant must show that his use of the water deprived the prior appropriators of water at times when such prior appropriators actually needed the water; the use does not become adverse until it interferes with the use thereof by the prior appropriators, and therefore proof merely that claimant used water and claimed the right to use it is no proof whatever of adverse use. *Head v. Merrick*, 69 Idaho 106, 203 P.2d 608 (1949).

Appropriation of Water.

If one appropriates water for beneficial use, and then sells, rents, or distributes it to others who apply it to such beneficial use, he has a valuable right which is entitled to protection as property right. *Murray v. Public Utils. Comm'n*, 27 Idaho 603, 150 P. 47, 1915F P.U.R. 436, 1916F L.R.A. 756 (1915).

This section indicates that water is subject to appropriation only when flowing in its natural channel. *Rabido v. Furey*, 33 Idaho 56, 190 P. 73 (1920).

Spring situated wholly on government homestead entry is source from which valid water appropriation may be made, with entryman's consent. *Short v. Praisewater*, 35 Idaho 691, 208 P. 844 (1922); *Keiler v. McDonald*, 37 Idaho 573, 218 P. 365 (1923).

Where an appropriator diverted and applied water on his own land to a beneficial use without the initiation of the right in trespass, and diverted the water, continuously and uninterruptedly, for such beneficial use, his right by virtue of appropriation was complete. *Jones v. McIntire*, 60 Idaho 338, 91 P.2d 373 (1939).

Where village duly appropriated to its beneficial use all water, which was public, from certain springs, and no other persons had ever appropriated this water to beneficial use, village acquired right to use all the water from these springs. *Village of Peck v. Denison*, 92 Idaho 747, 450 P.2d 310 (1969).

Where an owner of land diverted water from a spring on the land and applied it to a beneficial use, the appropriation was valid when made, and the water right thus perfected was appurtenant to the land which received the benefit of the water and thus passed on to the person who acquired title to the benefited land. *Parke v. Bell*, 97 Idaho 67, 539 P.2d 995 (1975).

Diversion is a prerequisite to appropriation of water, along with the application of such

water to a beneficial use. *Hidden Springs Trout Ranch, Inc. v. Hagerman Water Users, Inc.*, 101 Idaho 677, 619 P.2d 1130 (1980).

Channel of Creek — Rights.

Substitution of an artificial drainage channel for the natural channel of creek did not affect rights of users of waters of creek to use of its water course to drain away waste waters arising from use of the waters of the creek. *Poole v. Olaveson*, 82 Idaho 496, 356 P.2d 61 (1960).

Compliance with Statutes.

The statutes, with respect to proof of application for beneficial use of public water and allotment of rights appurtenant to land, have application only where there is a full compliance with such statutes; otherwise the right to assert the doctrine of relation is cut off. *Bachman v. Reynolds Irrigation Dist.*, 56 Idaho 507, 55 P.2d 1314 (1936).

Constitutionality.

This section is in harmony with Const., Art. 15, § 1. *Adams v. Twin Falls-Oakley Land & Water Co.*, 29 Idaho 357, 161 P. 322 (1916); *Short v. Praisewater*, 35 Idaho 691, 208 P. 844 (1922); *Poole v. Olaveson*, 82 Idaho 496, 356 P.2d 61 (1960).

Contracts for Water Rights.

Contractual provision empowering company to refuse delivery of water during default by user in payment other than for maintenance was contrary to public policy and void. *Adams v. Twin Falls-Oakley Land & Water Co.*, 29 Idaho 357, 161 P. 322 (1916).

Contract between irrigation company and purchaser of water rights to the effect that no water should be delivered to the latter until maintenance assessments for current year have been paid to company was valid. *Parrott v. Twin Falls Salmon River Land & Water Co.*, 32 Idaho 759, 188 P. 451 (1920).

Irrigation company was without authority to withhold water delivery on account of non-payment of past due assessments. *Reynolds v. North Side Canal Co.*, 36 Idaho 622, 213 P. 344 (1923).

Provision in contract between a Carey Act company and settler upon school land empowering company, upon failure by settler to make required payments for the purchase of water rights, to declare a forfeiture of contract and all payments made theretofore is void. *Rogers v. Thomas*, 38 Idaho 802, 226 P. 165 (1924).

Where state contracts provided for storage dams, permittee was authorized to take all waters up to amount specified in contract, whether or not it included flood or winter flow of granted streams. *Big Wood Canal Co. v. Chapman*, 45 Idaho 380, 263 P. 45 (1927).

Damages for Loss of Use.

Plaintiff, who had prior decreed rights to water, was entitled to recover damages from the defendants for loss or damage to plaintiff's crops proximately caused by acts of defendants, which deprived plaintiff of the water decreed to his land, and of the use of which he was entitled. *Follett v. Taylor Bros.*, 77 Idaho 416, 294 P.2d 1088 (1956).

Delivery to Outsider.

State may forbid appropriation and diversion of its public waters for application and use beyond confines of state. *Walbridge v. Robinson*, 22 Idaho 236, 125 P. 812, 43 L.R.A. (n.s.) 240 (1912).

Delivery of water to outsider where same is not needed by user in district is not dedication. *Yaden v. Gem Irrigation Dist.*, 37 Idaho 300, 216 P. 250 (1923).

Diversion.

It is sufficient, for establishing diversion, that the water flows in a different channel than it would have done absent intervention by the appropriator; where, instead of running downhill directly into the creek, water entered a pipe and traveled approximately one-half mile before the water in dispute was lost as seepage and reemerged would be considered diverted for purposes of appropriation. *Hidden Springs Trout Ranch, Inc. v. Hagerman Water Users, Inc.*, 101 Idaho 677, 619 P.2d 1130 (1980).

Evidence of Compliance With Statute.

Where an irrigation district has not proven the issuance of a permit by the department of water resources, nor made a showing of a compliance with the law with respect to appropriation, it is not entitled to prove a beneficial using of an additional amount of water from a natural stream. *Bachman v. Reynolds Irrigation Dist.*, 56 Idaho 507, 55 P.2d 1314 (1936).

Evidence Showing Diversion and Use.

Evidence supported a finding that the owners of an irrigation ditch, who had diverted water from a certain creek for many years, had established a right thereto by actual diversion and use. *Bachman v. Reynolds Irrigation Dist.*, 56 Idaho 507, 55 P.2d 1314 (1936).

Exceptions to Section.

This section does not apply to waste water from irrigation system, although such water may be flowing in natural channel of stream. *United States v. Haga*, 276 F. 41 (D. Idaho 1921).

This section does not include percolating waters. *Public Utils. Comm'n v. Natatorium Co.*, 36 Idaho 287, 211 P. 533 (1922).

Interstate Streams.

Under the doctrine of appropriation, one state may acquire priority over another state

in the use of water of an interstate stream. *Weiland v. Pioneer Irrigation Co.*, 259 U.S. 498, 42 S. Ct. 568, 66 L. Ed. 1027 (1922).

Laches Applied to Purchaser of Land.

The equitable principle of laches and negligence barred the correction of water right decree which had been entered 16 years prior and 7 years had elapsed after petitioner had purchased the land, during which time the rights of other owners of water rights had intervened. *Albion-Idaho Land Co. v. Adams*, 58 F. Supp. 579 (D. Idaho 1945).

Mandamus to Compel Delivery.

Upon proper demand and tender of payment of assessment for current year, stockholder may compel delivery of water by writ of mandamus. *Reynolds v. North Side Canal Co.*, 36 Idaho 622, 213 P. 344 (1923).

Nature of Water Right.

Clause of this section which provides that right of water user shall not be considered as being a property right in itself but shall become a complement, or one of the appurtenances, of the land on which water is applied, does not deprive or divest right to use of water of any of the qualities or elements of property it otherwise might have. *Hard v. Boise City Irrigation & Land Co.*, 9 Idaho 589, 76 P. 331, 65 L.R.A. 407 (1904).

Policy of State.

The policy of the law of the state is to secure the maximum use and benefit and least wasteful use of its water resources. *Poole v. Olaveson*, 82 Idaho 496, 356 P.2d 61 (1960).

Prescriptive Right in Ditch Unaffected by Foreclosure.

A foreclosure decree against a land owner did not destroy the prescriptive right of ditch owners to maintain a point of diversion on the landowner's property, where the owners of such ditch continued as prescriptive users for more than the statutory period prior to the institution of a suit seeking a decree of adjudication of water rights, and the fact that the ditch owners were joined in the foreclosure suit does not militate against their prescriptive right in such ditch. *Bachman v. Reynolds Irrigation Dist.*, 56 Idaho 507, 55 P.2d 1314 (1936).

Remedies for Nonpayment of Maintenance.

For user's default in payment of maintenance, water company may proceed either under this section or under § 42-806 (presently § 43-806). *Adams v. Twin Falls-Oakley Land & Water Co.*, 29 Idaho 357, 161 P. 322 (1916).

Right of Purchaser After Decree Adjudicating Water Rights.

Where purchaser acquired land after the rendition of water right decree, he received

only that which the vendor had for sale, and if the right to correct the decree had been lost by laches or otherwise, the purchaser was in no better position than the vendor. *Albion-Idaho Land Co. v. Adams*, 58 F. Supp. 579 (D. Idaho 1945).

Rights Between Water Users.

Priority of appropriation gives the better right between those using the water. *Beecher v. Cassia Creek Irrigation Co.*, 66 Idaho 1, 154 P.2d 507 (1944).

It was error for trial court to require users to restrict use to amount of water represented by shares in company, if use was not rotated, since it is policy of the law to restrict use to a percentage, either above or below amount of shares depending upon availability of water and demand. *Simonson v. Moon*, 72 Idaho 39, 237 P.2d 93 (1951).

Rights of Senior Appropriator.

A senior appropriator of water retains his right to surface waste and seepage water, and may reclaim it, even though such water has been used by a junior appropriator, even for as long as 40 years. *Hidden Springs Trout Ranch, Inc. v. Hagerman Water Users, Inc.*, 101 Idaho 677, 619 P.2d 1130 (1980).

Rights to Ditches and Water Separate.

As possessory rights to ditches and to use of water may each have an existence independent of the other, a ditch may be conveyed, reserving water right, or water may be conveyed, reserving ditch. *Ada County Farmers Irrigation Co. v. Farmers Canal Co.*, 5 Idaho 793, 51 P. 990, 40 L.R.A. 485 (1898).

Riparian Rights.

Riparian water rights are not recognized in Idaho. *Jones v. McIntire*, 60 Idaho 338, 91 P.2d 373 (1939). However, see *Drake v. Earhart*, 2 Idaho 750, 23 P. 541 (1890); *Hutchinson v. Watson Slough Ditch Co.*, 16 Idaho 484, 101 P. 1059, 133 Am. St. 125 (1909).

Slough As Water Course.

Where a creek was a continuous water course, the fact that it flowed through sloughs did not change its character or prevent appropriation of waters therefrom. *Bachman v. Reynolds Irrigation Dist.*, 56 Idaho 507, 55 P.2d 1314 (1936). See also, *Hutchinson v. Watson Slough Ditch Co.*, 16 Idaho 484, 101 P. 1059, 133 Am. St. 125 (1909).

Suit for Exclusive Use and Possession.

Suit by federally recognized Indian tribe brought in federal court against the state and various state agencies, and numerous state officials in their individual capacities seeking title to the banks and submerged lands of lake and various rivers and streams that were within their reservation and a declaratory

judgment to establish its entitlement to the exclusive use, occupancy and right to quiet enjoyment of the submerged lands as well as a declaration of the invalidity of all Idaho statutes, ordinances, regulations, customs or usages which purport to regulate, authorize, use or affect in any way the submerged land and a permanent injunction prohibiting the state from permitting or taking any action in violation of the tribe's rights of exclusive use, was barred by Idaho's Eleventh Amendment immunity since the exception of *Ex Parte Young*, 209 U.S. 123, 52 L.Ed. 714, 28 S.Ct. 441 (1908), did not apply, and a state forum was available to hear such claims. *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 117 S. Ct. 2028, 138 L. Ed. 2d 438 (1997).

Tiling of Ditch.

Where, in suit by irrigation district to quiet title to ditch on land owned by defendant, defendant complained that a portion of the ditch had been tiled by the plaintiff so as to deprive the defendant of the use of the ditch, the court will assume that ditch was tiled for the purpose of preventing waste, since it is the policy of the law to increase effective use of water and to prevent its waste. *Reynolds Irrigation Dist. v. Sproat*, 69 Idaho 315, 206 P.2d 774 (1948).

Title of State.

Title to public waters is held by the state in its sovereign capacity as representative of all the people. *Walbridge v. Robinson*, 22 Idaho 236, 125 P. 812, 43 L.R.A. (n.s.) 240 (1912).

The interest or title of the state to all waters of the state as provided by this section is not in the proprietary sense, but rather in the sovereign capacity as representative of all the people for the purpose of guaranteeing that the common rights of all shall be equally protected and that no one shall be denied his proper use and benefit of this common necessity. *Poole v. Olaveson*, 82 Idaho 496, 356 P.2d 61 (1960).

Waste Water.

—Appropriation of.

No distinction is to be drawn between waste water appropriated after it has been put to irrigation use and waste water seeping from irrigation canals, and no appropriator of waste water should be able to compel any other appropriator to continue the waste of water which benefits the former. *Hidden Springs Trout Ranch, Inc. v. Hagerman Water Users, Inc.*, 101 Idaho 677, 619 P.2d 1130 (1980).

—Drainage.

Where springs arose in area of respondent's land and those springs were tributary of the watercourse of a creek, waste water in that area constituted a by-product of the irrigation

waters likewise arising in the area and re-claiming of such waste water by drainage into the natural channel of a stream, if without detriment or damage to others is in keeping with the expressed policy of the state to secure the maximum beneficial and least wasteful use of its water resources. *Poole v. Olaveson*, 82 Idaho 496, 356 P.2d 61 (1960).

Water Right Appurtenant to Land.

Appellants' decreed water right constitutes real property and such right is appurtenant to appellants' land to which the water represented thereby has been beneficially applied. *Anderson v. Cummings*, 81 Idaho 327, 340 P.2d 1111 (1959).

The owners of the old lands, through and by means of the irrigation district, acquired, and for many years applied to the irrigation of their lands, valuable water rights which had become appurtenant and dedicated to their lands, and which were held in trust by the district for their use; they could not thereafter, without their consent, be deprived of the use of that water when needed to irrigate their lands. *Bradshaw v. Milner Low Lift Irrigation Dist.*, 85 Idaho 528, 381 P.2d 440 (1963).

Water Right As Real Property.

Water rights are included within the definition of real property by § 55-101. *Ireton v. Idaho Irrigation Co.*, 30 Idaho 310, 164 P. 687 (1917).

Waters from Natural Spring.

It was held that waters from a creek, which was formed by natural springs on privately owned property, still constituted public waters within this section and cognate legislation, and were therefore subject to appropriation. *Bachman v. Reynolds Irrigation Dist.*, 56 Idaho 507, 55 P.2d 1314 (1936). See also *Hutchinson v. Watson Slough Ditch Co.*, 16 Idaho 484, 101 P. 1059, 133 Am. St. 125 (1909).

Insofar as the rights of appropriation are concerned, waters of a natural spring or stream, flowing from the lands of another where they arise, are subject to diversion and application to beneficial use if there is not a prior right in existence. *Jones v. McIntire*, 60 Idaho 338, 91 P.2d 373 (1939); *Maheer v. Gentry*, 67 Idaho 559, 186 P.2d 870 (1947).

Plaintiffs, who established beneficial use of spring waters for a period in excess of 40 years, which beneficial use had been known to the defendants, were entitled to have title quieted in the springs, regardless of whether the springs were public or private. *Whittaker v. Kauer*, 78 Idaho 94, 298 P.2d 745 (1956).

It is only when the waters of natural springs flow on privately owned lands into a natural channel that such waters when flowing in the natural channel become public waters subject to appropriation, diversion and application to a beneficial use. *Nordick v. Sorensen*, 81 Idaho 117, 338 P.2d 766 (1959).

Opinions of Attorney General. The rights to the use of all hot waters that rise and flow at Lava Hot Springs are water rights that have been appropriated under state law and are subject to regulation by the Idaho Department of Water Resources under the provisions of title 42 of the Idaho Code (§§ 42-101, 42-103, 42-104 and 42-106). OAG 97-1.

The Lava Springs Foundation has the authority under title 67, chapter 44, Idaho Code, to enter into agreements involving easements with private parties to discharge the Foundation's waste water. However, the Foundation may not authorize the use of any portion of its water in a manner that is inconsistent with its state water right. Other parties seeking to use the Foundation's waste water for new uses or on lands other than the authorized place of use must file for a permit from the Idaho Department of Water Resources. OAG 97-1.

Since Idaho law, Const., Art. 15, § 3 and §§ 42-101, 42-103, 42-104 and 42-106, specifies the law of prior appropriation as the method to establish the right to use water in Idaho, absent a clear statutory expression by the legislature to create an exception to the appropriation statutes, all rights to the use of water in Idaho must be acquired by appropriation and the language in §§ 67-4401 and 67-4403 is not a clear expression that the legislature intended to create an exception from the appropriation process for the waters at Lava Hot Springs as the most reasonable interpretation of this language is that the Foundation's jurisdiction and control over waters at Lava Hot Springs refers to those waters that have already been appropriated or that will be appropriated in the future. OAG 97-1.

Collateral References. 78 Am. Jur. 2d, Waters, § 1 et seq.

93 C.J.S., Waters, §§ 342-436.

Constitutionality of statute limiting or controlling the exploitation or waste of water. 24 A.L.R. 307; 78 A.L.R. 834.

Constitutionality of statute affecting riparian rights. 56 A.L.R. 277.

Appropriation of water as creating right, as against subsequent appropriator, to continue method or means of diversion. 121 A.L.R. 1044.

42-102. Measurement of water. — A cubic foot of water per second of time shall be the legal standard for the measurement of water in this state,

and it shall be the duty of the department of water resources to devise a simple, uniform system for the measurement and distribution of water. [1899, p. 380, §§ 1, 21; reen. R.C. & C.L., § 3241; C.S., § 5557; I.C.A., § 41-102.]

Compiler's notes. The name of the department of water administration (formerly the department of reclamation) has been changed to the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

Cross ref. Acre foot recognized as standard for stored water, § 42-202.

ANALYSIS

Courts must recognize standard.
Requirements of decree.

Courts Must Recognize Standard.

This section is the measurement of water which should be recognized by court in enter-

ing decree of distribution of water. *Lee v. Hanford*, 21 Idaho 327, 121 P. 558 (1912).

Requirements of Decree.

The requirement that a decree of water rights set out a specific water measurement is not imposed by this section as this section simply provides the basic unit of measurement of water for whatever purpose may be relevant. *Village of Peck v. Denison*, 92 Idaho 747, 450 P.2d 310 (1969).

42-103. Right acquired by appropriation. — The right to the use of the unappropriated waters of rivers, streams, lakes, springs, and of subterranean waters or other sources within this state shall hereafter be acquired only by appropriation under the application, permit and license procedure as provided for in this title, unless hereinafter in this title excepted. [R.S., § 3155; 1899, p. 380, § 2; reen. R.C. & C.L., § 3242; C.S., § 5558; I.C.A., § 41-103; am. 1971, ch. 177, § 1, p. 843.]

Cross ref. Adjudication of water rights, §§ 42-1401 — 42-1414.

Cited in: *Speer v. Stephenson*, 16 Idaho 707, 102 P. 365 (1909); *Nielson v. Parker*, 19 Idaho 727, 115 P. 488 (1911); *Marshall v. Niagara Springs Orchard Co.*, 22 Idaho 144, 125 P. 208 (1912); *Bower v. Moorman*, 27 Idaho 162, 147 P. 496, 1917C Ann. Cas. 99 (1915); *Stevenson v. Steele*, 93 Idaho 4, 453 P.2d 819 (1969); *State, Dep't of Parks v. Idaho Dep't of Water Admin.*, 96 Idaho 440, 530 P.2d 924 (1974); *Crow v. Carlson*, 107 Idaho 461, 690 P.2d 916 (1984); *Fremont-Madison Irrigation Dist. & Mitigation Group v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 926 P.2d 1301 (1996).

ANALYSIS

Adverse user.
Compliance with statutes.
Constitutional use water right.
Continued use a valid appropriation.
Dependence on supply.
Ditch owners' rights after foreclosure.
Ditch users not trespassers.
Downstream landowner.
Evidence of compliance with statutes.
Natural springs.
Ownership of land.

Percolating waters.

Quiet title action.

Relation to other laws.

Riparian rights.

Seepage water.

Slough as watercourse.

Subterranean waters.

Adverse User.

Where owners of irrigation ditch continued to use ditch after owner of land where point of diversion was located revoked license, dissolution of the injunction against interference with the use of the ditch was sufficient notice to owner of land of adverse use by owners of ditch to start the prescriptive period. *Bachman v. Reynolds Irrigation Dist.*, 56 Idaho 507, 55 P.2d 1314 (1936).

Compliance with Statutes.

The statutes, with respect to proof of application for beneficial use of public water and allotment of rights appurtenant to land, have application only where there is a full compliance with such statutes, otherwise, the right to assert the doctrine of relation is cut off. *Bachman v. Reynolds Irrigation Dist.*, 56 Idaho 507, 55 P.2d 1314 (1936).

Constitutional Use Water Right.

A constitutional use water right is created simply by diverting unappropriated waters

and putting those waters to beneficial use. *Nettleton v. Higginson*, 98 Idaho 87, 558 P.2d 1048 (1977).

Where the water right of the upstream appropriator with a valid permit was junior to that of the downstream appropriator with constitutional water rights, and the former's impoundment of water interfered with the latter's senior entitlement, the upstream appropriator was liable for any damages caused by the wrongful interference. *R.T. Nahas Co. v. Hulet*, 114 Idaho 23, 752 P.2d 625 (Ct. App. 1988).

An appropriator, whose right is based upon a valid, although unadjudicated, constitutional method of appropriation, retains a senior claim in relation to a person holding a later issued permit. *R.T. Nahas Co. v. Hulet*, 114 Idaho 23, 752 P.2d 625 (Ct. App. 1988).

Continued Use a Valid Appropriation.

Continued and uninterrupted use of water for period of more than five years constituted valid appropriation. *Short v. Praisewater*, 35 Idaho 691, 208 P. 844 (1922).

Evidence in the cited case supported a finding that the owners of an irrigation ditch, who had diverted water from a certain creek for many years, had established a right thereto by actual diversion and use. *Bachman v. Reynolds Irrigation Dist.*, 56 Idaho 507, 55 P.2d 1314 (1936).

Where an appropriator diverted and applied water on his own land to a beneficial use without the initiation of the right in trespass, and diverted the water continuously and uninterruptedly for such beneficial use, his right by virtue of appropriation was complete. *Jones v. McIntire*, 60 Idaho 338, 91 P.2d 373 (1939).

Dependence on Supply.

The right of appropriation does not carry with it an unconditional guarantee of water regardless of supply of water available. *Nettleton v. Higginson*, 98 Idaho 87, 558 P.2d 1048 (1977).

Ditch Owners' Rights After Foreclosure.

A foreclosure decree against a landowner did not destroy the prescriptive right of ditch owners to maintain a point of diversion on the landowner's property, where the owners of such ditch continued as prescriptive users for more than the statutory period prior to the institution of a suit seeking a decree of adjudication of water rights, and the fact that the ditch owners were joined in the foreclosure suit does not militate against their prescriptive right in such ditch. *Bachman v. Reynolds Irrigation Dist.*, 56 Idaho 507, 55 P.2d 1314 (1936).

Ditch Users Not Trespassers.

Where a landowner attempted to revoke the license of ditch owners, which ditch was

situated upon the property of the landowner, but notwithstanding such attempted revocation, the ditch owners continued to use the ditch for the prescriptive period, which use was continuous, notorious, and under claim of right, the landowner or his successors in estate cannot contend that the ditch owners, after such revocation, were mere trespassers. *Bachman v. Reynolds Irrigation Dist.*, 56 Idaho 507, 55 P.2d 1314 (1936).

Downstream Landowner.

Where, under his license and certificate of water right plaintiff, downstream landowner, was entitled to year round unobstructed flow of creek for irrigation and domestic purposes up to 1.44 cubic feet per second, and other plaintiffs owned right to have the water proceed through their field by diversion ditch, plaintiff was entitled to have the water flow uninterrupted any time it would reach his land. *Ward v. Kidd*, 87 Idaho 216, 392 P.2d 183 (1964).

Evidence of Compliance With Statutes.

Where an irrigation district had not proven the issuance of a permit by the department of water resources, nor made a showing of a compliance with the law with respect to appropriation, it was not entitled to prove a beneficial using of an additional amount of water from a natural stream. *Bachman v. Reynolds Irrigation Dist.*, 56 Idaho 507, 55 P.2d 1314 (1936).

Natural Springs.

Water of natural springs is public water and subject to valid appropriation to beneficial use. *Rabido v. Furey*, 33 Idaho 56, 190 P. 73 (1920); *Short v. Praisewater*, 35 Idaho 691, 208 P. 844 (1922).

Waters from a creek, which was formed by natural springs on privately owned property, constituted public waters within this section and cognate legislation, and were therefor subject to appropriation. *Bachman v. Reynolds Irrigation Dist.*, 56 Idaho 507, 55 P.2d 1314 (1936). See also, *Hutchinson v. Watson Slough Ditch Co.*, 16 Idaho 484, 101 P. 1059, 133 Am. St. 125 (1909).

Waters of a natural spring or stream, flowing from the lands of another where they arose were subject to diversion and application to beneficial use if there was not a prior right in existence. *Jones v. McIntire*, 60 Idaho 338, 91 P.2d 373 (1939); *Maher v. Gentry*, 67 Idaho 559, 186 P.2d 870 (1947).

It is only when the waters of natural springs flow on privately owned lands into a natural channel that such waters become public waters subject to appropriation, diversion and application to a beneficial use. *Nordick v. Sorenson*, 81 Idaho 117, 338 P.2d 766 (1959).

Where village duly appropriated to its ben-

ificial use all water, which was public, from certain springs, and no other persons had ever appropriated this water to beneficial use, village acquired right to use all the water from these springs. *Village of Peck v. Denison*, 92 Idaho 747, 450 P.2d 310 (1969).

Ownership of Land.

Water may be appropriated for beneficial use on land not owned by appropriator, and such water rights become appropriator's property. *First Sec. Bank v. State*, 49 Idaho 740, 291 P. 1064 (1930).

Percolating Waters.

Percolating subterranean waters may be appropriated either by the statutory permit method, or by actual diversion and application to a beneficial use. *Silkey v. Tiegs*, 51 Idaho 344, 5 P.2d 1049 (1931).

Quiet Title Action.

Plaintiffs, who established beneficial use of spring waters for a period in excess of 40 years, which beneficial use had been known to the defendants, were entitled to have title quieted in the springs, regardless of whether the springs were public or private. *Whittaker v. Kauer*, 78 Idaho 94, 298 P.2d 745 (1956).

Relation to Other Laws.

The right defined by this section is not abrogated by § 42-229, but the latter section regulates the method and means by which one may perfect a right to the use of water. *State ex rel. Tappan v. Smith*, 92 Idaho 451, 444 P.2d 412 (1968).

Riparian Rights.

Riparian water rights are not recognized in Idaho. *Jones v. McIntire*, 60 Idaho 338, 91 P.2d 373 (1939). However, see *Drake v. Earhart*, 2 Idaho 750, 23 P. 541 (1890); *Hutchinson v. Watson Slough Ditch Co.*, 16 Idaho 484, 101 P. 1059, 133 Am. St. 125 (1909).

Seepage Water.

This section does not apply to waste water from irrigation system, although such water may be flowing in the natural channel of stream. *United States v. Haga*, 276 F. 41 (D. Idaho 1921).

Slough As Watercourse.

Where a creek was a continuous watercourse, the fact that it flowed through sloughs did not change its character or prevent appropriation of waters therefrom. *Bachman v. Reynolds Irrigation Dist.*, 56 Idaho 507, 55 P.2d 1314 (1936). See also, *Hutchinson v. Watson Slough Ditch Co.*, 16 Idaho 484, 101 P. 1059, 133 Am. St. 125 (1909).

Subterranean Waters.

Rule of first in time, first in right applied to subterranean waters confined horizontally between impervious strata in such a manner that when artificial openings were made in the upper stratum water was forced to, or above, surface of ground. *Hinton v. Little*, 50 Idaho 371, 296 P. 582 (1931).

Opinions of Attorney General. The rights to the use of all hot waters that rise and flow at Lava Hot Springs are water rights that have been appropriated under state law and are subject to regulation by the Idaho Department of Water Resources under the provisions of title 42 of the Idaho Code (§§ 42-101, 42-103, 42-104 and 42-106). OAG 97-1.

The Lava Springs Foundation has the authority under title 67, chapter 44, Idaho Code, to enter into agreements involving easements with private parties to discharge the Foundation's waste water. However, the Foundation may not authorize the use of any portion of its water in a manner that is inconsistent with its state water right. Other parties seeking to use the Foundation's waste water for new uses or on lands other than the authorized place of use must file for a permit from the Idaho Department of Water Resources. OAG 97-1.

Since Idaho law, Const., Art. 15, § 3 and §§ 42-101, 42-103, 42-104 and 42-106, specifies the law of prior appropriation as the method to establish the right to use water in Idaho, absent a clear statutory expression by the legislature to create an exception to the appropriation statutes, all rights to the use of water in Idaho must be acquired by appropriation and the language in §§ 67-4401 and 67-4403 is not a clear expression that the legislature intended to create an exception from the appropriation process for the waters at Lava Hot Springs as the most reasonable interpretation of this language is that the Foundation's jurisdiction and control over waters at Lava Hot Springs refers to those waters that have already been appropriated or that will be appropriated in the future. OAG 97-1.

Collateral References. 78 Am. Jur. 2d, §§ 341-366.

93 C.J.S., Waters, §§ 190-235, 342-436.

Right to conduct and use artesian water out of artesian basin. 31 A.L.R. 906.

Appropriation of water as creating right to continue a method or means of diversion as against subsequent appropriators. 121 A.L.R. 1044.

Divisibility of easement in gross or license in respect to water. 130 A.L.R. 1253.

42-104. Appropriation must be for beneficial purpose. — The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such purpose, the right ceases. [R.S., § 3156; 1899, p. 380, § 3; reen. R.C. & C.L., § 3243; C.S., § 5559; I.C.A., § 41-104.]

Cited in: *Marshall v. Niagara Springs Orchard Co.*, 22 Idaho 144, 125 P. 208 (1912); *Village of Peck v. Denison*, 92 Idaho 747, 450 P.2d 310 (1969); *Stevenson v. Steele*, 93 Idaho 4, 453 P.2d 819 (1969).

ANALYSIS

Time allowed appropriator to use water.
Use by junior appropriators.
Waste irrigation water.

Time Allowed Appropriator to Use Water.

Appropriator of water for irrigation purposes, after conducting water to point of intended use, had a reasonable length of time to apply it to such intended use. *Hall v. Blackman*, 8 Idaho 272, 68 P. 19 (1902); *Bennett v. Nourse*, 22 Idaho 249, 125 P. 1038 (1912).

Use by Junior Appropriators.

To allow a junior, or other appropriator to establish an adverse right to such water during times when it is not required and not being used by the original appropriator, on the theory that such adverse use was inconsistent with the right of the prior appropriator, would subvert the purpose of the law and encourage wasteful diversion and use of water in violation thereof. *Mountain Home Irrigation Dist. v. Duffy*, 79 Idaho 435, 319 P.2d 965 (1957).

Under § 18-4302 and the constitutional policy of securing the maximum use and benefit from water resources, it is the duty of the prior appropriator to allow the water, which he has a right to use, to flow down the channel for the benefit of junior appropriators when he has no immediate need for the use thereof. *Mountain Home Irrigation Dist. v. Duffy*, 79 Idaho 435, 319 P.2d 965 (1957).

Waste Irrigation Water.

Where springs arise in area of respondent's land and those springs were tributary of the watercourse of a creek, waste water in the area constituted a by-product of the irrigation waters likewise arising in the area and reclaiming of such waste water by drainage into

the natural channel of a stream, if without detriment or damage to others, is in keeping with the expressed policy of the state to secure the maximum beneficial and least wasteful use of its water resources. *Poole v. Olaveson*, 82 Idaho 496, 356 P.2d 61 (1960).

Opinions of Attorney General. The rights to the use of all hot waters that rise and flow at Lava Hot Springs are water rights that have been appropriated under state law and are subject to regulation by the Idaho Department of Water Resources under the provisions of title 42 of the Idaho Code (§§ 42-101, 42-103, 42-104 and 42-106). OAG 97-1.

The Lava Springs Foundation has the authority under title 67, chapter 44, Idaho Code, to enter into agreements involving easements with private parties to discharge the Foundation's waste water. However, the Foundation may not authorize the use of any portion of its water in a manner that is inconsistent with its state water right. Other parties seeking to use the Foundation's waste water for new uses or on lands other than the authorized place of use must file for a permit from the Idaho Department of Water Resources. OAG 97-1.

Since Idaho law, Const., Art. 15, § 3 and §§ 42-101, 42-103, 42-104 and 42-106, specifies the law of prior appropriation as the method to establish the right to use water in Idaho, absent a clear statutory expression by the legislature to create an exception to the appropriation statutes, all rights to the use of water in Idaho must be acquired by appropriation and the language in §§ 67-4401 and 67-4403 is not a clear expression that the legislature intended to create an exception from the appropriation process for the waters at Lava Hot Springs as the most reasonable interpretation of this language is that the Foundation's jurisdiction and control over waters at Lava Hot Springs refers to those waters that have already been appropriated or that will be appropriated in the future. OAG 97-1.

Collateral References. 78 Am. Jur. 2d, Waters, §§ 353, 354.

93 C.J.S., Waters, § 363.

42-105. Use of natural waterways — Measurement of commingled water — Approval of right to exchange water. — (1) The water that a person is entitled to divert by reason of a valid water right may be turned into the channel of a natural waterway and mingled with its water, and then reclaimed, but in reclaiming the water so mingled, the amount of

water to which prior appropriators may be entitled shall not be diminished, and due allowance shall be made for loss by evaporation and seepage. The use of natural waterways to commingle and reclaim water shall be subject at all times to the supervision and control of the director of the department of water resources and shall be subject to the regulation of the watermaster within an established water district. The amounts of water turned into or diverted from all natural waterways are subject to the requirement of measurement and reporting.

(2) The water that a person is entitled to divert by reason of a valid water right, or water that a person is seeking to appropriate, may be exchanged for water under another water right, or for other water from the same or another source, as hereinafter provided:

(a) If the applicant intends to exchange water the applicant is entitled to divert under an existing valid water right for any other water, approval of the exchange shall be obtained by filing an application under the provisions of section 42-240, Idaho Code;

(b) If the applicant proposes to exchange water that the applicant is seeking to appropriate, approval of the exchange shall be obtained by filing an application to appropriate water under section 42-202, Idaho Code. The proposed exchange shall be described in the application and the application shall be processed in accordance with the provisions of section 42-203A, Idaho Code. If the application seeks to exchange the water to be appropriated with water available under another water right, the application shall be accompanied by an agreement to exchange signed by the owner of the existing water right. An exchange with water under an existing water right cannot result in an enlargement in use of the existing right.

(3) An exchange of water hereafter made without the approval of the department of water resources as provided in this section shall be invalid. Nothing in this section shall affect the right a person may have or may obtain to turn water into a ditch or other artificial conveyance and reclaim the water. [R.S., § 3158; reen. R.C., § 3244; am. 1911, ch. 149, § 1, p. 454; C.L., § 3244; C.S., § 5560; I.C.A., § 41-105; am. 1969, ch. 300, § 1, p. 900; am. 1998, ch. 424, § 1, p. 1339.]

Compiler's notes. The name of the department of water administration (formerly the department of reclamation) has been changed to the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

Section 2 of S.L. 1969, ch. 300 has been repealed.

Section 2 of S.L. 1998, ch. 424 is compiled as § 42-240.

Cited in: Schodde v. Twin Falls Land & Water Co., 161 F. 43 (9th Cir. 1908), aff'd, 224 U.S. 107, 32 S. Ct. 470, 56 L. Ed. 686 (1912); Rabido v. Furey, 33 Idaho 56, 190 P. 73 (1920).

ANALYSIS

Contracts for supplemental water.
Cotenants of canal system.

Decreed and undecreed waters.

Exchange distinguished.

Fluctuating flow.

In general.

Injury to channel.

Interruption of flow.

Use of natural channel.

Contracts for Supplemental Water.

Wilder Irrigation District has power to enter into contract with federal government to obtain supplemental water supply for irrigation, to be replaced later with water from another source. Board of Dirs. v. Jorgensen, 64 Idaho 538, 136 P.2d 461 (1943).

Cotenants of Canal System.

The cotenant of a canal system must necessarily be able to commingle the waters with

other cotenants, if not, condemnation of concurrent ownership in a canal system would never be possible. *Canyon View Irrigation Co. v. Twin Falls Canal Co.*, 101 Idaho 604, 619 P.2d 122 (1980), cert. denied, 451 U.S. 912, 101 S. Ct. 1983, 68 L. Ed. 2d 301 (1981).

Decreed and Undecreed Waters.

Watermaster upon a stream, waters of which have been decreed, cannot be compelled by mandatory injunction to distribute decreed waters of one stream in exchange for undecreed waters of another. *Daniels v. Adair*, 38 Idaho 130, 220 P. 107 (1923).

Exchange Distinguished.

An exchange differs from commingling, although the two concepts are closely related and may in some circumstances overlap; essentially, commingling occurs when waters are mixed and later separated, and exchange takes place when different waters are traded without being mixed. *Canyon View Irrigation Co. v. Twin Falls Canal Co.*, 101 Idaho 604, 619 P.2d 122 (1980), cert. denied, 451 U.S. 912, 101 S. Ct. 1983, 68 L. Ed. 2d 301 (1981).

Fluctuating Flow.

An easement which granted a power company the right to fluctuate the flow of a river would be construed as granting something in addition to the right of the power company to fill completely the natural channel of the river, since the power company had the latter right without the aid of an easement. *Griffeth v. Utah Power & Light Co.*, 226 F.2d 661 (9th Cir. 1955).

In General.

Party can condemn right to use portion of system of another, if necessary to convey water appropriated by him to land upon which it is to be used and he can also mix waters appropriated by him with those of others in natural watercourse. *Berg v. Twin Falls Canal Co.*, 36 Idaho 62, 213 P. 694 (1922).

Water exchanges are invalid only if they clearly infringe on the rights of other water users. *Almo Water Co. v. Darrington*, 95 Idaho 16, 501 P.2d 700 (1972).

42-106. Priority. — As between appropriators, the first in time is first in right. [R.S., § 3159; 1899, p. 380, § 4; reen. R.C. & C.L., § 3245; C.S., § 5561; I.C.A., § 41-106.]

Cross ref. Priority between persons who have settled on land receiving water for agricultural purposes under a sale, rental or distribution, is subject to reasonable limitations as to the quantity of water used and the time of use, Const., Art. 15, § 5.

Right of priority and preferences as be-

Injury to Channel.

Water appropriator using natural channel for conveyance of water was responsible for any injury resulting from negligent or unlawful use of such channel. *Blaine County Inv. Co. v. Mays*, 49 Idaho 766, 291 P. 1055 (1930).

Interruption of Flow.

By virtue of prior appropriation of waters of nonnavigable stream, claimants had right to quantity of water originally appropriated, and if such flow was interrupted by dam, they had right to cut such dam to extent of obtaining their ordinary flow. *Carey Lake Reservoir Co. v. Strunk*, 39 Idaho 332, 227 P. 591 (1924).

Where defendant built a series of dams that increased the flow of a river to such extent that plaintiff's access to his farm land, which was across the river from his place of residence making it necessary for plaintiff to ford the river in order to reach his farm land, was obstructed and plaintiff sought to recover damages on the theory that the dams constituted a nuisance, court held that, by statute, defendant and other appropriators of water for lawful purposes had right to use channel of natural streams for carrying stored water or water diverted from other streams. *Johnson v. Utah Power & Light Co.*, 215 F.2d 814 (9th Cir. 1954).

Use of Natural Channel.

The current of a river cannot be appropriated by a riparian proprietor in Idaho, even assuming the possible persistence in that state of the doctrine of riparian rights, in view of statutes declaring the right of appropriators of water for irrigation or other lawful purpose to use the channel of natural streams for carrying stored water or water diverted from other streams. *Johnson v. Utah Power & Light Co.*, 215 F.2d 814 (9th Cir. 1954).

The use of the natural channel of a stream to carry water not discharged by one pumping unit to another pumping unit did not constitute appropriation of the water at two points of diversion. *Keller v. Magic Water Co.*, 92 Idaho 276, 441 P.2d 725 (1968).

Collateral References. 78 Am. Jur. 2d, Waters, §§ 176-184.

tween domestic, irrigation, and mining uses, Const., Art. 15, § 3.

Cited in: *Brose v. Board of Dirs.*, 24 Idaho 116, 132 P. 799 (1913); *Colthorp v. Mountain Home Irrigation Dist.*, 66 Idaho 173, 157 P.2d 1005 (1945); *Stevenson v. Steele*, 93 Idaho 4, 453 P.2d 819 (1969); *Crow v. Carlson*, 107

Idaho 461, 690 P.2d 916 (1984).

ANALYSIS

Appropriation by drainage district.
 Completion of appropriation.
 Contravention of constitutional provisions.
 Date of priority.
 Decree establishing priority.
 Diversion by subsequent appropriator.
 Finding of priority.
 Grant of vested rights or appropriation permit.
 Interstate streams.
 Manner of appropriation.
 Nature of right.
 Priorities.
 Protection of right.
 Riparian rights repudiated.
 Springs as public waters.
 Subterranean waters.

Appropriation by Drainage District.

Drainage district, by constructing drain which destroyed drain of prior appropriator of waste and seepage waters, did not thereby destroy his right to such waters. *Sebern v. Moore*, 44 Idaho 410, 258 P. 176 (1927).

Completion of Appropriation.

Where an appropriator diverted and applied water on his own land to a beneficial use without the initiation of the right in trespass, and diverted the water, continuously and uninterruptedly, for such beneficial use, his right by virtue of appropriation was complete. *Jones v. McIntire*, 60 Idaho 338, 91 P.2d 373 (1939).

Contravention of Constitutional Provisions.

One who initiates right on state property, subsequent to existing right, does so subject to such existing right, and legislation, substituting procedure or time for perfection of original right, does not necessarily contravene any constitutional provisions. *Big Wood Canal Co. v. Chapman*, 45 Idaho 380, 263 P. 45 (1927).

Date of Priority.

When two persons as partners appropriated water sufficient to irrigate 480 acres of land, owned by them as tenants in common, in 1872, and actually irrigated 200 acres of land until 1886, when they severed their interests, right of each to his respective share of water appropriated by them jointly dates from 1872. *Hall v. Blackman*, 8 Idaho 272, 68 P. 19 (1902).

Water right acquired dated from time when water was actually delivered upon the ground for the use of which it was diverted, and the priority thereby acquired was not broken by a subsequent sale of the claim, ditch and water right, and transfer of possession to vendee.

Brown v. Newell, 12 Idaho 166, 85 P. 385 (1906).

Date of application of water to beneficial use, and not date of commencement of construction of diversion works, determined priority where right was dependent upon appropriation and not upon application for permit. *Rabido v. Furey*, 33 Idaho 56, 190 P. 73 (1920).

Decree Establishing Priority.

Where priority of appropriation, amount of water appropriated and beneficial use thereof have been established, court, in its decree establishing such facts, cannot go further and dictate manner in which appropriator shall use the water, so long as it is adapted to a beneficial purpose. *McGinness v. Stanfield*, 6 Idaho 372, 55 P. 1020 (1898).

Diversion by Subsequent Appropriator.

The first appropriator of water has the first right thereto, and clear and convincing proof must be given to show that such prior appropriator will not be injured or affected by the diversion made by a subsequent appropriator. *Silkey v. Tieg*s, 54 Idaho 126, 28 P.2d 1037 (1934).

Finding of Priority.

In action to quiet title to water appropriated from public stream, where issue joined was one of priority, court needed to find actual appropriation made by each appropriator, giving time appropriation was made and quantity of water appropriated to beneficial use by each appropriator. *Lee v. Hanford*, 21 Idaho 327, 121 P. 558 (1912).

Grant of Vested Rights or Appropriation Permit.

State engineer (director of department of water resources) had no right, power or authority to interfere with vested rights or to grant a permit for appropriation and diversion of water of stream, which had already been diverted and applied to a beneficial use. *Lockwood v. Freeman*, 15 Idaho 395, 98 P. 295 (1908); *Nielson v. Parker*, 19 Idaho 727, 115 P. 488 (1911).

An appropriator, whose right is based upon a valid, although unadjudicated, constitutional method of appropriation, retains a senior claim in relation to a person holding a later issued permit. *R.T. Nahas Co. v. Hulet*, 114 Idaho 23, 752 P.2d 625 (Ct. App. 1988).

Interstate Streams.

Right obtained by appropriation of water from stream in one state for use on lands in another state is superior to later appropriation in former state for use in former state. *Weiland v. Pioneer Irrigation Co.*, 259 U.S. 498, 42 S. Ct. 568, 66 L. Ed. 1027 (1922).

Manner of Appropriation.

Whether party obtains any right to water by his attempted appropriation depends upon

whether water was subject to appropriation at that place, and on manner in which he attempted to appropriate it. *Rabido v. Furey*, 33 Idaho 56, 190 P. 73 (1920).

Nature of Right.

One who first appropriated all the waters of creek, and since appropriation continually used same for purpose of irrigating his lands, was entitled to all of said waters, to the extent of the capacity of his ditches, necessary to the proper irrigation of his lands, as against subsequent locators. *Hillman v. Hardwick*, 3 Idaho 255, 28 P. 438 (1891) (see also, *Nordick v. Sorenson*, 81 Idaho 117, 338 P.2d 776 (1959)); *Village of Peck v. Denison*, 92 Idaho 747, 450 P.2d 310 (1969).

The basic law of water rights in Idaho, that first in time is first in right, creates a vested right, protected by the constitution and by this section. *Board of Dirs. v. Jorgensen*, 64 Idaho 538, 136 P.2d 461 (1943).

It is the unquestioned rule in Idaho that priority of appropriation gives the better right between those using water; and as between appropriators, the first in time is the first in right. *Beecher v. Cassia Creek Irrigation Co.*, 66 Idaho 1, 154 P.2d 507 (1944).

Priorities.

First appropriation of water for useful or beneficial purposes gives prior right thereto, and right once vested will be protected and upheld unless abandoned. *Malad Valley Irrigation Co. v. Campbell*, 2 Idaho 411, 18 P. 52 (1888); *Geertson v. Barrack*, 3 Idaho 344, 29 P. 42 (1892); *Dunniway v. Lawson*, 6 Idaho 28, 51 P. 1032 (1898).

Doctrine of priority must be applied although its application may be harsh and unjust in the particular case. *Kirk v. Bartholomew*, 3 Idaho 367, 29 P. 40 (1892).

Right of prior appropriator of water to use of same to extent of his appropriation is not defeated by his having, through mistake, used a portion of water on land belonging to another. *Mahoney v. Neiswanger*, 6 Idaho 750, 59 P. 561 (1899).

Each junior appropriator is entitled to divert water only when the rights of previous appropriators have been satisfied. *R.T. Nahas Co. v. Hulet*, 114 Idaho 23, 752 P.2d 625 (Ct. App. 1988).

Protection of Right.

Where prior appropriation and right to use of water was established, appropriator was entitled to have sufficient unappropriated waters flow down to his point of diversion to supply his right, and injunction against interference therewith was proper protective relief. *Moe v. Harger*, 10 Idaho 302, 77 P. 645 (1904).

Plaintiff, who had prior decreed rights to water was entitled to recover damages from

the defendants for loss or damage to plaintiff's crops proximately caused by acts of defendants, which deprived plaintiff of the water decreed to his land, and to the use of which he was entitled. *Follett v. Taylor Bros.*, 77 Idaho 416, 294 P.2d 1088 (1956).

Where, under his license and certificate of water right plaintiff was entitled to year round unobstructed flow of creek for irrigation and domestic purposes up to 1.44 cubic feet per second, and other plaintiffs owned right to have the water proceed through their field by diversion ditch, plaintiffs were entitled to have the water flow uninterrupted any time it would reach their land. *Ward v. Kidd*, 87 Idaho 216, 392 P.2d 183 (1964).

Where the water right of the upstream appropriator with a valid permit was junior to that of the downstream appropriator with constitutional water rights, and the former's impoundment of water interfered with the latter's senior entitlement, the upstream appropriator was liable for any damages caused by the wrongful interference. *R.T. Nahas Co. v. Hulet*, 114 Idaho 23, 752 P.2d 625 (Ct. App. 1988).

Riparian Rights Repudiated.

Prior appropriator of water has right to use thereof which is superior to claim of riparian proprietor not based upon appropriation but on doctrine of riparian rights. *Drake v. Earhart*, 2 Idaho 750, 23 P. 541 (1890).

Springs As Public Waters.

It is well settled that the waters of natural springs, which form a natural stream or streams flowing off the premises on which they arise, are public waters subject to appropriation, diversion and application to a beneficial use. *Maher v. Gentry*, 67 Idaho 559, 186 P.2d 870 (1947).

Subterranean Waters.

First appropriator of subterranean waters is first in right. *Bower v. Moorman*, 27 Idaho 162, 147 P. 496, 1917C Ann. Cas. 99 (1915).

Opinions of Attorney General. The rights to the use of all hot waters that rise and flow at Lava Hot Springs are water rights that have been appropriated under state law and are subject to regulation by the Idaho Department of Water Resources under the provisions of title 42 of the Idaho Code (§§ 42-101, 42-103, 42-104 and 42-106). OAG 97-1.

Since Idaho law, Const., Art. 15, § 3 and §§ 42-101, 42-103, 42-104 and 42-106, specifies the law of prior appropriation as the method to establish the right to use water in Idaho, absent a clear statutory expression by the legislature to create an exception to the appropriation statutes, all rights to the use of water in Idaho must be acquired by appropriation and the language in §§ 67-4401 and 67-4403 is not a clear expression that the

legislature intended to create an exception from the appropriation process for the waters at Lava Hot Springs as the most reasonable interpretation of this language is that the Foundation's jurisdiction and control over waters at Lava Hot Springs refers to those

waters that have already been appropriated or that will be appropriated in the future. OAG 97-1.

Collateral References. 93 C.J.S., Waters, §§ 410-436.

42-107. Priority — Waste, seepage, and spring waters. — All ditches now constructed or which may hereafter be constructed for the purpose of utilizing seepage, waste or spring water of the state, shall be governed by the same laws relating to priority of right as those ditches, canals and conduits constructed for the purpose of utilizing the waters of running streams. [1899, p. 380, § 23; reen. R.C. & C.L., § 3246; C.S., § 5562; I.C.A., § 41-107.]

ANALYSIS

Abandonment of beneficial use.
Appropriation of waste or seepage water.
Cessation of waste.
Dedication of waste water.
Grounds for injunction against diversion.
Pleading and practice.
Riparian owners.
Suit for diversion.
Utilization of seepage.
Water in canals.

Abandonment of Beneficial Use.

It is only where there is an abandonment of five years of beneficial use by the appropriator that water may be considered as unappropriated water of the state. *Colthorp v. Mountain Home Irrigation Dist.*, 66 Idaho 173, 157 P.2d 1005 (1945).

Appropriation of Waste or Seepage Water.

Seepage water from canal having its source in watershed other than that in which seepage occurs was subject to appropriation under this section. *Breyer v. Baker*, 31 Idaho 387, 171 P. 1135 (1918); *Sebern v. Moore*, 44 Idaho 410, 258 P. 176 (1927).

Water right may not be initiated by diverting water from ditch of another against his will and without his consent. *Rabido v. Furey*, 33 Idaho 56, 190 P. 73 (1920).

Waste or seepage water of which there had been no appropriation prior to construction of drain in which such water collected was in the possession of owner of drain and was therefore not subject to appropriation. *Sebern v. Moore*, 44 Idaho 410, 258 P. 176 (1927).

Cessation of Waste.

Rights of appropriator of waste or seepage water were subject to the right of owner to cease wasting it, or in good faith to change place or manner of wasting it, or to recapture it, so long as he applied it to a beneficial use. *Sebern v. Moore*, 44 Idaho 410, 258 P. 176

(1927); *Colthorp v. Mountain Home Irrigation Dist.*, 66 Idaho 173, 157 P.2d 1005 (1945).

Dedication of Waste Water.

If waste water is furnished by canal company to applicant, under a sale or a rental, user thereof can maintain action against canal company only to compel it to furnish him with such waste water, if any, and he cannot compel canal company to furnish perpetual supply of water, such as is required to be furnished to an original appropriator. *Gerber v. Nampa & Meridian Irrigation Dist.*, 16 Idaho 22, 100 P. 80 (1908).

Grounds for Injunction Against Diversion.

To enjoin diversion and change in the place of use of water, the injury, if any, must be confined to a water right. *Colthorp v. Mountain Home Irrigation Dist.*, 66 Idaho 173, 157 P.2d 1005 (1945).

Pleading and Practice.

The denial of irrigation district's application of order for change of point of diversion did not constitute *res judicata*. *Colthorp v. Mountain Home Irrigation Dist.*, 66 Idaho 173, 157 P.2d 1005 (1945).

Riparian Owners.

Fact that there had been a conversion by lower riparian owner of seepage water of upper riparian owner would not of itself entitle former to injunctive relief restraining latter from cessation of waste or to beneficial use of it. *Colthorp v. Mountain Home Irrigation Dist.*, 66 Idaho 173, 157 P.2d 1005 (1945).

Suit for Diversion.

A suit for damages for diversion of return flow of water after 40 years, such water being decreed to defendant's land, the seepage of which had been used by plaintiff and his predecessors, without alleging an abandonment, failed to state a cause of action. *Colthorp v. Mountain Home Irrigation Dist.*, 66 Idaho 173, 157 P.2d 1005 (1945).

Utilization of Seepage.

Construction of ditches to utilize seepage or waste water rightfully under control of another was not authorized by this section. *United States v. Haga*, 276 F. 41 (D. Idaho 1921).

Water in Canals.

There is a priority among consumers from canal analogous to that which exists among appropriators from a natural stream, and rights of later applicants for water are subor-

dinate to those of prior consumers, which, when exercised in full, exhaust the carrying capacity of the canal. *Gerber v. Nampa & Meridian Irrigation Dist.*, 19 Idaho 765, 116 P. 104 (1911).

Collateral References. 78 Am. Jur. 2d, Waters, §§ 176-184.

Right of appropriator of water to recapture water which has escaped or is otherwise no longer within his immediate possession. 89 A.L.R. 210.

42-108. Change in point of diversion, place of use, period of use, or nature of use — Application of act. — The person entitled to the use of water or owning any land to which water has been made appurtenant either by a decree of the court or under the provisions of the constitution and statutes of this state, may change the point of diversion, period of use, or nature of use, and/or may voluntarily abandon the use of such water in whole or in part on the land which is receiving the benefit of the same and transfer the same to other lands, if the water rights of others are not injured by such change in point of diversion, place of use, period of use, or nature of use, provided; if the right to the use of such water, or the use of the diversion works or irrigation system is represented by shares of stock in a corporation or if such works or system is owned and/or managed by an irrigation district, no change in the point of diversion, place of use, period of use, or nature of use of such water shall be made or allowed without the consent of such corporation or irrigation district. Any permanent or temporary change in period or nature of use in or out-of-state for a quantity greater than fifty (50) cfs or for a storage volume greater than five thousand (5,000) acre-feet shall require the approval of the legislature, except that any temporary change within the state of Idaho for a period of less than three (3) years may be approved by the director without legislative approval.

Any person desiring to make such change of point of diversion, place of use, period of use, or nature of use of water shall make application for change with the department of water resources under the provisions of section 42-222, Idaho Code. After the effective date of this act, no person shall be authorized to change the period of use or nature of use, point of diversion or place of use of water unless he has first applied for and received approval of the department of water resources under the provisions of section 42-222, Idaho Code. [R.S., § 3157; 1899, p. 380, § 11; reen. R.C. & C.L., § 3247; C.S., § 5563; I.C.A., § 41-108; am. 1943, ch. 53, § 1, p. 101; am. 1947, ch. 80, § 1, p. 130; am. 1969, ch. 303, § 1, p. 905; am. 1981, ch. 147, § 1, p. 253; am. 1986, ch. 313, § 1, p. 763.]

Compiler's notes. Section 2 of S.L. 1943, ch. 53 is compiled herein as § 42-222.

Section 2 of S.L. 1969, ch. 303 is compiled herein as § 42-222.

Section 2 of S.L. 1981, ch. 147 is compiled as § 42-221.

Section 2 of S.L. 1986, ch. 313 is compiled as § 42-201.

Section 2 of S.L. 1947, ch. 80 declared an

emergency. Approved February 25, 1947.

Section 4 of S.L. 1981, ch. 147 declared an emergency. Approved March 27, 1981.

Sec. to sec. ref. This section is referred to in §§ 42-222, 42-1425, 42-1763A and 50-1805A.

Cited in: *Schodde v. Twin Falls Land & Water Co.*, 161 F. 43 (9th Cir. 1908); *Nettleton v. Higginson*, 98 Idaho 87, 558 P.2d 1048

(1977); *Fremont-Madison Irrigation Dist. & Mitigation Group v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 926 P.2d 1301 (1996).

ANALYSIS

Abandonment.

Application of 1947 amendment.

Approval of department.

Change causing injury.

Change in nature of use.

Constitutionality.

Dedication.

Extent of right.

Federal decree fixing priorities.

Jurisdiction of district court.

Proof.

Right of diversion.

Rights of subsequent appropriator.

Subterranean waters.

Transfer of rights.

Abandonment.

Such change does not work a forfeiture or is not abandonment of such right. *Joyce v. Rubin*, 23 Idaho 296, 130 P. 793 (1913) (See also, *Joyce v. Murphy Land & Irrigation Co.*, 35 Idaho 549, 208 P. 241 (1922)).

Water right was not forfeited though abandoned for over five years where applicant for transfer resumed use of water prior to filing petition for transfer. In re *Boyer*, 73 Idaho 152, 248 P.2d 540 (1952).

Application of 1947 Amendment.

1947 amendment to this section requiring consent of irrigation district to transfer of water right, which did not take effect until February 25, 1947, did not apply to application for transfer filed on October 7, 1946. In re *Boyer*, 73 Idaho 152, 248 P.2d 540 (1952).

Approval of Department.

Change made without approval of state engineer (department of water resources) did not forfeit the water right. *Joyce v. Rubin*, 23 Idaho 296, 130 P. 793 (1913).

An appropriator who relies upon statutory appropriation through state engineer's (department of water resources) permit, must apply to state engineer (department) to change place of use. *Washington State Sugar Co. v. Goodrich*, 27 Idaho 26, 147 P. 1073 (1915).

Change Causing Injury.

Change cannot be made if others are injured thereby. *Walker v. McGinness*, 8 Idaho 540, 69 P. 1003 (1902); *Hard v. Boise City Irrigation & Land Co.*, 9 Idaho 589, 76 P. 331, 65 L.R.A. 407 (1904); *Hill v. Standard Mining Co.*, 12 Idaho 223, 85 P. 907 (1906); *Montpelier Milling Co. v. Montpelier*, 19 Idaho 212, 113 P. 741 (1911); *Bennett v. Nourse*, 22 Idaho 249, 125 P. 1038 (1912); *Hall v. Blackman*, 22

Idaho 539, 126 P. 1045 (1912); *Hall v. Blackman*, 22 Idaho 556, 126 P. 1047 (1912); *Basinger v. Taylor*, 30 Idaho 289, 164 P. 522 (1917).

Prior appropriator of waters of stream will not be permitted to change his point of diversion, if such change will injuriously affect rights of subsequent appropriators as they existed at time such subsequent appropriations were made. *Crockett v. Jones*, 42 Idaho 652, 249 P. 483 (1926).

No change in point of use of water will be permitted without limitation if enlarged use in time or amount burdens the stream or decreases volume to injury of others. *Beecher v. Cassia Creek Irrigation Co.*, 66 Idaho 1, 154 P.2d 507 (1944).

Change in Nature of Use.

The director of the Department of Water Resources has not been granted the authority to approve an application for a requested change in the nature of the use of water. *Beker Indus., Inc. v. Georgetown Irrigation Dist.*, 101 Idaho 187, 610 P.2d 546 (1980).

Constitutionality.

This section affords the water user due process of law. In re *Johnston*, 69 Idaho 139, 204 P.2d 434 (1949).

This section does not constitute a delegation of legislative power to a mutual water users' association and does not make an arbitrary discrimination between ordinary water corporations and Carey Act corporations, and the reason for Carey Act corporations not being included in § 42-108 was that the transfer of Carey Act water rights was already covered by chapter 25, title 42 of the Idaho Code. In re *Johnston*, 69 Idaho 139, 204 P.2d 434 (1949).

Dedication.

The wrongful diversion and use of water by appellant without the knowledge and consent of respondent, a mutual irrigation corporation, could not be made the basis of the dedication provided for in Const., Art. 15, § 4. In re *Johnston*, 69 Idaho 139, 204 P.2d 434 (1949).

Extent of Right.

Right to change place of diversion includes cases in which use of water amounts to its absorption, or is such as to imply notice to subsequent appropriators that such change may reasonably be expected, but excludes appropriations to be used at a specific place for purpose of operating machinery and other works, where water is used and then returned to stream practically undiminished in quantity, when such change will damage a subsequent appropriator. *Last Chance Mining Co. v. Bunker Hill & S. Mining & Concentrating Co.*, 49 F. 430 (C.C.D. Idaho 1892).

A water right cannot be resumed when the facts clearly establish that water was not applied to the land of which it was appurtenant. *McCray v. Rosenkrance*, 135 Idaho 509, 20 P.3d 693 (2001).

Federal Decree Fixing Priorities.

The court should have followed the federal decree adjudicating interrelated water rights and fixing the priorities as of the same date as in the federal decree to avoid confusion in administering the water rights where a change in points of diversion was sought. *Beecher v. Cassia Creek Irrigation Co.*, 66 Idaho 1, 154 P.2d 507 (1944).

Jurisdiction of District Court.

District court acquired full equitable jurisdiction on appeal from reclamation commission order and had full authority to impose reasonable conditions to avoid injury. *Beecher v. Cassia Creek Irrigation Co.*, 66 Idaho 1, 154 P.2d 507 (1944).

Proof.

Challenge by shareholders in water company to change of diversion point effected by two holders of water rights pursuant to valid water exchange was without basis absent a showing of actual harm to the shareholders. *Almo Water Co. v. Darrington*, 95 Idaho 16, 501 P.2d 700 (1972).

Right of Diversion.

Person claiming priority of right under judicial decrees had the statutory right to change his point of diversion provided that the rights of others were not injured, and such change did not work a forfeiture or an abandonment of such right. *Graham v. Leek*, 65 Idaho 279, 144 P.2d 475 (1944).

Rights of Subsequent Appropriator.

Subsequent appropriator had vested right to continuance of conditions as they existed

when his appropriation was made. *Crockett v. Jones*, 42 Idaho 652, 249 P. 483 (1926).

Subterranean Waters.

Where a subsequent appropriator of subterranean water operated pumps at a lower level than prior appropriators, and thereby caused a shortage, the expense of lowering the prior appropriators' pumps so they received the same amount of water as before must be borne by the subsequent appropriators. *Noh v. Stoner*, 53 Idaho 651, 26 P.2d 1112 (1933).

Transfer of Rights.

Users of water from ditch or canal acquire property right therein which they may transfer to other lands under such ditch or canal, or may sell and transfer to purchaser who may also transfer the same to other lands under the ditch and canal, so long as the change does not interfere with the rights of others. *Hard v. Boise City Irrigation & Land Co.*, 9 Idaho 589, 76 P. 331, 65 L.R.A. 407 (1904).

Nonconsent of ditch company and irrigation district did not bar transfer of water appropriation right where ditch company and irrigation district was unable to prove that the water appropriation right was represented by stock. In re *Boyer*, 73 Idaho 152, 248 P.2d 540 (1952).

Collateral References. 78 Am. Jur. 2d, Waters, §§ 176-184.

94 C.J.S., Waters, §§ 874-902.

Prescriptive right of riparian owners to continuance of artificial channel or ditches. 88 A.L.R. 134.

Obstruction, diversion, or other interference with flow of surface water as a taking or damaging of property. 128 A.L.R. 1195.

42-108A. Leasing of water for hydroelectric generation — Exception to requirement of application to change nature of use. — Any person having the right to the beneficial use of a water right may lease the water to a private or public utility doing business in the state of Idaho for hydroelectric generation purposes within the state of Idaho for a period not to exceed one (1) year on application to the department of water resources indicating the name of the owner of the right, the lessor, the lessee, the amount of water leased, the duration of the lease, and the proposed place of use and point of diversion. Such a lease or leases shall not constitute a change in the nature of use of such water nor shall the same constitute an abandonment or forfeiture or any other diminution of such water right. [I.C., § 42-108A, as added by 1981, ch. 267, § 1, p. 566.]

42-108B. Leasing of water under established rights — Notice — Appeal. — Any person, entitled to the use of water whether represented by

a license issued by the department of water resources, or by decree of the court, who shall desire to lease the water pursuant to section 42-108A, Idaho Code, shall make application to the department of water resources. Such application shall be upon forms furnished by the department and shall describe the right licensed, claimed or decreed which is to be leased. Upon receipt of said application, an application filing fee of thirty dollars (\$30.00) and a publication fee of fifty dollars (\$50.00), it shall be the duty of the director of the department of water resources to examine same and if otherwise proper, to cause notice of the proposed leasing of water and setting forth the hearing date at which protests will be heard, to be published once a week for two (2) consecutive weeks in a newspaper published and of general circulation within the county where the water is diverted, if there is such a paper, otherwise in a newspaper of general circulation within the county. Such notice shall advise that anyone who desires to protest the proposed leasing of water and who has a superior right to use the water and who may suffer pecuniary loss shall file notice of protest with the department within five (5) days of the last date of publication. The hearing date set by the director of the department of water resources shall be held not sooner than ten (10) nor later than fifteen (15) days after the last date of publication. Upon receipt of any protest, it shall be the duty of the director of the department of water resources to investigate the same and to conduct a hearing thereon. He shall also advise the watermaster of the district in which such water is used of the proposed lease.

The director of the department of water resources shall examine all of the evidence and available information and shall approve, in whole or in part, or upon conditions, provided no other water rights senior or junior to the water to be leased are injured thereby. A copy of the approved application for leasing of water shall be returned to the applicant, and he shall be authorized upon receipt thereof to lease the water pursuant to section 42-108A, Idaho Code. In the event the director of the department of water resources determines that a proposed change shall not be approved as provided in this section, he shall deny same and forward a notice of such action to the applicant by certified mail, which decision shall be subject to review pursuant to section 42-1701A, Idaho Code.

All fees received by the department of water resources under the provisions of this section shall be submitted to the state treasurer for deposit in the water administration fund. [I.C., § 42-108B, as added by 1981, ch. 267, § 2, p. 566.]

42-109. Change in course of ditch — When prohibited. — Whenever any ditch or canal has been constructed for the purpose of conveying water and selling the same for irrigating purposes, it is unlawful for the owner or owners of said ditch or canal to change the line of said ditch or canal so as to prevent or interfere with the use of water from said ditch or canal, by any one who, prior to the proposed change, had used water for irrigating purposes from said ditch or canal. [R.S., part of § 3189; reen. R.C. & C.L., § 3248; C.S., § 5564; I.C.A., § 41-109.]

Collateral References. 78 Am. Jur. 2d, Waters, §§ 176-184.

Obstruction, diversion, or other interference with flow of surface water as a taking or

damaging of property. 128 A.L.R. 1195.

Right of owner to alter his easement in such a way as to deprive servient estate of incidental benefits. 172 A.L.R. 193.

42-110. Right of ditch owners to divert water. — The proprietors of any ditch, canal or conduit, or other works for the carriage of water, whose right relative to the quantity of water they shall be entitled to divert by means of such works shall have been established by any decree of court, shall be entitled to such quantity measured at the point of diversion, subject, however, to all prior rights. [1899, p. 380, § 32; reen. R.C. & C.L., § 3249; C.S., § 5565; I.C.A., § 41-110.]

Cited in: State v. Twin Falls Canal Co., 21 Idaho 410, 121 P. 1039 (1911), writ of error dismissed, 235 U.S. 690, 35 S. Ct. 205, 59 L. Ed. 427 (1914); Kettenbach v. Walker, 32

Idaho 544, 186 P. 912 (1919).

Collateral References. 78 Am. Jur. 2d, Waters, §§ 176-184.

42-111. Domestic purposes defined. — (1) For purposes of sections 42-221, 42-227, 42-230, 42-235, 42-237a, 42-242, 42-243 and 42-1401A, Idaho Code, the phrase “domestic purposes” or “domestic uses” means:

(a) The use of water for homes, organization camps, public campgrounds, livestock and for any other purpose in connection therewith, including irrigation of up to one-half (½) acre of land, if the total use is not in excess of thirteen thousand (13,000) gallons per day, or

(b) Any other uses, if the total use does not exceed a diversion rate of four one-hundredths (0.04) cubic feet per second and a diversion volume of twenty-five hundred (2,500) gallons per day.

(2) For purposes of the sections listed in subsection (1) of this section, domestic purposes or domestic uses shall not include water for multiple ownership subdivisions, mobile home parks, or commercial or business establishments, unless the use meets the diversion rate and volume limitations set forth in subsection (1)(b) of this section.

(3) Multiple water rights for domestic uses or domestic purposes, as defined in this section, shall not be established or exercised in a manner to satisfy a single combined water use or purpose that would not itself come within the definition of a domestic use or purpose under this section. The purpose of this limitation is to prohibit the diversion and use of water, under a combination of domestic purposes or domestic uses as defined in this section, to provide a supply of water for a use that does not meet the exemption of section 42-227, Idaho Code, and is required to comply with the mandatory application and permit process for developing a right to the use of water pursuant to chapter 2, title 42, Idaho Code. [1899, p. 380, part of § 12; reen. R.C. & C.L., § 3250; C.S., § 5566; I.C.A., § 41-111; am. 1990, ch. 319, § 1, p. 870; am. 1995, ch. 233, § 1, p. 790.]

Compiler’s notes. Section 2 of S.L. 1990, ch. 319 is compiled as § 42-221.

Section 2 of S.L. 1995, ch. 233 declared an emergency. Approved March 20, 1995.

Cross ref. Definition in underground water law, § 42-230.

Domestic purposes not to include land irrigation, § 42-914.

Sec. to sec. ref. This section is referred to in § 42-701, 42-1401A.

Cited in: Village of Peck v. Denison, 92 Idaho 747, 450 P.2d 310 (1969); Stevenson v.

Steele, 93 Idaho 4, 453 P.2d 819 (1969).

Utils. Comm'n v. Natatorium Co., 36 Idaho 287, 211 P. 533 (1922).

Heating of Dwelling-houses.

Heating of dwelling-houses comes within the meaning of "domestic purposes." Public

42-112. Completion defined. — By completion is meant conducting the waters to the place of intended use. [R.S., § 3162; 1899, p. 380, § 7; reen. R.C. & C.L., § 3251; C.S., § 5567; I.C.A., § 41-112.]

Cited in: Schodde v. Twin Falls Land & Water Co., 161 F. 43 (9th Cir. 1908), aff'd, 224 U.S. 107, 32 S. Ct. 470, 56 L. Ed. 686 (1912);

Sand Point Water & Light Co. v. Panhandle Dev. Co., 11 Idaho 405, 83 P. 347 (1905).

42-113. In-stream and other water use for livestock. — (1) A permit may be issued, but shall not be required for appropriation of water for the in-stream watering of livestock. In the consideration of applications for permits to appropriate water for other purposes, the director of the department of water resources shall impose such reasonable conditions as are necessary to protect prior downstream water rights for in-stream livestock use, and in the administration of the water rights on any stream, the director, and the district court where applicable, shall recognize and protect water rights for in-stream livestock use, according to priority, as they do water rights for other purposes. As used in this section, the phrase "in-stream watering of livestock" means the drinking of water by livestock directly from a natural stream, without the use of any constructed physical diversion works.

(2) For rights to the use of water for in-stream or out-of-stream livestock purposes, associated with grazing on federally owned or managed land, established under the diversion and application to beneficial use method of appropriation, the priority date shall be the first date that water historically was used for livestock watering associated with grazing on the land, subject to the provisions of section 42-222(2), Idaho Code.

(3) This subsection is established to promote the watering of livestock away from streams and riparian areas, but not to require fencing of livestock away from streams and riparian areas.

(a) Any person having an established water right or appropriating water for in-stream watering of livestock pursuant to subsection (1) of this section may, in addition to the instream use, divert the water for livestock use away from the stream or riparian area. The diversion may occur only if the following conditions are met:

(i) The water is diverted from a surface water source to a trough or tank through an enclosed water delivery system;

(ii) The water delivery system is equipped with an automatic shutoff or flow control mechanism or includes a means for returning unused water to the surface water source through an enclosed delivery system, and the system is designed and constructed to allow the rate of diversion to be measured;

(iii) The diversion is from a surface water source to which the livestock would otherwise have access and the watering tank or trough is located

on land from which the livestock would have access to the surface water source from which the diversion is made;

- (iv) The diversion of water out of the stream in this manner does not injure other water rights;
 - (v) The use of the water diverted is for watering livestock; and
 - (vi) The bed and banks of the source shall not be altered as that term is defined in section 42-3802, Idaho Code, except that an inlet conduit may be placed into the source in a manner that does not require excavation or obstruction of the stream channel, unless additional work is approved by the director of the department of water resources.
- (b) The amount of water diverted for watering of livestock in accordance with this subsection shall not exceed thirteen thousand (13,000) gallons per day per diversion.
- (c) Before construction and use of a water diversion and delivery system as provided in this subsection, the person or other entity proposing to construct and use the system shall give notice to the director of the department of water resources. Separate notice for each diversion shall be provided on a form approved by the director and shall be accompanied by a twenty-five dollar (\$25.00) fee for each notice filed. Filing of the notice as herein provided shall serve as a substitute for filing a notice of claim to a water right pursuant to section 42-243, Idaho Code. The director may provide notice to holders of water rights and others as the director deems appropriate.
- (d) Compliance with the provisions of this subsection is a substitute for the requirements for transfer proceedings in section 42-222, Idaho Code. In the administration of water diverted for livestock watering pursuant to this subsection, the director, and the district court where applicable, shall recognize and protect water rights for out-of-stream livestock watering use pursuant to this subsection as they would in-stream livestock watering use. The priority date for out-of-stream watering of livestock pursuant to this subsection shall be the first date that water historically was used for livestock watering and shall not be altered due to the diversion out-of-stream.
- (e) Any water right holder who determines that diversion or use of water under the provisions of this subsection is depriving the water right holder of water to which the water right holder is entitled may petition the director of the department of water resources to curtail the diversion or use of water for livestock purposes. Upon such petition, the director shall cause an investigation to be made and may hold hearings or gather information in other ways. If the director finds that an interference is occurring, the director may order curtailment of diversion or use of the water or may require the water diversion and delivery system to be modified to prevent injury to other water rights. Any person feeling aggrieved by an order of the director in response to a petition filed as herein provided shall be entitled to review as provided in section 42-1701A, Idaho Code.
- (4) No change in use of any water right used for watering of livestock, whether proposed under this section or section 42-222, Idaho Code, shall be made or allowed without the consent of the permittee in the federal grazing

allotment, if any, in which the water right is used for the watering of livestock. [I.C., § 42-113, as added by 1984, ch. 124, § 1, p. 299; am. 1998, ch. 344, § 1, p. 1095; am. 2000, ch. 255, § 1, p. 721.]

Compiler's notes. Section 2 of S.L. 1984, ch. 124 read: "The provisions of this act are hereby declared to be severable and if any provision of this act or the application of such provision to any person or circumstance is declared invalid for any reason, such declara-

tion shall not affect the validity of remaining portions of this act."

Section 3 of S.L. 1984, ch. 124 declared an emergency. Approved March 31, 1984.

Section 2 of S.L. 1998, ch. 344 declared an emergency. Approved March 25, 1998.

42-114. Stock watering permit. — Any permit issued for the watering of domestic livestock shall be issued to the person or association of persons making application therefor and the watering of domestic livestock by the person or association of persons to whom the permit was issued shall be deemed a beneficial use of the water.

As used in this section, the "watering of domestic livestock" means the drinking of water by domestic livestock from a natural stream, ground water source or other source. [I.C., § 42-114, as added by 1986, ch. 199, § 1, p. 498.]

Opinions of Attorney General. This section does not prohibit the Idaho Department of Water Resources from issuing a water right permit to a landowner for stock watering purposes even though the landowner leases his land to another person for the grazing of stock; this section merely affirms that stock

watering is a beneficial use of water and that any person may file an application for that use. OAG 88-6.

It is unlikely that a court will find that the legislature intended a repeal of § 42-501 by enactment of § 42-114. OAG 88-6.

CHAPTER 2

APPROPRIATION OF WATER—PERMITS, CERTIFICATES, AND LICENSES—SURVEY

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42-201. Water rights acquired under chapter — Illegal application of water. — (1) All rights to divert and use the waters of this state for beneficial purposes shall hereafter be acquired and confirmed under the provisions of this chapter and not otherwise. And after the passage of this title all the waters of this state shall be controlled and administered in the manner herein provided. Such appropriation shall be perfected only by means of the application, permit and license procedure as provided in this title; provided, however, that in the event an appropriation has been commenced by diversion and application to beneficial use prior to the effective date of this act it may be perfected under such method of appropriation.

(2) No person shall use the public waters of the state of Idaho except in accordance with the laws of the state of Idaho. No person shall divert any water from a natural watercourse or apply water to land without having

obtained a valid water right to do so, or apply it to purposes for which no valid water right exists.

(3) Notwithstanding the provisions of subsection (2) of this section, water may be used at any time, with or without a water right, to extinguish an existing fire on private or public lands, structures, or equipment, or to prevent an existing fire from spreading to private or public lands, structures, or equipment endangered by an existing fire. [1903, p. 223, § 41; am. R.C. & C.L., § 3252; C.S., § 5568; I.C.A., § 41-201; am. 1971, ch. 177, § 2, p. 843; am. 1986, ch. 313, § 2, p. 763; am. 2000, ch. 291, § 1, p. 1007.]

Compiler's notes. Sections 1 and 3 of S.L. 1986, ch. 313 are compiled as §§ 42-108 and 42-204, respectively.

Sec. to sec. ref. This chapter is referred to in §§ 42-401, 42-1420, 42-1421, 42-1501, 42-1502, 42-1734G, 42-1805, 42-4003, 42-4005, 42-4201, 42-4201A and 42-4202.

This section is referred to in § 42-202A, 42-229, 42-1426.

Cited in: State, Dep't of Parks v. Idaho Dep't of Water Admin., 96 Idaho 440, 530 P.2d 924 (1974); Parke v. Bell, 97 Idaho 67, 539 P.2d 995 (1975).

ANALYSIS

Construction.

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Validity.

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Construction.

It was never intended that this statute should authorize the taking and diversion by one man of the property of another. *King v. Chamberlin*, 20 Idaho 504, 118 P. 1099 (1911).

Evidence of Amount Diverted.

Claimant seeking decree to confirm his right to the use of water by appropriation must present to court sufficient evidence to enable it to make definite and certain findings as to amount of water actually diverted and applied, as well as amount necessary for beneficial use claimed. *Reno v. Richards*, 32 Idaho 1, 178 P. 81 (1918).

Federal Law.

The Federal Power Act does preempt some state laws relating to the building of dams on navigable streams and it particularly preempts those state laws which require a state license as a predicate for building a dam; however, state law regarding proprietary rights in water is expressly saved. *Idaho*

Power Co. v. State, 104 Idaho 575, 661 P.2d 741 (1983).

There is nothing in the law of Idaho which precludes a person from voluntarily obtaining less than the full panoply of rights associated with the ownership of real property and a voluntary subordination agreement is not in violation of Idaho's water law. Therefore there was no conflict between state water law and the language of the subordination clause inserted in the licenses issued by federal power commission to power company in connection with the Hells Canyon hydroelectric project. *Idaho Power Co. v. State*, 104 Idaho 575, 661 P.2d 741 (1983).

Methods of Appropriation.

One may obtain prior right to use of water of stream where he actually diverts and applies the same to a beneficial use, although he may never have applied to state engineer for permit to do so. *Neilson v. Parker*, 19 Idaho 727, 115 P. 488 (1911); *Youngs v. Regan*, 20 Idaho 275, 118 P. 499 (1911); *Furey v. Taylor*, 22 Idaho 605, 127 P. 676 (1912); *Crane Falls Power & Irrigation Co. v. Snake River Irrigation Co.*, 24 Idaho 63, 133 P. 655 (1913); *Washington State Sugar Co. v. Goodrich*, 27 Idaho 26, 147 P. 1073 (1915); *Basinger v. Taylor*, 30 Idaho 289, 164 P. 522 (1917); *Silkey v. Tiegs*, 51 Idaho 344, 5 P.2d 1049 (1931).

Water may be appropriated without compliance with the steps provided by the statute, but in such case it requires actual application to a beneficial use to complete the appropriation and the right is limited to the amount so applied, with date of priority determined by such application to beneficial use. *Reno v. Richards*, 32 Idaho 1, 178 P. 81 (1918).

An appropriator, whose right is based upon a valid, although unadjudicated, constitutional method of appropriation, retains a senior claim in relation to a person holding a later issued permit. *R.T. Nahas Co. v. Hulet*, 114 Idaho 23, 752 P.2d 625 (Ct. App. 1988).

Protection of Right.

Where the water right of the upstream appropriator with a valid permit was junior to that of the downstream appropriator with constitutional water rights, and the former's impoundment of water interfered with the latter's senior entitlement, the upstream ap-

proprietor was liable for any damages caused by the wrongful interference. *R.T. Nahas Co. v. Hulet*, 114 Idaho 23, 752 P.2d 625 (Ct. App. 1988).

Public Use.

Use of land for development of power from streams for aid of farming was a public use for which condemnation would lie. *Bassett v. Swenson*, 51 Idaho 256, 5 P.2d 722 (1931).

Relation to Other Law.

Section 42-1426 provides for a waiver of the mandatory permit requirements of this section and/or § 42-229 and a decree of a new water right for an enlarged use of the original water right. *Fremont-Madison Irrigation Dist. & Mitigation Group v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 926 P.2d 1301 (1996).

Riparian Owners Subject to Law.

Riparian owners who desire to appropriate public waters for beneficial use must comply with provisions of the law same as those who are not riparian owners. *Idaho Power & Transp. Co. v. Stephenson*, 16 Idaho 418, 101 P. 821 (1909).

Validity.

The 1903 act is not a local and special law. *Boise City Irrigation & Land Co. v. Stewart*,

10 Idaho 38, 77 P. 25 (1904).

The subject matter of the 1903 act is within its title. *Boise City Irrigation & Land Co. v. Stewart*, 10 Idaho 38, 77 P. 25 (1904).

Enactment of this section was proper exercise of legislative power. *Big Wood Canal Co. v. Chapman*, 45 Idaho 380, 263 P. 45 (1927).

Water From Mine Portal.

Water emanating from mine portal falls clearly within the definition of public ground water which is subject to appropriation; the water is from an underground source which has been brought to the surface through the excavation of the mine. *Branson v. Miracle*, 107 Idaho 221, 687 P.2d 1348 (1984).

Wrongful Appropriation.

One who diverted water and put it to a beneficial use by aid of a trespass, did not, pursuant to such trespass, acquire a water right. *Bassett v. Swenson*, 51 Idaho 256, 5 P.2d 722 (1931).

Collateral References. 78 Am. Jur. 2d, Waters, §§ 341-366.

93 C.J.S., Waters, §§ 333-341, 358-365.

42-202. Application to appropriate water — Contents — Filing fees — Disposition of fees — Record of receipts. — (1) For the purpose of regulating the use of the public waters and of establishing by direct means the priority right to such use, any person, association or corporation hereafter intending to acquire the right to the beneficial use of the waters of any natural streams, springs or seepage waters, lakes or ground water, or other public waters in the state of Idaho, shall, before commencing of the construction, enlargement or extension of the ditch, canal, well, or other distributing works, or performing any work in connection with said construction or proposed appropriation or the diversion of any waters into a natural channel, make an application to the department of water resources for a permit to make such appropriation. Such application must set forth:

- (a) The name and post-office address of the applicant.
- (b) The source of the water supply.
- (c) The nature of the proposed use or uses and the period of the year during which water is to be used for such use or uses.
- (d) The location of the point of diversion and description of the proposed ditch, channel, well or other work and the amount of water to be diverted and used.
- (e) The time required for the completion of construction of such works and application of the water to the proposed use.

(2) An application proposing an appropriation of water by a municipal provider for reasonably anticipated future needs shall be accompanied by sufficient information and documentation to establish that the applicant

qualifies as a municipal provider and that the reasonably anticipated future needs, the service area and the planning horizon are consistent with the definitions and requirements specified in this chapter. The service area need not be described by legal description nor by description of every intended use in detail, but the area must be described with sufficient information to identify the general location where the water under the water right is to be used and the types and quantity of uses that generally will be made.

(3) Whenever it is desired to appropriate and store flood or winterflow waters, the applicant shall specify in acre feet the quantity of such flood or winterflow waters which he intends to store, but for irrigation purposes he shall not claim more than five (5) acre feet of stored water per acre of land to be irrigated, nor, in the event of the filing of an application claiming both normal flow and flood water and winterflow water, shall the total amount of water claimed exceed the equivalent of a continuous flow during the irrigation season of more than one (1) cubic foot per second for each fifty (50) acres of land to be irrigated, or more than five (5) acre feet of stored water for each acre of land to be irrigated.

(4) The application shall be accompanied by a plan and map of the proposed works for the diversion and application of the water to a beneficial use, showing the character, location and dimensions of the proposed reservoirs, dams, canals, ditches, pipelines, wells and all other works proposed to be used by them in the diversion of the water, and the area and location of the lands proposed to be irrigated, or location of place of other use.

(5) If the application involves more than twenty-five (25) cubic feet per second of water or the development of more than five hundred (500) theoretical horsepower, or impoundment of water in a reservoir with an active storage capacity in excess of ten thousand (10,000) acre feet, the applicant may be required by the director of the department of water resources to furnish a statement of the financial resources of the corporation, association, firm or person making the application, and the means by which the funds necessary to construct the proposed works are to be provided, and the estimated cost of construction; and if such application is made by a corporation, the amount of its capital stock, how much thereof has been actually paid in, and the names and places of residence of its directors; and if for the generation of power or any other purpose than irrigation or domestic use, the purpose for which it is proposed to be used, the nature, location, character, capacity and estimated cost of the works, and whether the water used is to be and will be returned to the stream, and if so, at what point on the stream.

(6) In case the proposed right of use is for agricultural purposes, the application shall give the legal subdivisions of the land proposed to be irrigated, with the total acreage to be reclaimed as near as may be; provided, that no one shall be authorized to divert for irrigation purposes more than one (1) cubic foot of water per second of the normal flow for each fifty (50) acres of land to be so irrigated, or more than five (5) acre feet of stored water per annum for each acre of land to be so irrigated, unless it can be shown to the satisfaction of the department of water resources that a greater amount

is necessary. Provided further, that the plan of irrigation submitted shall provide for the distribution of water to within not more than one (1) mile of each legal subdivision of the land proposed to be reclaimed by the use of such water; provided also, that in the case of all ditches designed to have a capacity of ten (10) cubic feet per second or less, such map showing the location of such ditch, and the place of use of such water, or the location of the lands to be irrigated, may be upon blanks furnished by the department of water resources.

(7) No application shall be accepted and filed by the department of water resources until the applicant shall have deposited with the department a filing fee as in this chapter provided.

(8) All moneys received by the department of water resources under the provisions of this chapter shall be deposited with the state treasurer, and such sums as may be necessary shall be available for the payment of the expenses of the department of water resources incurred in carrying out the provisions of this chapter.

(9) Such expense shall be paid by the state controller in the manner provided by law, upon vouchers duly approved by the state board of examiners, for the work performed under the direction of the department of water resources. The department of water resources shall keep a record of all filing fees received in connection with applications for permits to appropriate public waters.

(10) Provided further, that rights initiated prior to the enactment of this amendment, so far as it pertains to flood and winterflow waters, shall not be affected thereby.

(11) Provided further, that water rights held by municipal providers prior to July 1, 1996, shall not be limited thereby. [1903, p. 223, § 1; am. 1905, p. 357, § 1; reen. R.C., § 3253; am. 1913, ch. 37, § 1, p. 136; reen. C.L., § 3253; C.S., § 5569; am. 1929, ch. 281, § 1, p. 675; I.C.A., § 41-202; am. 1935, ch. 145, § 1, p. 353; am. 1967, ch. 374, § 1, p. 1079; am. 1973, ch. 184, § 1, p. 428; am. 1994, ch. 180, § 83, p. 420; am. 1996, ch. 297, § 1, p. 967.]

Compiler's notes. Section 241 of S.L. 1994, ch. 180 provided that such act should become effective on and after the first Monday in January, 1995 [January 2, 1995] if the amendment to the Constitution of Idaho changing the names of the state auditor to state controller [1994 S.J.R. No. 109, p. 1493] was adopted at the general election held on November 8, 1994. Since such amendment was adopted, the amendment to this section by § 83 of S.L. 1994, ch. 180 became effective January 2, 1995.

The name of the department of water administration (formerly the department of reclamation) was changed to the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

Sections 82 and 84 of S.L. 1994, ch. 180 are compiled as §§ 41-406 and 42-2018, respectively.

Section 2 of S.L. 1996, ch. 297 is compiled as § 42-202B.

Section 2 of S.L. 1973, ch. 184 declared an emergency. Approved March 16, 1973.

Sec. to sec. ref. This section is referred to in §§ 42-105, 42-1426.

Cited in: Lemmon v. Hardy, 95 Idaho 778, 519 P.2d 1168 (1974); Nettleton v. Higginson, 98 Idaho 87, 558 P.2d 1048 (1977); Fremont-Madison Irrigation Dist. & Mitigation Group v. Idaho Ground Water Appropriators, Inc., 129 Idaho 454, 926 P.2d 1301 (1996).

ANALYSIS

Amendment, effect of.
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 Private rights in waters.
 Private waters.
 Public waters.
 Rights acquired.
 Riparian owners.
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 Subterranean waters.
 Unconstitutionality of part of amendment.
 Waters from hot wells.

Amendment, Effect of.

The 1935 amendment to this section did not operate to amend §§ 42-216 (now repealed), 42-224 (now repealed), 42-306 (now repealed), and 42-308 (now repealed). *Twin Falls Canal Co. v. Huff*, 58 Idaho 587, 76 P.2d 923 (1938).

Change of Diversion.

Where person made application under this section and permit was granted, but he subsequently desired to change point of diversion, it was necessary for him to comply substantially with § 42-222. *Washington State Sugar Co. v. Goodrich*, 27 Idaho 26, 147 P. 1073 (1915).

The denial of irrigation district's application of order for change of point of diversion did not constitute res judicata. *Colthorp v. Mountain Home Irrigation Dist.*, 66 Idaho 173, 157 P.2d 1005 (1945).

Constitutionality of Amendment.

This section is not unconstitutional, as amended, as conferring judicial power on commissioner of reclamation. *Twin Falls Canal Co. v. Huff*, 58 Idaho 587, 76 P.2d 923 (1938).

Contents of Application.

Application under this section was required to state facts which could be secured only by entrance to place where appropriation was made, and survey of premises and surroundings at point of diversion and place of improvement, and also a survey of the realty to be taken for dams and ditches to be used in appropriating water to a beneficial use. *Marshall v. Niagara Springs Orchard Co.*, 22 Idaho 144, 125 P. 208 (1912).

Failure of an applicant to include a statement of its financial condition in its application could not be used for the first time as a basis for an action to quiet title to waters involved eleven years later. *Keller v. Magic Water Co.*, 92 Idaho 276, 441 P.2d 725 (1968).

Contingent Right of Permittee.

By application for permit, permittee secured inchoate and contingent right which would ripen into legal and complete appropri-

ation by compliance with statutory steps. *Big Wood Canal Co. v. Chapman*, 45 Idaho 380, 263 P. 45 (1927).

Enjoining Diversion.

To enjoin diversion and change in the place of use of water, the injury, if any, must be confined to a water right. *Colthorp v. Mountain Home Irrigation Dist.*, 66 Idaho 173, 157 P.2d 1005 (1945).

Federal Law.

The Federal Power Act does preempt some state laws relating to the building of dams on navigable streams and it particularly preempts those state laws which require a state license as a predicate for building a dam; however, state law regarding proprietary rights in water is expressly saved. *Idaho Power Co. v. State*, 104 Idaho 575, 661 P.2d 741 (1983).

State water licenses not containing subordination clauses did not control and override the federal subordination clause contained in the federal licenses for the Hells Canyon hydroelectric project; however, neither were the state water licenses preempted by the federal license. *Idaho Power Co. v. State*, 104 Idaho 575, 661 P.2d 741 (1983).

Issuance of License.

Under Idaho law, a water license does not issue until after the diversion works are completed and the water is applied to a beneficial use, albeit an application for license can be made prior to actual construction. *Idaho Power Co. v. State*, 104 Idaho 575, 661 P.2d 741 (1983).

Natural Springs.

Water of natural spring was subject to a valid appropriation for a beneficial use. *Short v. Praisewater*, 35 Idaho 691, 208 P. 844 (1922).

Necessity for Proposal.

The legislature in appropriating water under § 67-4307 without requiring a diversion intended to dispense with the requirement that a proposal for physical diversion of water must be made before there will be an issuance of a permit to appropriate such water. *State, Dep't of Parks v. Idaho Dep't of Water Admin.*, 96 Idaho 440, 530 P.2d 924 (1974).

Parties to Suits.

The United States was an indispensable party to a suit by an irrigation district where the United States had a contractual interest for use of the waters involved. *American Falls Reservoir Dist. No. 2 v. Crandall*, 82 F.2d 973 (9th Cir.), modified, 85 F.2d 865 (9th Cir. 1936).

Percolating Waters.

It can make no difference, for purpose of appropriation, that waters collected and

formed what is known as a spring are seepage and percolating waters, rather than from well-defined subterranean stream, so long as such waters gravitate to and collect at a certain and definite point, and there constitute a volume of water known and designated as a spring. *Le Quime v. Chambers*, 15 Idaho 405, 98 P. 415, 21 L.R.A. (n.s.) 76 (1908).

Percolating or subterranean waters are subject to appropriation. *Bower v. Moorman*, 27 Idaho 162, 147 P. 496, 1917C Ann. Cas. 99 (1915).

Period of Abandonment.

It was only where there was an abandonment of five years of beneficial use by the appropriator that water could be considered as unappropriated water of the state. *Colthorp v. Mountain Home Irrigation Dist.*, 66 Idaho 173, 157 P.2d 1005 (1945).

Private Rights in Waters.

Private rights in waters authorized by law are simply rights to the use of the "public waters" and not an ownership in them, at least while they are flowing in the natural channel. *Boise City Irrigation & Land Co. v. Stewart*, 10 Idaho 38, 77 P. 25 (1904).

So long as water continues to flow in its natural channel, it is not and cannot be made the subject of private ownership, except insofar as it is regarded as a part of the land by or through which the stream flows. *Boise City Irrigation & Land Co. v. Stewart*, 10 Idaho 38, 77 P. 25 (1904).

Private Waters.

Law does not purport to deal with private waters, such as private ponds, artificial lakes or wells owned by private persons and formed by collecting and impounding surface waters. *King v. Chamberlin*, 20 Idaho 504, 118 P. 1099 (1911).

Public Waters.

The term "public waters" refers to all waters running in the natural channel of the streams, and the state may, by proper legislation, regulate the appropriation and use thereof. *Boise City Irrigation & Land Co. v. Stewart*, 10 Idaho 38, 77 P. 25 (1904).

Rights Acquired.

Rights acquired under water license are confined to waters described in application. *Rabido v. Furey*, 33 Idaho 56, 190 P. 73 (1920).

Riparian Owners.

Riparian owners who desire to appropriate public waters for a beneficial use must comply with the provisions of law the same as those

who are not riparian owners. *Idaho Power & Transp. Co. v. Stephenson*, 16 Idaho 418, 101 P. 821 (1909).

Fact that there had been a conversion by lower riparian owner of seepage water of upper riparian owner would not of itself entitle former to injunctive relief restraining latter from cessation of waste or to beneficial use of it. *Colthorp v. Mountain Home Irrigation Dist.*, 66 Idaho 173, 157 P.2d 1005 (1945).

Seepage Water.

Surface waste and seepage water may be appropriated, subject to right of owner to cease wasting it, or in good faith to change place or manner of wasting it, or to recapture it, so long as he applies it to a beneficial use. *Sebern v. Moore*, 44 Idaho 410, 258 P. 176 (1927).

A suit for damages for diversion of return flow of water after 40 years, such water being decreed to defendant's land, the seepage of which had been used by plaintiff and his predecessors, without alleging an abandonment, failed to state a cause of action. *Colthorp v. Mountain Home Irrigation Dist.*, 66 Idaho 173, 157 P.2d 1005 (1945).

The appropriation of seepage and waste water was subject to the right of the owner to cessation of waste, or in good faith changing place of wasting, or to recapture so long as it was applied to a beneficial use. *Colthorp v. Mountain Home Irrigation Dist.*, 66 Idaho 173, 157 P.2d 1005 (1945).

Subterranean Waters.

Subterranean waters may be appropriated by diversion and beneficial use without compliance with this section. *Silkey v. Tiegs*, 51 Idaho 344, 5 P.2d 1049 (1931).

Unconstitutionality of Part of Amendment.

Even if some provisions of an amendment of this section were unconstitutional, the district court should not have dismissed the action, but should have proceeded under the prior valid statute and such portion of the amendment as could be held valid; and such a proceeding would not be an action for a declaratory judgment, and the court would not pass upon the question of unconstitutionality until presented in a cause demanding rulings thereon. *Twin Falls Canal Co. v. Huff*, 58 Idaho 587, 76 P.2d 923 (1938).

Waters from Hot Wells.

Waters of hot wells held not public waters and not subject to appropriation except by owners of fee. *Public Utils. Comm'n v. Nattorium Co.*, 36 Idaho 287, 211 P. 533 (1922).

DECISIONS UNDER PRIOR LAW

When Right Vests.

When right to use of unappropriated waters had been initiated by application for permit and proper steps taken to perfect such right, such right vested and dated back to issuance

of permit. *Big Wood Canal Co. v. Chapman*, 45 Idaho 380, 263 P. 45 (1927).

Collateral References. 78 Am. Jur. 2d, Waters, §§ 345-348.

93 C.J.S., Waters, §§ 358-369.

42-202A. Temporary approval — Application — Exceptions. — (1) Any person, association or corporation hereafter intending to use the waters of any natural streams, springs or seepage waters, lakes or ground water, or other public waters in the state of Idaho, for a minor use of short duration may make application to the department of water resources for temporary approval.

(2) Application for temporary approval shall be upon forms provided by the department of water resources and shall be accompanied by a fifty dollar (\$50.00) fee.

(3) The director of the department of water resources is not required to publish notice of the application pursuant to the provisions of section 42-203A, Idaho Code, and is not required to make findings as provided in section 42-203A or 42-203C, Idaho Code. The director may, however, give notice of an application as he determines appropriate and may grant a temporary approval upon completion of the application form, payment of the filing fee, a determination by the director that the temporary approval can be properly administered, a determination that other sources of water are not available, a determination that approval is in the public interest and a determination that the temporary approval will not injure public values associated with the water source or any other water right. If the temporary approval is within a water district, the director shall seek and consider the recommendations of the watermaster before granting a temporary approval. The director may issue a temporary approval with the conditions determined by the director to be necessary to protect other water rights and the public interest.

(4) The recipient of any temporary approval issued pursuant to the provisions of this act shall assume all risk that the diversion and use of the water may injure other water rights, or otherwise not comply with the criteria described in section 42-203A(5), Idaho Code. Any applicant for a temporary approval who is aggrieved by a denial of the director of a temporary approval pursuant to this act may file an application to appropriate water as provided in section 42-202, Idaho Code.

(5) A temporary approval shall only be granted for a use not intended to become an established water right and for a use which will not exceed a total diverted volume of five (5) acre feet for the duration of the approval, which shall not exceed one (1) year. Approvals issued under the provisions of this section constitute a waiver of the mandatory permit requirements of section 42-201(2), Idaho Code, and do not create a continuing right to use water. Temporary approvals shall not be issued as an interim water supply for a use which requires a continuing water supply.

(6) The provisions of this section do not require a temporary approval before diverting and using water to extinguish or prevent the spread of an

existing wildfire on private or public lands, facilities or equipment, including the use of water by personnel engaged in fighting an existing wildfire. [I.C., § 42-202A, as added by 1993, ch. 255, § 1, p. 880.]

Compiler's notes. Section 2 of S.L. 1993, ch. 255 declared an emergency. Approved March 29, 1993.

42-202B. Definitions. — Whenever used in this title, the term:

(1) "Consumptive use" means that portion of the annual volume of water diverted under a water right that is transpired by growing vegetation, evaporated from soils, converted to nonrecoverable water vapor, incorporated into products, or otherwise does not return to the waters of the state. Consumptive use does not include any water that falls as precipitation directly on the place of use unless the precipitation is captured, controlled and used under an appurtenant water right.

(2) "Digital boundary" means the boundary encompassing and defining an area consisting of or incorporating the place of use or permissible place of use for a water right prepared and maintained by the department of water resources using a geographic information system in conformance with the national standard for spatial data accuracy or succeeding standard.

(3) "Local public interest" is defined as the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource.

(4) "Municipality" means a city incorporated under section 50-102, Idaho Code, a county, or the state of Idaho acting through a department or institution.

(5) "Municipal provider" means:

(a) A municipality that provides water for municipal purposes to its residents and other users within its service area;

(b) Any corporation or association holding a franchise to supply water for municipal purposes, or a political subdivision of the state of Idaho authorized to supply water for municipal purposes, and which does supply water, for municipal purposes to users within its service area; or

(c) A corporation or association which supplies water for municipal purposes through a water system regulated by the state of Idaho as a "public water supply" as described in section 39-103(10), Idaho Code.

(6) "Municipal purposes" refers to water for residential, commercial, industrial, irrigation of parks and open space, and related purposes, excluding use of water from geothermal sources for heating, which a municipal provider is entitled or obligated to supply to all those users within a service area, including those located outside the boundaries of a municipality served by a municipal provider.

(7) "Planning horizon" refers to the length of time that the department determines is reasonable for a municipal provider to hold water rights to meet reasonably anticipated future needs. The length of the planning horizon may vary according to the needs of the particular municipal provider.

(8) "Reasonably anticipated future needs" refers to future uses of water by a municipal provider for municipal purposes within a service area which,

on the basis of population and other planning data, are reasonably expected to be required within the planning horizon of each municipality within the service area not inconsistent with comprehensive land use plans approved by each municipality. Reasonably anticipated future needs shall not include uses of water within areas overlapped by conflicting comprehensive land use plans.

(9) "Service area" means that area within which a municipal provider is or becomes entitled or obligated to provide water for municipal purposes. For a municipality, the service area shall correspond to its corporate limits, or other recognized boundaries, including changes therein after the permit or license is issued. The service area for a municipality may also include areas outside its corporate limits, or other recognized boundaries, that are within the municipality's established planning area if the constructed delivery system for the area shares a common water distribution system with lands located within the corporate limits. For a municipal provider that is not a municipality, the service area shall correspond to the area that it is authorized or obligated to serve, including changes therein after the permit or license is issued. [I.C., § 42-202B, as added by 1996, ch. 297, § 2, p. 967; am. 1997, ch. 373, § 1, p. 1188; am. 2000, ch. 132, § 36, p. 309; am. 2002, ch. 306, § 1, p. 870; am. 2003, ch. 298, § 1, p. 806.]

Compiler's notes. Sections 1 and 3 of S.L. 1996, ch. 297 are compiled as §§ 42-202 and 42-217, respectively.

Section 2 of S.L. 1997, ch. 373 is compiled as § 42-222.

Sections 35 and 37 of S.L. 2000, ch. 132, are compiled as §§ 39-419 and 57-1701, respectively.

Section 2 of S.L. 2002, ch. 306 is compiled as § 42-219.

Section 39 of S.L. 2000, ch. 132 provided: "This act shall be in full force and effect on

and after July 1, 2000, except that the Division of Environmental Quality shall have one (1) year thereafter to accomplish necessary changes to complete the physical transition to the new department."

Section 2 of S.L. 2003, ch. 298, is compiled as § 42-203A.

Sec. to sec. ref. This section is referred to in §§ 42-203A, 42-222, 42-240, 42-250 and 42-1763.

Cited in: Barron v. Idaho Dep't of Water Resources, 135 Idaho 414, 18 P.3d 219 (2001).

42-203. [Amended and Redesignated.]

Compiler's notes. This section was amended and redesignated as § 42-203A by § 1 of S.L. 1985, ch. 17.

42-203A. Notice upon receipt of application — Protest — Hearing and findings — Appeals. — (1) Upon receipt of an application to appropriate the waters of this state, the department of water resources shall prepare a notice in such form as the department may prescribe, specifying: (a) the number of the application; (b) the date of filing thereof; (c) the name and post-office address of the applicant; (d) the source of the water supply; (e) the amount of water to be appropriated; (f) in general the nature of the proposed use; (g) the approximate location of the point of diversion; and (h) the point of use. The department shall also state in said notice that any protest against the approval of such application, in form prescribed by the department, shall be filed with the department within ten (10) days from the last date of publication of such notice.

(2) The director of the department of water resources shall cause the notice to be published in a newspaper printed within the county wherein the point of diversion lies or, in the event no newspaper is printed in said county, then in a newspaper of general circulation therein. When the application proposes a diversion in excess of ten (10) c.f.s. or one thousand (1,000) acre feet, the director shall cause the notice to be published in a newspaper or newspapers sufficient to achieve statewide circulation. Any notice shall be published at least once each week for two (2) successive weeks.

(3) The director of the department shall cause a copy of the notice of application to be sent by ordinary mail to any person who requests in writing to receive any class of notices of application and who pays an annual mailing fee as established by departmental regulation.

(4) Any person, firm, association or corporation concerned in any such application may, within the time allowed in the notice of application, file with said director of the department of water resources a written protest, together with the statutory filing fee as provided in section 42-221, Idaho Code, against the approval of such application, which protest shall state the name and address of protestant and shall be signed by him or by his agent or attorney and shall clearly set forth his objections to the approval of such application. Hearing upon the protest so filed shall be held within sixty (60) days from the date such protest is received. Notice of this hearing shall be given by mailing notice not less than ten (10) days before the date of hearing and shall be forwarded to both the applicant and the protestant, or protestants, by certified mail. Such notice shall state the names of the applicant and protestant, or protestants, the time and place fixed for the hearing and such other information as the director of the department of water resources may deem advisable. In the event that no protest is filed, then the director of the department of water resources may forthwith approve the application, providing the same in all respects conforms with the requirements of this chapter, and with the regulations of the department of water resources.

(5) Such hearing shall be conducted in accordance with the provisions of section 42-1701A(1) and (2), Idaho Code. The director of the department of water resources shall find and determine from the evidence presented to what use or uses the water sought to be appropriated can be and are intended to be applied. In all applications whether protested or not protested, where the proposed use is such (a) that it will reduce the quantity of water under existing water rights, or (b) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or (c) where it appears to the satisfaction of the director that such application is not made in good faith, is made for delay or speculative purposes, or (d) that the applicant has not sufficient financial resources with which to complete the work involved therein, or (e) that it will conflict with the local public interest as defined in section 42-202B, Idaho Code, or (f) that it is contrary to conservation of water resources within the state of Idaho, or (g) that it will adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of

water originates; the director of the department of water resources may reject such application and refuse issuance of a permit therefor, or may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions. Provided however, that minimum stream flow water rights may not be established under the local public interest criterion, and may only be established pursuant to chapter 15, title 42, Idaho Code. The provisions of this section shall apply to any boundary stream between this and any other state in all cases where the water sought to be appropriated has its source largely within the state, irrespective of the location of any proposed power generating plant.

(6) Any person or corporation who has formally appeared at the hearing, aggrieved by the judgment of the director of the department of water resources, may seek judicial review thereof in accordance with section 42-1701A(4), Idaho Code. [C.S., § 5569A, as added by 1929, ch. 212, § 1, p. 429; I.C.A., § 41-203; am. 1935, ch. 145, § 2, p. 353; am. 1967, ch. 374, § 2, p. 1079; am. 1969, ch. 469, § 1, p. 1346; am. 1978, ch. 306, § 1, p. 767; am. 1980, ch. 238, § 2, p. 526; am and redesign. 1985, ch. 17, § 1, p. 23; am. 1990, ch. 141, § 4, p. 316; am. 1994, ch. 64, § 1, p. 121; am. 2003, ch. 298, § 2, p. 806.]

Compiler's notes. This section was formerly compiled as § 42-203.

The law enacting this section was approved March 16, 1929, and did not carry an emergency clause.

Section 2 of S.L. 1969, ch. 469 repealed chapter 15 of title 42, and section 3 of S.L. 1969, ch. 469 is compiled herein as § 42-1737.

Section 1 of S.L. 1980, ch. 238 is compiled as § 42-1701A.

Sections 3 and 5 of S.L. 1990, ch. 141 are compiled as §§ 42-401 and 42-222, respectively.

Section 2 of S.L. 1994, ch. 64 is compiled as § 42-221.

Section 2 of S.L. 1978, ch. 306 declared an emergency. Approved March 29, 1978.

Sections 1 and 3 of S.L. 2003, ch. 298, are compiled as § 42-202B and 42-222, respectively.

Sec. to sec. ref. This section is referred to in §§ 42-202A, 42-203C, 42-211, 42-222, 42-233a, 42-401, 42-1426, 42-4201, 42-4201A, 42-5225, and 43-343.

ANALYSIS

Amendment, effect of.

Appeals.

Constitutionality.

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Public interest.

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Rejection of application involving speculation.

Retroactive application of public interest standard.

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Sufficient financial resources.

Unsatisfactory permit conditions.

When appeal taken.

Amendment, Effect of.

The 1935 amendment to this section did not operate to amend §§ 42-216 (now repealed), 42-224 (now repealed), 42-306 (now repealed) and 42-308 (now repealed). *Twin Falls Canal Co. v. Huff*, 58 Idaho 587, 76 P.2d 923 (1938).

Appeals.

Court was bound to take, on an appeal from an order of the commissioner of reclamation, the date on letter to the protestant reciting that the order was "made and entered this day" rather than the date actually appearing on the ruling and order. *Idaho Power Co. v. Buhl*, 62 Idaho 351, 111 P.2d 1088 (1941).

Constitutionality.

One to whom water permit was granted by the commissioner of reclamation could not urge unconstitutionality of amendment to statutes governing contests of permits in the absence of a showing of injury by reason thereof. *Twin Falls Canal Co. v. Huff*, 58 Idaho 587, 76 P.2d 923 (1938).

Even if some provisions of the 1935 amendment to this section were unconstitutional, the district court should not have dismissed the action, but should have proceeded under the prior valid statute and such portion of the amendment as could be held valid, and such a proceeding would not be an action for a declaratory judgment, and the court could not pass upon the question of unconstitutionality until presented in a cause demanding rulings thereon. *Twin Falls Canal Co. v. Huff*, 58

Idaho 587, 76 P.2d 923 (1938).

Design Plan.

The design plan for a proposed facility depends on the nature of the facility, the complexity of the proposal, and the extent of the proposed appropriation's impact on the local area; the plans should be sufficient to generally apprise the public of the efficacy of the proposed use in the planned facility, and of its potential impact. *Shokal v. Dunn*, 109 Idaho 330, 707 P.2d 441 (1985).

Public Interest.

The legislature in this section must have intended the public interest on the local scale to include the public interest elements listed in § 42-1501, as well as assuring minimum stream flows, discouraging waste and encouraging conservation. The relevant elements of public interest and their relative weights will vary with local needs, circumstances and interests. *Shokal v. Dunn*, 109 Idaho 330, 707 P.2d 441 (1985).

While the burden of production as to which elements of public interest are impacted and to what degree lies with the party that has knowledge peculiar to himself, the burden of proof in all cases as to where the public interest lies rests with the applicant for a permit to appropriate water. *Shokal v. Dunn*, 109 Idaho 330, 707 P.2d 441 (1985).

The determination of what elements of the public interest are impacted, and what the public interest requires, is committed to the Department of Water Resources' sound discretion. *Shokal v. Dunn*, 109 Idaho 330, 707 P.2d 441 (1985).

Attaching nine conditions to the approved water permit was within the authority granted the Department of Water Resources by the legislature; when the legislature enacted subsection (5) of this section it clearly vested in the director of the department considerable authority and discretion to determine and protect the "local public interest" when issuing or rejecting water permits. *Collins Bros. Corp. v. Dunn*, 114 Idaho 600, 759 P.2d 891 (1988).

The director correctly found that the transfer of water right to land not previously covered by the right did not conflict with the local public interest even though a local road had been flooded on several occasions by the water appropriated under the water right. *Dovel v. Dobson*, 122 Idaho 59, 831 P.2d 527 (1992).

Under this section, any application to appropriate water in Idaho is subject to the local public interest standard. Likewise, any change to a water right under § 42-222 is also subject to a determination that the change is in the local public interest as stated in this section; as is an amendment to a water permit under § 42-211. *Hardy v. Higginson*, 123 Idaho 485, 849 P.2d 946 (1993).

Publication of Notice.

In the absence of a showing to the contrary, it will be presumed that publication of notice was made as required by this section and that, in passing on the application, the reclamation engineer (director of the department of water resources) complied with statutory provisions concerning filing of protests to the granting of the application. *Keller v. Magic Water Co.*, 92 Idaho 276, 441 P.2d 725 (1968).

Rejection of Application Involving Speculation.

Where plaintiffs filed an application for a water permit but had no possessory right in the land designated as the place of use, it amounted to speculation, and a person may not file an application for water right and then seek a place for its use. *Lemmon v. Hardy*, 95 Idaho 778, 519 P.2d 1168 (1974).

Retroactive Application of Public Interest Standard.

It was not improper to apply the new local public interest standard imposed by the 1978 amendment to an application for a water appropriation permit filed prior to the amendment, since a permit applicant applying to appropriate water has no prior individually vested right to the water at the time of the application in that it does not already own the water and since impermissible retroactive legislation is only that legislation which affects vested or preexisting rights. *Hidden Spring Trout Ranch, Inc. v. Allred*, 102 Idaho 623, 636 P.2d 745 (1981).

The filing of an application for a water appropriation permit establishes the priority date of the appropriation under the relation back doctrine, but any such priority date right is nonetheless contingent upon future statutory adherence and issuance of a license pursuant to § 42-219 and is therefore not a vested right which would preclude application of § 42-203 (now this section), as amended in 1978, to a permit application filed prior to that amendment. *Hidden Springs Trout Ranch, Inc. v. Allred*, 102 Idaho 623, 636 P.2d 745 (1981).

Standing to Contest Change.

Where the Box Canyon area was designated by the Bureau of Land Management (BLM) as an Area of Critical Environmental Concern (ACEC), and where the values justifying the ACEC designation included the identification of four candidate threatened and endangered aquatic species and the scenic and unique natural qualities of the area, the protection of this habitat fell within the local public interest as defined in *Shokal v. Dunn*, 109 Idaho 330, 770 P.2d 441 (1985); therefore, the protestants, although having no water rights within Box Canyon, sought to protect these locally important factors and

thus their interests were properly considered by the Director of the Idaho Department of Water Resources. *Hardy v. Higginson*, 123 Idaho 485, 849 P.2d 946 (1993).

Sufficient Financial Resources.

A showing by the applicant that it is "reasonably probable" that financing can be secured to complete the project within five years serves the purpose of screening out undeserving projects without being destructive of growth and development in the state. *Shokal v. Dunn*, 109 Idaho 330, 707 P.2d 441 (1985).

Unsatisfactory Permit Conditions.

If a permittee finds the conditions imposed on an amendment to a water permit to be unsatisfactory, the permittee shall be allowed to withdraw the application and be left with what the permittee had before submitting the application to the Idaho Department of Water

Resources (IDWR). *Hardy v. Higginson*, 123 Idaho 485, 849 P.2d 946 (1993).

When Appeal Taken.

For jurisdictional purposes an appeal from the department of water resources to the district court under this section has been taken when the appellant files his petition setting forth the appellant's reason for appeal in the appropriate district court, and failure to take the additional steps outlined in this section is only grounds for the court to exercise its discretion in imposing sanctions, including dismissal, if any delay caused thereby can fairly be said to have prejudiced the other party or parties to the appeal. *Neal v. Harris*, 100 Idaho 348, 597 P.2d 234 (1979).

Collateral References. 78 Am. Jur. 2d, Waters, §§ 345-348.

93 C.J.S., Waters, §§ 358-369.

42-203B. Authority to subordinate rights — Nature of subordinated water right and authority to establish a subordination condition — Authority to limit term of permit or license. — (1) The legislature finds and declares that it is in the public interest to specifically implement the state's power to regulate and limit the use of water for power purposes and to define the relationship between the state and the holder of a water right for power purposes to the extent such right exceeds an established minimum flow. The purposes of the trust established by subsections (2) and (3) of this section are to assure an adequate supply of water for all future beneficial uses and to clarify and protect the right of a user of water for power purposes subordinated by a permit issued after July 1, 1985, or by an agreement, to continue using the water pending approval of depletionary future beneficial uses.

(2) A water right for power purposes which is defined by agreement with the state as unsubordinated to the extent of a minimum flow established by state action shall remain unsubordinated as defined by the agreement. Any portion of the water rights for power purposes in excess of the level so established shall be held in trust by the state of Idaho, by and through the governor, for the use and benefit of the user of the water for power purposes, and of the people of the state of Idaho; provided, however, that application of the provisions of this section to water rights for hydropower purposes on the Snake river or its tributaries downstream from Milner dam shall not place in trust any water from the Snake river or surface or ground water tributary to the Snake river upstream from Milner dam. For the purposes of the determination and administration of rights to the use of the waters of the Snake river or its tributaries downstream from Milner dam, no portion of the waters of the Snake river or surface or ground water tributary to the Snake river upstream from Milner dam shall be considered. The rights held in trust shall be subject to subordination to and depletion by future upstream beneficial users whose rights are acquired pursuant to state law, including compliance with the requirements of section 42-203C, Idaho Code.

(3) Water rights for power purposes not defined by agreement with the state shall not be subject to depletion below any applicable minimum stream flow established by state action. Water rights for power purposes in excess of such minimum stream flow shall be held in trust by the state of Idaho, by and through the governor, for the use and benefit of the users of water for power purposes and of the people of the state of Idaho. The rights held in trust shall be subject to subordination to and depletion by future consumptive upstream beneficial users whose rights are acquired pursuant to state law, excluding compliance with the requirements of section 42-203C, Idaho Code.

(4) The user of water for power purposes as beneficiary of the trust established in subsections (2) and (3) of this section shall be entitled to use water available at its facilities to the extent of the water right, and to protect its rights to the use of the water as provided by state law against depletions or claims not in accordance with state law.

(5) The governor or his designee is hereby authorized and empowered to enter into agreements with holders of water rights for power purposes to define that portion of their water rights at or below the level of the applicable minimum stream flow as being unsubordinated to upstream beneficial uses and depletions, and to define such rights in excess thereof as being held in trust by the state under subsection (2) of this section. Such agreements shall be subject to ratification by law. The contract entered into by the governor and the Idaho Power Company on October 25, 1984, is hereby found and declared to be such an agreement, and the legislature hereby ratifies the governor's authority and power to enter into this agreement.

(6) The director shall have the authority to subordinate the rights granted in a permit or license for power purposes to subsequent upstream beneficial depletionary uses. A subordinated water right for power use does not give rise to any claim against, or right to interfere with, the holder of subsequent upstream rights established pursuant to state law. The director shall also have the authority to limit a permit or license for power purposes to a specific term.

Subsection (6) of this section shall not apply to licenses which have already been issued as of the effective date [July 1, 1985] of this act.

(7) The director in the exercise of the authority to limit a permit or license for power purposes to a specific term of years shall designate the number of years through which the term of the license shall extend and for purposes of determining such date shall consider among other factors:

- (a) The term of any power purchase contract which is, or reasonably may become, applicable to, such permit or license;
- (b) The policy of the Idaho public utilities commission (IPUC) regarding the term of power purchase contracts as administered by the IPUC under and pursuant to the authority of the public utility regulatory policy act of 1978 (PURPA);
- (c) The term of any federal energy regulatory commission (FERC) license granted, or which reasonably may be granted, with respect to any particular permit or license for power purpose;

(d) Existing downstream water uses established pursuant to state law. The term of years shall be determined at the time of issuance of the permit, or as soon thereafter as practicable if adequate information is not then available. The term of years shall commence upon application of water to beneficial use. The term of years, once established, shall not thereafter be modified except in accordance with due process of law. [I.C., § 42-203B, as added by 1985, ch. 17, § 2, p. 23 and ch. 224, § 1, p. 537; am. 1986, ch. 117, § 1, p. 308.]

Compiler's notes. Concerning the contract of October 25, 1984, referred to in subsection (5), see S.L. 1985, ch. 14.

The Public Utility Regulatory Policy Act of 1978 referred to in subdivision (7)(b) of this section is compiled as 16 U.S.C. § 2601 et seq.

Sec. to sec. ref. This section is referred to in §§ 42-234 and 42-1701.

Purpose of Agreement Concerning Subordination.

The purpose of Idaho Power Company's agreement to have its claim to Snake River

water rights for its Swan Falls hydroelectric facility of 8,400 c.f.s. (measured at the Murphy gauging station) subordinated down to a reduced average daily flow, was to make available more water for future appropriators and to assist in the expansion of other beneficial uses of the water in the Snake River. *Miles v. Idaho Power Co.*, 116 Idaho 635, 778 P.2d 757 (1989).

42-203C. Hydropower water right — Criteria for reallocation — Weight — Burden of proof. — (1) If an applicant intends to appropriate water which is held in trust by the state of Idaho pursuant to subsection (5) of section 42-203B, Idaho Code, the director shall consider, prior to approving the application, the criteria established in section 42-203A, Idaho Code, and whether the proposed use, individually or cumulatively with other existing uses, or uses reasonably likely to exist within twelve (12) months of the proposed use, would significantly reduce the amount of trust water available to the holder of the water right used for power production that is defined by agreement pursuant to subsection (5) of section 42-203B, Idaho Code, and, if so, whether the proposed reduction is in the public interest.

(2)(a) The director in making such public interest determinations for purposes of this section shall consider:

- (i) The potential benefits, both direct and indirect, that the proposed use would provide to the state and local economy;
- (ii) The economic impact the proposed use would have upon electric utility rates in the state of Idaho, and the availability, foreseeability and cost of alternative energy sources to ameliorate such impact;
- (iii) The promotion of the family farming tradition;
- (iv) The promotion of full economic and multiple use development of the water resources of the state of Idaho;
- (v) In the Snake River Basin above the Murphy gauge whether the proposed development conforms to a staged development policy of up to twenty thousand (20,000) acres per year or eighty thousand (80,000) acres in any four (4) year period.

No single factor enumerated above shall be entitled to greater weight by the director in arriving at this determination.

(b) The burden of proof under the provisions of this section shall be on the protestant. [I.C., § 42-203C, as added by 1985, ch. 17, § 3, p. 23; am. 1986, ch. 117, § 2, p. 308.]

Sec. to sec. ref. This section is referred to in § 42-202A.

42-203D. Review of permits — Opportunity for hearing. —

(1) The director of the department of water resources shall review all permits issued prior to July 1, 1985, which propose to divert water held in trust by the state of Idaho pursuant to subsection (5) of section 42-203B, Idaho Code, except to the extent a permit has been put to beneficial use prior to July 1, 1985, to determine whether they comply with the provisions of section 42-203C, Idaho Code. If the department finds that the proposed use is allowed under section 42-203C, Idaho Code, then the department shall enter an order continuing the permit. If the department finds that the proposed use is not allowed under section 42-203C, Idaho Code, then the department shall either cancel the permit or impose the conditions required to bring the permit into compliance with section 42-203C, Idaho Code.

(2) The department shall provide an opportunity for hearing in accordance with section 42-1701A, Idaho Code, and chapter 52, title 67, Idaho Code, for each holder of a permit that is proposed either to be cancelled or made subject to new conditions. [I.C., § 42-203D, as added by 1985, ch. 17, § 4, p. 23; am. 1986, ch. 117, § 3, p. 308; am. 1993, ch. 216, § 32, p. 587.]

Legislative Intent. Section 5 of S.L. 1985, ch. 17 read: "This act shall not be construed as modifying, amending, or repealing any interstate compact."

Compiler's notes. Sections 31 and 33 of S.L. 1993, ch. 216 are compiled as §§ 41-1435 and 42-238, respectively.

Section 6 of S.L. 1985, ch. 17 read: "The

provisions of this act are hereby declared to be severable and if any provision of this act or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of remaining portions of this act."

Section 4 of S.L. 1986, ch. 117 declared an emergency. Approved March 24, 1986.

42-204. Examination — Permit — Commencement of work — Extensions — Appeal. — On receipt of the application, which shall be of a form prescribed by the department of water resources, it shall be the duty of that department to make an indorsement thereon of the date of its receipt, and to examine said application and ascertain if it sets forth all the facts necessary to show the location, nature and amount of the proposed use. If upon such examination the application is found defective, it shall be the duty of the department of water resources to return the same for correction or to correspond with the applicant to obtain the needed information or amendments. If the application is returned to the applicant or the department shall request additional information and the applicant fails to return the corrected application or to supply the needed information within thirty (30) days, the department may void the record of said application and notify the applicant of such action. If the corrected application is returned or the information is supplied after thirty (30) days, such corrected application shall be treated in all respects as a new application, and the priority of the

right initiated shall be determined by the date of receipt, in the office of the department, of the corrected application or additional information; provided, that upon request, and good cause appearing therefor, the director of the department of water resources may grant an extension of time within which to return the corrected application or supply needed information. All applications which shall comply with the provisions of this chapter and with the regulations of the department of water resources shall be numbered in such manner as will aid in their identification, and it shall be the duty of the department to approve all applications, made in proper form, which contemplate the application of water to a beneficial use: provided, that the department may deny any such application, or may partially approve and grant permit for a lesser quantity of water than applied for, or may grant permit upon conditions as provided in the preceding section.

The department of water resources shall issue a permit for any approved application, make a record of the approval and provide a copy of the permit to the applicant, who shall be authorized, on receipt thereof, to proceed with the construction of the necessary works for the diversion of such water, and to take all steps required to apply the water to a beneficial use and perfect the proposed appropriation. The department shall require that actual construction work and application of the water to full beneficial use shall be complete within a period of five (5) years from the date of such approval, but may limit the permit to a less period than is named in the application, and the permit shall set forth the date when beneficial application of the water to be diverted by such works shall be made. Sixty (60) days before the date set for the completion of the appropriation of water under any permit, the department shall forward a notice to the applicant by certified mail at his address of record of the date for such completion, which said notice shall advise the applicant of the necessity of submitting an affidavit of completion or a request for an extension of time on or before said date; Provided that:

1. In cases where the applicant is prevented from proceeding with his work by his failure to obtain necessary consent or final approval or rejection from the federal government because of the pendency of an application for right of way or other matter within the jurisdiction of the United States, or by litigation of any nature which might bring his title to said water in question, the department of water resources upon proper showing of the existence of any such condition, and being convinced that said applicant is proceeding diligently and in good faith, shall extend the time so that the amount of time lost by such delays shall be added to the time given in the original permit for each and every action required.

2. The time for completion of works and application of the water to full beneficial use under any permit involving the diversion of more than twenty-five thousand (25,000) acre feet in one (1) irrigation season for a project of no less than five thousand (5,000) acres, may upon application to the director of the department of water resources supported by a showing that additional time is needed on account of the time required for organizing, financing and constructing works of such large size, be extended by the director of the department of water resources for an additional period of seven (7) years, but not to exceed twelve (12) years in all from the date of

permit: Provided, that no such extension shall be granted unless the applicant for such extension shall show that there has been actually expended toward the construction of said diversion (including expenditures for the purchase of rights of way and property in connection therewith) at least one hundred thousand dollars (\$100,000).

3. The time for completion of works and application of the water to full beneficial use under any permit involving the construction of a reservoir of more than ten thousand (10,000) acre feet capacity or for the appropriation of water to be impounded in such reservoir of more than ten thousand (10,000) acre feet capacity, may be extended by the director of the department of water resources upon application to the director if the permittee establishes that the permittee has exercised reasonable diligence and that good cause exists for the requested extension.

4. In connection with permits held by the United States, or the Idaho water resource board, whether acquired as the original applicant, by assignment or otherwise, the director of the department of water resources may extend the time for completion of the works and application of the water to full beneficial use for such additional period or periods of time as he may deem necessary upon application supported by a showing that such additional time is required by reason of the status of plans, authorization, construction fund appropriations, construction, or any arrangements which are found to be requisite to completion of the construction of such works.

5. In all other situations not governed by these provisions the department may grant one (1) extension of time, not exceeding five (5) years beyond the date originally set for completion of works and application of the water to full beneficial use, upon request for extension received on or before the date set for completion, provided good cause appears therefor.

Any applicant feeling himself aggrieved by the decision of the department of water resources regarding his application may request a hearing before the director in accordance with section 42-1701A(3), Idaho Code, for the purpose of contesting the decision and may seek judicial review pursuant to section 42-1701A(4), Idaho Code, of any final decision of the director following the hearing.

Every holder of a permit which shall be issued under the terms and conditions of an application filed hereafter appropriating twenty-five (25) cubic feet or less per second must, within one (1) year from the date upon which said permit issues from the office of the department of water resources, commence the excavation or construction of the works by which he intends to divert the water, and must prosecute the work diligently and uninterruptedly to completion, unless temporarily interrupted through no fault of the holder of such permit by circumstances, over which he has no control.

The holder of any permit who shall fail to comply with the provisions of this section within the time or times specified shall be deemed to have abandoned all rights under his permit. [1903, p. 223, § 2; am. 1905, p. 357, § 2; reen. R.C., § 3254; am. 1911, ch. 64, § 1, p. 184; am. 1915, ch. 133, § 1, p. 289; reen. C.L., § 3254; C.S., § 5570; am. 1923, ch. 135, § 1, p. 196; I.C.A., § 41-204; am. 1935, ch. 145, § 3, p. 353; am. 1941, ch. 161, § 1, p.

320; am. 1949, ch. 127, § 1, p. 222; am. 1963, ch. 214, § 1, p. 618; am. 1967, ch. 374, § 3, p. 1079; am. 1980, ch. 238, § 3, p. 526; am. 1982, ch. 62, § 1, p. 122; am. 1986, ch. 313, § 3, p. 763; am. 1989, ch. 96, § 1, p. 223.]

Compiler's notes. The words enclosed in parentheses so appeared in the law as enacted.

Section 4 of S.L. 1980, ch. 238 is compiled as § 42-211.

Sections 2 and 4 of S.L. 1986, ch. 313 are compiled as §§ 42-201 and 42-221, respectively.

Section 2 of S.L. 1963, ch. 214 declared an emergency. Approved March 25, 1963.

Section 2 of S.L. 1982, ch. 62 declared an emergency. Approved March 15, 1982.

Cross ref. Cancellation of permits, §§ 42-208, 42-301 et seq.

Sec. to sec. ref. This section is referred to in §§ 42-218, 42-233a.

Cited in: *Shokal v. Dunn*, 109 Idaho 330, 707 P.2d 441 (1985).

ANALYSIS

Amendment, effect of.

Applicable to United States.

Constitutionality.

Conveyance of water right.

Effect of permit.

Trespass.

Unsatisfactory permit conditions.

Vested rights.

Amendment, Effect of.

The 1935 amendment to this section did not operate to amend §§ 42-216 (now repealed), 42-224 (now repealed), 42-306 (now repealed) and 42-308 (now repealed). *Twin Falls Canal Co. v. Huff*, 58 Idaho 587, 76 P.2d 923 (1938).

Applicable to United States.

Restrictive five-year requirement for completion of irrigation appropriations was binding on United States, public waters not being governed, in this respect, by same principle applicable to public lands. *Pioneer Irrigation Dist. v. American Ditch Ass'n*, 50 Idaho 732, 1 P.2d 196 (1931).

Constitutionality.

One to whom water permit was granted by the commissioner of reclamation could not urge unconstitutionality of amendment to statutes governing contests of permits in the absence of a showing of injury by reason thereof. *Twin Falls Canal Co. v. Huff*, 58 Idaho 587, 76 P.2d 923 (1938).

Even if some provisions of an amendment of this section were unconstitutional, the district court should not have dismissed the action, but should have proceeded under the prior valid statute and such portion of the amendment as could be held valid, and such a

proceeding would not be an action for a declaratory judgment, and the court could not pass upon the question of unconstitutionality until presented in a cause demanding rulings thereon. *Twin Falls Canal Co. v. Huff*, 58 Idaho 587, 76 P.2d 923 (1938).

The application of this act as amended in 1963 to a petition for a permit opposed by parties because of its alleged adverse effect on rights of such parties existing prior to the 1963 amendment was not unconstitutional as retrospective. *Keller v. Magic Water Co.*, 92 Idaho 276, 441 P.2d 725 (1968).

The provisions of this section granting to persons or corporations owning irrigation systems covering more than 25,000 acres additional time in which to apply diverted water to beneficial use are not unconstitutional class legislation. *Keller v. Magic Water Co.*, 92 Idaho 276, 441 P.2d 725 (1968).

Conveyance of Water Right.

Water right is real estate and must be conveyed as real estate, and where one had a valid water permit issued to him by state engineer (department of water resources) he could not convey water right secured thereby by simply handing permit to would-be purchaser. *Gard v. Thompson*, 21 Idaho 485, 123 P. 497 (1912).

Effect of Permit.

Permit is not an appropriation of the public waters of state, but is the consent of state given in manner provided by law to construct and acquire real property, and it gives applicant an inchoate right, which will ripen into a legal and complete appropriation only upon completion of works and application of water to a beneficial use. *Speer v. Stephenson*, 16 Idaho 707, 102 P. 365 (1909); *Marshall v. Niagara Springs Orchard Co.*, 22 Idaho 144, 125 P. 208 (1912); *Basinger v. Taylor*, 30 Idaho 289, 164 P. 522 (1917).

Merely fact that state engineer (department of water resources) grants permit in no way confers any right to enter upon private land for the purpose of making appropriation. *Marshall v. Niagara Springs Orchard Co.*, 22 Idaho 144, 125 P. 208 (1912).

Granting of permit secures no rights to holder, but compliance with conditions of permit initiates right to use water, which right becomes vested and dates back to the issuance of permit. *Washington State Sugar Co. v. Goodrich*, 27 Idaho 26, 147 P. 1073 (1915).

Trespass.

In order to initiate right to appropriate water under this section at a point upon land

belonging to state, if it is necessary for applicant to enter upon land owned by state for purpose of making necessary examination, surveys, maps and plans required in order to make a proper application to state engineer (department of water resources) for a permit, by so entering, such party would be a trespasser upon said land, under R. C., § 1578. *Tobey v. Bridgewood*, 22 Idaho 566, 127 P. 178 (1912), overruled on other grounds, *Idaho-Iowa Lateral and Reservoir Co. v. Fisher*, 27 Idaho 695, 151 P.2d 998 (1915).

Where necessary data can be furnished from observation or survey made beyond the premises where the diversion is to take place, there is no trespass, since trespass must be physical, not merely mental. *Idaho Power Co. v. Buhl*, 62 Idaho 351, 111 P.2d 1088 (1941).

Unsatisfactory Permit Conditions.

If a permittee finds the conditions imposed on an amendment to a water permit to be unsatisfactory, the permittee shall be allowed to withdraw the application and be left with what the permittee had before submitting the application to the Idaho Department of Water Resources (IDWR). *Hardy v. Higginson*, 123 Idaho 485, 849 P.2d 946 (1993).

Vested Rights.

State engineer (department of water resources), by granting subsequent water permit, cannot interfere in any manner with vested rights of prior appropriators. *Lockwood v. Freeman*, 15 Idaho 395, 98 P. 295 (1908); *Nielson v. Parker*, 19 Idaho 727, 115 P. 488 (1911); *Gard v. Thompson*, 21 Idaho 485, 123 P. 497 (1912).

DECISIONS UNDER PRIOR LAW

ANALYSIS

Action at law.

Necessity of compliance.

Action at Law.

Holders of subsequent permits, upon a proper showing, are entitled to judgment in action at law canceling prior permits issued without statutory compliance, when state engineer (department of reclamation) refuses to

cancel such permits. *Clark v. Hansen*, 35 Idaho 449, 206 P. 808 (1922).

Necessity of Compliance.

Total failure to commence work within time provided in permit, or to complete one fifth of work in limited time, cannot be cured by extending time for making proof of beneficial use of water so attempted to be appropriated. *Washington State Sugar Co. v. Goodrich*, 27 Idaho 26, 147 P. 1073 (1915).

42-205. Issuance of permit — Restrictions — Preference. — (1) No permit shall be issued by the department of water resources of the state of Idaho, for the appropriation of water for power purposes, nor shall any such permit be assigned, transferred, mortgaged, sold or conveyed to any person, firm or corporation except in accordance with the provisions of this act.

(2) Water cannot be appropriated for hydropower development uses within or using existing man-made irrigation facilities without the permission of the owner thereof.

(3) When competing applications for a permit have been filed prior to the effective date [April 1, 1981] of this act for the additional use for hydropower purposes that would utilize facilities that are owned or controlled by the holder of an existing water permit, license, decree, or established constitutional water usage, the director shall give preference to the application of the owner of the existing rights or his agent. [1937, ch. 142, § 1, p. 233; am. 1947, ch. 66, § 1, p. 106; am. 1981, ch. 206, § 1, p. 371.]

Compiler's notes. The bracketed reference "April 1, 1981" was inserted by the compiler.

The words "this act" refer to S.L. 1937, ch.

142, as amended by S.L. 1947, ch. 66, which is compiled herein as §§ 42-205 — 42-210.

Section 2 of S.L. 1981, ch. 206 declared an emergency. Approved April 1, 1981.

42-206. Residence a requisite for issuance. — No permit to appropriate water for power purposes in the state of Idaho shall hereafter be granted to any person or association of persons not an actual bona fide

resident or residents of the state of Idaho, nor to any corporation or partnership unless organized or qualified to do business in and under the laws of the state of Idaho. [1937, ch. 142, § 2, p. 233; am. 1947, ch. 66, § 2, p. 106; am. 1986, ch. 217, § 1, p. 553.]

42-207. Sale, transfer, assignment or mortgage of permit. —

Whenever the holder of a permit to appropriate water for power purposes within the state of Idaho, desires to sell, assign, transfer or mortgage such permit so held by him, he shall file with the director of the department of water resources a copy of the deed, bill of sale, assignment, mortgage or other document of transfer, together with such proof as the director of the department of water resources may require that the new owner, holder or assignee of such permit, or the mortgagee, or one or more of the trustees under any mortgage trust indenture, possesses the qualifications set forth in section 42-206, and that such transfer is made in good faith, and not for purposes of speculation or delay; and the sale, transfer, assignment or mortgaging of any such permit except as herein provided shall be void, it being the express intention of the legislature to prohibit the transfer of permits to appropriate water for power purposes by mortgaging the same or otherwise, except in accordance with the provisions of this act. [1937, ch. 142, § 3, p. 233; am. 1947, ch. 66, § 3, p. 106.]

Compiler's notes. For sections in which "this act" is compiled, see note to § 42-205.

The name of the director of the department of water administration (formerly the state reclamation engineer) has been changed to the director of the department of water re-

sources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 31 (§ 42-1804).

Collateral References. Assignability of an easement in gross or of a license in respect to water. 130 A.L.R. 1253.

42-208. Cancellation or revocation for noncompliance. — Every permit to appropriate water for power purposes hereafter issued by the director of the department of water resources shall have plainly printed thereon, that the same is issued subject to the provisions of this act and in the event of its sale, transfer, assignment or of its being mortgaged without a compliance with the provisions of this act, such permit shall be immediately canceled and revoked by the director of the department of water resources. [1937, ch. 142, § 4, p. 233; am. 1947, ch. 66, § 4, p. 106.]

Compiler's notes. For sections in which "this act" is compiled, see note to § 42-205.

The name of the director of the department of water administration (formerly the state reclamation engineer) has been changed to

the director of the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

Cross ref. Petition for cancellation, § 42-302.

42-209. Effect of illegal transfer. — Every permit to appropriate water for power purposes that shall be sold, transferred, assigned or mortgaged in violation of the provisions of this act shall be immediately canceled, and the transfer thereof shall not be binding on the state of Idaho. [1937, ch. 142, § 5, p. 233; am. 1947, ch. 66, § 5, p. 106.]

Compiler's notes. For sections in which "this act" is compiled, see note to § 42-205.

42-210. Application of act. — The provisions of this act shall not apply to any municipal corporations within the state. [1937, ch. 142, § 6, p. 233.]

Compiler's notes. For sections in which "this act" is compiled, see note to § 42-205. Section 7 of S.L. 1937, ch. 142 repealed S.L. 1935, ch. 75.

42-211. Amended application or permit — Appeals. — Whenever a permit has been issued pursuant to the provisions of this act, and the permit holder desires to change the place, period, or nature of the intended use, or make other substantial changes in the method of diversion or proposed use or uses of the water, he shall file an application for amendment upon forms to be furnished by the department of water resources together with the statutory fee for filing and recording same, and upon receipt thereof it shall be the duty of the department of water resources to examine same and if approval thereof would not result in the diversion and use of more water than originally permitted and if the rights of others will not be adversely affected thereby, the director of the department of water resources shall approve said application and return an approved copy to the permit holder. The director of the department of water resources shall give such notice to other affected water users as he deems appropriate and may grant the amendment, in whole or in part or upon conditions, or may deny same. Notice of partial approval or conditions or denial of an amendment shall be forwarded to the applicant by certified mail and shall be subject to judicial review as hereafter provided. The priority of the right established pursuant to a permit which has been amended under these provisions shall date from the date of the original application for permit, provided the permit holder has complied with other provisions of this act.

In connection with any application on which permit has not been issued, amendments may be made by indorsement by the applicant or his agent on the original application, which indorsement shall be initialed and dated. If the amendment will result in the use of more water than originally asked, the priority of the right shall be changed to the date of said amendment. The applicant shall also be required to pay any additional filing fee as a result of an amendment of the rate of diversion or volume of storage requested in such amended application. If amendment is made after publication of notice of the original application, said notice shall be republished following amendment, upon payment by the applicant of the statutory fee for republication as in this act provided.

The notice shall be published in the same manner as provided by section 42-203 [42-203A], Idaho Code, for publication of notice of an application for permit. Protests to the application for amendment may be filed with and heard by the director in the same manner as provided by section 42-203 [42-203A], Idaho Code, for protests to an application for a permit.

If a protest is filed and a hearing on the protest held, any person aggrieved by the final decision of the director following the hearing may seek judicial review thereof pursuant to section 42-1701A(4), Idaho Code.

If no protest is filed and the director grants the amendment in part or on conditions or rejects the amendment without a hearing, the applicant may request a hearing pursuant to section 42-1701A(3), Idaho Code, for the purpose of contesting the action of the director and following the hearing and the issuance of a final decision by the director may seek judicial review thereof pursuant to section 42-1701A(4), Idaho Code. [1907, p. 314, § 1; reen. R. C. & C. L., § 3255; C. S., § 5571; I. C. A., § 41-205; am. 1967, ch. 374, § 4, p. 1079; am. 1980, ch. 238, § 4, p. 526.]

Compiler's notes. The bracketed references "42-203A" in the third paragraph of this section were inserted by the compiler since § 42-203 was amended and redesignated as § 42-203A by S.L. 1985, ch. 17, § 1.

Sections 3 and 5 of S.L. 1980, ch. 238 are compiled as §§ 42-204 and 42-219, respectively.

Sec. to sec. ref. This section is referred to in §§ 42-222A, 42-248, 42-1409.

Cited in: Shokal v. Dunn, 109 Idaho 330, 707 P.2d 441 (1985).

ANALYSIS

Changing point of diversion.

List of lands.

Public interest.

Standing to contest change.

Unsatisfactory permit conditions.

Changing Point of Diversion.

It was error for the district court to enjoin landowners from changing the point of diversion of water from a well located on one section of land owned by them to another section of their land, where such owners had filed a proper application for such change with the state reclamation engineer (now the director of the department of water resources), who declined to hear or process the application. *State ex rel. Tappan v. Smith*, 92 Idaho 451, 444 P.2d 412 (1968).

List of Lands.

Amendment of list of lands to be reclaimed is properly allowed where rights of others are not adversely affected and no additional water is claimed. *Big Wood Canal Co. v. Chapman*, 45 Idaho 380, 263 P. 45 (1927).

Public Interest.

Under § 42-203A, any application to appropriate water in Idaho is subject to the local public interest standard. Likewise, any change to a water right under § 42-222 is also subject to a determination that the change is in the local public interest as stated in § 42-203A; as is an amendment to a water permit under this section. *Hardy v. Higginson*, 123 Idaho 485, 849 P.2d 946 (1993).

Standing to Contest Change.

Where the Box Canyon area was designated by the Bureau of Land Management (BLM) as an Area of Critical Environmental Concern (ACEC), and where the values justifying the ACEC designation included the identification of four candidate threatened and endangered aquatic species and the scenic and unique natural qualities of the area, the protection of this habitat fell within the local public interest as defined in *Shokal v. Dunn*, 109 Idaho 330, 770 P.2d 441 (1985); therefore, the protestants, although having no water rights within Box Canyon, sought to protect these locally important factors and thus their interests were properly considered by the Director of the Idaho Department of Water Resources. *Hardy v. Higginson*, 123 Idaho 485, 849 P.2d 946 (1993).

Unsatisfactory Permit Conditions.

If a permittee finds the conditions imposed on an amendment to a water permit to be unsatisfactory, the permittee shall be allowed to withdraw the application and be left with what the permittee had before submitting the application to the Idaho Department of Water Resources (IDWR). *Hardy v. Higginson*, 123 Idaho 485, 849 P.2d 946 (1993).

42-212. Diversion of private waters. — The department of water resources is hereby prohibited from issuing or granting permits to divert or appropriate the waters of any lake not exceeding five (5) acres in surface area at highwater mark, pond, pool or spring in this state, which is located or situated wholly or entirely upon the lands of a person or corporation, except to the person or corporation owning said land, or with his or its written permission, executed and acknowledged as required for the conveyance of real estate. [1911, ch. 230, § 1, p. 782; reen. C.L., § 3255a; C.S., § 5572; I.C.A., § 41-206.]

Compiler's notes. The name of the department of water administration (formerly the department of reclamation) has been changed to the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

Sec. to sec. ref. This section is referred to in § 39-103.

ANALYSIS

Percolating waters.

Private waters.

Spring waters.

Water from mine portal.

Percolating Waters.

This section is statutory recognition of private ownership in certain waters, and that right to percolating waters cannot be taken from owner of fee without compensation. *Public Utils. Comm'n v. Natatorium Co.*, 36 Idaho 287, 211 P. 533 (1922).

Private Waters.

Where waters of creek consisted primarily of spring runoff which arose in the mountains on U.S. government property, and where but for farmer's actions of capturing those waters and putting them to use on his farmland the stream would have flowed into a river, the creek was not a private stream within the definition of this section. *Olson v. Bedke*, 97 Idaho 825, 555 P.2d 156 (1976).

Spring Waters.

Notwithstanding this section, it is well settled that waters of natural springs which form a natural stream or streams flowing off of the premises on which they arise are public waters, subject to acquirement by appropriation, diversion and application to beneficial

use. *Jones v. McIntire*, 60 Idaho 338, 91 P.2d 373 (1939); *Maher v. Gentry*, 67 Idaho 559, 186 P.2d 870 (1947); *Nordick v. Sorensen*, 81 Idaho 117, 338 P.2d 766 (1959).

The waters of spring on land where they arose and sank were private waters and owner of adjoining land had no right to the use of same in absence of a showing of strict compliance with this section. *Maher v. Gentry*, 67 Idaho 559; 186 P.2d 870 (1947).

Where an owner of land diverted water from a spring on the land and applied it to a beneficial use, the appropriation was valid when made, and the water right thus perfected was appurtenant to the land which received the benefit of the water and thus passed on to the person who acquired title to the benefited land. *Parke v. Bell*, 97 Idaho 67, 539 P.2d 995 (1975).

Water from Mine Portal.

An open flow of water emanating from a mine portal which would not exist absent development of the mine was not nonappropriable private water as defined by this section. *Branson v. Miracle*, 107 Idaho 221, 687 P.2d 1348 (1984).

Issue which had previously been litigated concerning whether or not water which flowed from mine tunnel on parties' property was private or public water was not subject to further review in subsequent action and owners of land were collaterally estopped from raising it. *Branson v. Higginson*, 128 Idaho 274, 912 P.2d 642 (1996).

Collateral References. 78 Am. Jur. 2d, Waters, §§ 48-52.

Propriety of injunctive relief against diversion of water by municipal corporation or public utility. 42 A.L.R.3d 426.

42-213. Diversion of private waters — Applicants must show right of way. — All applications to the department of water resources for permits to divert or appropriate the waters of any lake, pond, pool or spring shall state whether such lake, pond, pool or spring is wholly or entirely upon the land of any person or corporation other than the applicant, and, in the event that it is, such application shall state that the applicant has the written permission from such owner, executed and acknowledged as required by the provisions of the preceding section to divert or appropriate such water. [1911, ch. 230, § 2, p. 783; reen. C.L., § 3255b; C.S., § 5573; I.C.A., § 41-207.]

Compiler's notes. The name of the department of water administration (formerly the department of reclamation) has been

changed to the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

42-214 — 42-216. Proof of completion — Department of reclamation to report on work — Issuance of certificate — Appeal from department's decision. [Repealed.]

Compiler's notes. These sections, which comprised 1903, p. 223, §§ 4-6; reen. R.C., §§ 3257-3259; am. 1913, ch. 144, § 1, p. 509; am. 1913, ch. 83, § 1, p. 340; reen. C.L., §§ 3257-3259; C.S., §§ 5574-5576; I.C.A., §§ 41-208 — 41-210, were repealed by S.L. 1967, ch. 374, §§ 5-7.

42-217. Proof of application to beneficial use. — On or before the date set for the beneficial use of waters appropriated under the provisions of this chapter, the permit holder shall submit a statement that he has used such water for the beneficial purpose allowed by the permit. The statement shall include:

1. The name and post-office address of the permit holder.
2. The permit number.
3. A description of the extent of the use.
4. In the case of a municipal provider, a revised estimate of the reasonably anticipated future needs, a revised description of the service area, and a revised planning horizon, together with appropriate supporting documentation.
5. The source of the water used.
6. Such other information as shall be required by the blank form furnished by the department.

Such written proof as may be required to be submitted by such user shall be upon forms furnished by the department of water resources and shall include fees as provided in subsection K. of section 42-221, Idaho Code, or a field examination report prepared by a certified water right examiner.

Upon receipt of such proof and the fee as required in section 42-221, Idaho Code, by the department of water resources the department shall examine, or cause to be examined:

1. The place where such water is diverted and used, and, if the use is for irrigation, he shall ascertain the area and location of the land irrigated and the nature of all the improvements which have been made as a direct result of such use.
2. The capacities of the ditches or canals or other means by which such water is conducted to such place of use, and the quantity of water which has been beneficially applied for irrigation or other purposes.

The department or the person making such examination under the direction of the department shall prepare and file a report of the investigation: provided, that whenever an irrigation project is developed in the name of an association, company, corporation, irrigation district or the United States as provided in section 42-219, Idaho Code, proof of beneficial use shall be made by the permit holder. The lands upon which the water has been used need not be described by legal subdivisions, but may be described as provided in section 42-219, Idaho Code, and it shall only be necessary to show in such cases that the quantity of water beneficially applied for irrigation has been applied within the limits of the project.

Holders of permits who have submitted proof of beneficial use but have not had their project examined for beneficial use shall submit the fee

required in section 42-221, Idaho Code, within sixty (60) days of notification by the director of the department of water resources that a license examination fee is required. Failure to submit the fee in the time allowed shall be cause for the director to advance the date of priority of the permit one (1) day for each day that the fee is late; provided that if the fee is not fully paid within one (1) year of the time it is due, the director of the department of water resources may consider the proof of beneficial use for the permit to be incomplete and lapse the permit, as provided in section 42-218a, Idaho Code. [1903, p. 223, § 7; reen. R.C., § 3260; am. 1913, ch. 36, § 1, p. 134; am. 1915, ch. 94, § 1, p. 216; reen. C.L., § 3260; C.S., § 5577; I.C.A., § 41-211; am. 1967, ch. 374, § 8, p. 1079; am. 1979, ch. 138, § 1, p. 434; am. 1986, ch. 242, § 1, p. 657; am. 1996, ch. 297, § 3, p. 967; am. 1998, ch. 332, § 1, p. 1065.]

Compiler's notes. Section 2 of S.L. 1986, ch. 242 is compiled as § 42-221.

Sections 2 and 4 of S.L. 1996, ch. 297 are compiled as §§ 42-202B and 42-219, respectively.

Section 2 of S.L. 1998, ch. 332 is compiled as § 42-219.

Section 5 of S.L. 1998, ch. 332 declared an emergency. Approved March 25, 1998.

Cited in: Vineyard Land & Stock Co. v. Twin Falls Salmon River Land & Water Co., 245 F. 9 (9th Cir. 1917); Vineyard Land & Stock Co. v. Twin Falls Oakley Land & Water Co., 245 F. 30 (9th Cir. 1917); Idaho Power & Transp. Co. v. Stephenson, 16 Idaho 418, 101 P. 821 (1909).

Proof of Use Inadmissible.

Where it appeared that an irrigation district failed to prove the issuance of a permit by the state engineer (department of water resources), or a compliance with the terms of such a permit, as it has alleged in its pleading, it was not permitted to prove the beneficial use of an additional amount of water. *Bachman v. Reynolds Irrigation Dist.*, 56 Idaho 507, 55 P.2d 1314 (1936).

Collateral References. 78 Am. Jur. 2d, Waters, §§ 345-348.

93 C.J.S., Waters, § 363.

42-217a. Certified water right examiner. — The director shall adopt all necessary rules and regulations setting forth the procedures and requirements for qualification of licensed professional engineers or geologists to become certified water right examiners.

An initial application fee of two hundred dollars (\$200) shall be paid by those applying for certification with an annual renewal fee of fifty dollars (\$50.00). All certificates of appointment shall expire on March 31 of each year and thereafter are void unless renewed. The fees collected shall be transmitted to the state treasurer for deposit in the water administration account.

Employees of the department shall be exempt from the requirements of this section. [I.C., § 42-217a, as added by 1987, ch. 97, § 1, p. 192.]

42-218. Proof of application to beneficial use — Extension of time. — Whenever a less period of time than the maximum prescribed in section 42-204 has been granted by the department of water resources for making proof of beneficial use, upon a satisfactory showing being made by the permit holder, the department can extend the time for making such proof of beneficial use, but in no case shall such extension or extensions, including the original time granted, exceed the maximum prescribed in section 42-204. The department shall grant no extension unless the application therefor be filed with it prior to the date upon which the proof of

beneficial use was required to be made under the original terms of the permit. [1913, ch. 47, § 1, p. 154; am. by implication, 1915, ch. 94, § 1, p. 216; adding a proviso extending the maximum period of ten years in some cases; compiled and reen. C.L., § 3260a; C.S., § 5578; I.C.A., § 41-212; am. 1967, ch. 374, § 9, p. 1079.]

Compiler's notes. The name of the department of water administration (formerly the department of reclamation) has been changed to the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

42-218a. Lapse of application for failure to request extension or submit proof of application to beneficial use — Notice of lapsing. — A permit upon which the proof of beneficial use has not been submitted, or a request for extension of time has not been received on or before the date set for such proof, shall lapse and be of no further force nor effect. Notice of said lapsing shall be sent by the department to the applicant at the address of record by regular mail provided:

1. That within sixty (60) days after such notice of lapsing the department may, upon a showing of reasonable cause, reinstate the permit with the priority date advanced a time equal to the number of days that said showing is subsequent to the date set for proof;

2. That upon receipt of proof of beneficial use after sixty (60) days after such notice of lapsing, the director shall require sufficient evidence to be submitted by the permit holder to clearly establish the extent of beneficial use made during the time authorized by the permit and any extensions of time previously approved. Upon finding that beneficial use had occurred during the authorized period and upon a showing of reasonable cause for filing a late proof of beneficial use, the director may reinstate the permit with the priority date advanced to the day that proof of beneficial use was received;

3. The original priority date of a lapsed permit shall not be reinstated except upon a showing of error or mistake of the department. [I.C., § 42-218a, as added by 1967, ch. 374, § 10, p. 1079; am. 1983, ch. 157, § 1, p. 435.]

Compiler's notes. Section 2 of S.L. 1983, ch. 157 declared an emergency. Approved April 8, 1983. **Sec. to sec. ref.** This section is referred to in § 42-217.

42-219. Issuance of license — Priority. — (1) Upon receipt by the department of water resources of all the evidence in relation to such final proof, it shall be the duty of the department to carefully examine the same, and if the department is satisfied that the law has been fully complied with and that the water is being used at the place claimed and for the purpose for which it was originally intended, the department shall issue to such user or users a license confirming such use. Such license shall be issued under the seal of the office of the department of water resources, and shall state the name and post-office address of such user, the purpose for which such water is used, the quantity of water which may be used, which in no case shall be an amount in excess of the amount that has been beneficially applied. A

license may be issued to a municipal provider for an amount up to the full capacity of the system constructed or used in accordance with the original permit provided that the director determines that the amount is reasonably necessary to provide for the existing uses and reasonably anticipated future needs within the service area and otherwise satisfies the definitions and requirements specified in this chapter for such use. The director shall condition the license to prohibit any transfer of the place of use outside the service area, as defined in section 42-202B, Idaho Code, or to a new nature of use of amounts held for reasonably anticipated future needs together with such other conditions as the director may deem appropriate.

(2) If such use is for irrigation, such license shall give a description, by legal subdivisions, of the land which is irrigated by such water, except that the general description of a place of use described in accordance with subsection (5) or (6) of this section may be described using a digital boundary, as defined in section 42-202B, Idaho Code. If the use is for municipal purposes, the license shall describe the service area and shall state the planning horizon for that portion of the right, if any, to be used for reasonably anticipated future needs.

(3) Such license shall bear the date of the application for, and the number of, the permit under which the works from which such water is taken were constructed; the capacity of such works; the date when proof of beneficial use of such water was made, and also the date of the priority of the right confirmed by such license.

(4) The date of priority confirmed by the license shall be the date of the application for the permit for the construction of the works from which the water is taken, and to which the right relates, provided there has been no loss of priority under the provisions of this chapter. Whenever proof of the beneficial application of water shall be offered subsequent to the date stated in the permit, or in any authorized extension thereof, when such beneficial application shall be made, the proof shall be taken, if received by the department within the sixty (60) days prescribed in the preceding section. If the proof taken is satisfactory to the department of water resources, a license shall be issued by the department the same as though proof had been made before the date fixed for such beneficial application. The priority of the right established by the proof shall not date back to the date of the application for the permit to which the right would relate under the provisions of this chapter, but shall bear a date which shall be subsequent to the date of the application, a time equal to the difference between the date set in the permit, or extension thereof, for such beneficial application of water and the date of proof.

(5) For irrigation projects where the canals constructed cover an area of twenty-five thousand (25,000) acres or more, or within irrigation districts organized and existing as such under the laws of the state of Idaho, the license issued shall be issued to the persons, association, company, corporation or irrigation district owning the project, and final proof may be made by such owners for the benefit of the entire project. It shall not be necessary to give a description of the land by legal subdivisions but a general description of the entire area under the canal system shall be sufficient. The

water diverted and the water right acquired thereby shall relate to the entire project and the diversion of the water for the beneficial use under the project shall be sufficient proof of beneficial use without regard as to whether each and every acre under the project is irrigated or not.

(6) For an irrigation project developed under a permit held by an association, company, corporation or the United States to divert and deliver or distribute surface water under any annual charge or rental for beneficial use by more than five (5) water users in an area of less than twenty-five thousand (25,000) acres, the license issued shall be issued to the permit holder. For the place of use description in the license issued for the irrigation project, it shall be sufficient to provide a general description of the area within which the total number of acres developed under the permit are located and within which the location of the licensed acreage can be moved provided there is no injury to other water rights.

(7) Subject to other governing law, the location of the acreage irrigated within a generally described place of use, as defined in accordance with subsections (5) and (6) of this section and as filed with the department pursuant to section 43-323, Idaho Code, may be changed without approval under the provisions of section 42-222, Idaho Code. However, the change shall not result in an increase in either the rate of flow diverted or in the total number of acres irrigated under the water right and shall cause no injury to other water rights. If the holder of any water right seeks to challenge such a change, the challenge may only be brought as an action initiating a contested case before the department, pursuant to the administrative procedure act, chapter 52, title 67, Idaho Code. Nothing in this section shall be construed to grant, deny or otherwise affect an irrigation district's authority to deliver water to areas outside the boundaries of such district.

(8) In the event that the department shall find that the applicant has not fully complied with the law and the conditions of permit, it may issue a license for that portion of the use which is in accordance with the permit, or may refuse issuance of a license and void the permit. Notice of such action shall be forwarded to the permit holder by certified mail. The applicant may contest such action by the department pursuant to section 42-1701A(3), Idaho Code. [1903, p. 233, § 8; reen. R. C., § 3261; modified by 1913, ch. 47, § 1, p. 154, and 1915, ch. 94, § 2, p. 216; compiled and reen. C. L., § 3261; C. S., § 5579; am. 1925, ch. 44, § 1, p. 61; I. C. A., § 41-213; am. 1967, ch. 374, § 11, p. 1079; am. 1980, ch. 238, § 5, p. 526; am. 1996, ch. 297, § 4, p. 967; am. 1998, ch. 332, § 2, p. 1065; am. 2002, ch. 306, § 2, p. 870.]

Compiler's notes. Sections 4 and 6 of S.L. 1980, ch. 238 are compiled as §§ 42-211 and 42-222, respectively.

Sections 3 and 5 of S.L. 1996, ch. 297 are compiled as §§ 42-217 and 42-222, respectively.

Sections 1 and 3 of S.L. 1998, ch. 332 are compiled as §§ 42-217 and 43-323, respectively.

Sections 1 and 3 of S.L. 2002, ch. 306 are

compiled as §§ 42-202B and 42-1411, respectively.

Section 5 of S.L. 1998, ch. 332 declared an emergency. Approved March 25, 1998.

Sec. to sec. ref. This section is referred to in §§ 42-217, 42-1409 and 42-1411.

Cited in: Vineyard Land & Stock Co. v. Twin Falls Salmon River Land & Water Co., 245 F. 9 (9th Cir. 1917); Vineyard Land & Stock Co. v. Twin Falls Oakley Land & Water

Co., 245 F. 30 (9th Cir. 1917); Idaho Power & Transp. Co. v. Stephenson, 16 Idaho 418, 101 P. 821 (1909); Speer v. Stephenson, 16 Idaho 707, 102 P. 365 (1909); Newport Water Co. v. Kellogg, 31 Idaho 574, 174 P. 602 (1918).

ANALYSIS

Doctrine of relation.

Federal law.

Priority date right not vested.

Subordinated rights.

Time of issuance.

Use of water.

Doctrine of Relation.

Doctrine of relation as to priority of appropriation cannot be invoked until final consummation of appropriation as defined by statute, and can be invoked only to extent of completion of appropriation. Basinger v. Taylor, 30 Idaho 289, 164 P. 522 (1917).

Federal Law.

The Federal Power Act does preempt some state laws relating to the building of dams on navigable streams and it particularly preempts those state laws which require a state license as a predicate for building a dam; however, state law regarding proprietary rights in water is expressly saved. Idaho Power Co. v. State, 104 Idaho 575, 661 P.2d 741 (1983).

Priority Date Right Not Vested.

The filing of an application for a water appropriation permit establishes the priority date of the appropriation under the relation back doctrine, but any such priority date right is nonetheless contingent upon future statutory adherence and issuance of a license pursuant to this section and is therefore not a

vested right which would preclude application of § 42-203, as amended in 1978 (now § 42-203A), to a permit application filed prior to that amendment. Hidden Springs Trout Ranch, Inc. v. Allred, 102 Idaho 623, 636 P.2d 745 (1981).

Subordinated Rights.

State water licenses not containing subordination clauses did not control and override the federal subordination clause contained in the federal licenses for the Hells Canyon hydroelectric project; however, neither were the state water licenses preempted by the federal license. Idaho Power Co. v. State, 104 Idaho 575, 661 P.2d 741 (1983).

When the federal power commission (now federal energy regulatory commission) authorized the obtention of only subordinated state water rights, and where, the state and the licensee power company both intended the subordination of those water rights, failure to include a subordination clause in the state water licenses did not render those rights unsubordinated. Idaho Power Co. v. State, 104 Idaho 575, 661 P.2d 741 (1983).

Time of Issuance.

Under Idaho law, a water license does not issue until after the diversion works are completed and the water is applied to a beneficial use, albeit an application or license can be made prior to actual construction. Idaho Power Co. v. State, 104 Idaho 575, 661 P.2d 741 (1983).

Use of Water.

In order to warrant issuance of license, it must appear that water is being used at place claimed, and for purposes for which it was originally intended. Basinger v. Taylor, 36 Idaho 591, 211 P. 1085 (1922).

42-220. Effect of license. — Such license shall be binding upon the state as to the right of such licensee to use the amount of water mentioned therein, and shall be prima facie evidence as to such right; and all rights to water confirmed under the provisions of this chapter, or by any decree of court, shall become appurtenant to, and shall pass with a conveyance of, the land for which the right of use is granted. The right to continue the beneficial use of such waters shall never be denied nor prevented for any cause other than the failure, on the part of the user or holder of such right, to pay the ordinary charges or assessments which may be made or levied to cover the expenses for the delivery or distribution of such water, or for other reasons set forth in this title: provided, that when water is used for irrigation, no such license or decree of the court allotting such water shall be issued confirming the right to the use of more than one second foot of water for each fifty (50) acres of land so irrigated, unless it can be shown to the satisfaction of the department of water resources in granting such license, and to the court in making such decree, that a greater amount is necessary, and neither such licensee nor any one claiming a right under such decree,

shall at any time be entitled to the use of more water than can be beneficially applied on the lands for the benefit of which such right may have been confirmed, and the right to the use of such water confirmed by such license shall always be held subject to the local or community customs, rules and regulations which may be adopted from time to time by a majority of the users from a common source of supply, canal or lateral from which such water may be taken, when such rules or regulations have for their object the economical use of such water. [1903, p. 223, § 9; 1905, ch. 166, § 1, p. 174; reen. R.C. & C.L., § 3262; C.S., § 5580; I.C.A., § 41-214.]

Compiler's notes. The name of the department of water administration (formerly the department of reclamation) has been changed to the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

Cited in: Idaho Power & Transp. Co. v. Stephenson, 16 Idaho 418, 101 P. 821 (1909); Russell v. Irish, 20 Idaho 194, 118 P. 501 (1911); Peck v. Sharrow, 96 Idaho 512, 531 P.2d 1157 (1975); Crow v. Carlson, 107 Idaho 461, 690 P.2d 916 (1984); Feustel v. Stevenson, 119 Idaho 698, 809 P.2d 1177 (Ct. App. 1991).

ANALYSIS

- In general.
- Prima facie evidence.
- Test of necessary amount.
- Waiver of rights.

In General.

The evidence was undisputed that the duty of water upon the 217 acres of land would be one inch to the acre in suit brought by plaintiff seeking to have decreed a prior right to the use of 125 miner's inches for irrigation purposes of certain creek waters which plaintiffs alleged entitlement by reason of a prior de-

cree. Nordick v. Sorensen, 81 Idaho 117, 338 P.2d 766 (1959).

Prima Facie Evidence.

Water license is only prima facie evidence of water right. Basinger v. Taylor, 36 Idaho 591, 211 P. 1085 (1922).

Test of Necessary Amount.

The amount of water that a water user had been in the habit of using was not the true test of the duty of the water, but the test was the amount actually necessary for the beneficial purpose to which the water was to be applied. Graham v. Leek, 65 Idaho 279, 144 P.2d 475 (1943).

Waiver of Rights.

By obtaining issuance of license, licensee did not waive any rights he may previously have had through actual diversion and application to a beneficial use. Joyce v. Rubin, 23 Idaho 296, 130 P. 793 (1913); Newport Water Co. v. Kellogg, 31 Idaho 574, 174 P. 602 (1918).

Opinions of Attorney General. Where a water right is owned by a person other than the underlying landowner, the landowner does not have the power to convey the water right; therefore, this section would not change the ownership of the water right — it would remain with the licensee. OAG 88-6.

42-221. Fees of department. — The department of water resources shall collect the following fees which shall constitute a fund to pay for legal advertising, the publication of public notices and for investigations, research, and providing public data as required of the department in the performance of its statutory duties:

A. For filing an application for a permit to appropriate the public waters of this state or an application to change the point of diversion, place, period or nature of use of water under a vested water right:

1. For a quantity of 0.2 c.f.s. or less or for a storage volume of 20 acre feet or less \$100
2. For a quantity greater than 0.2 c.f.s. but not exceeding 1.0 c.f.s. or for a storage volume greater than 20 acre feet but not exceeding 100 acre feet \$250
3. For a quantity greater than 1.0 c.f.s. but not exceeding 20 c.f.s., or for a storage volume greater than 100 acre feet but not exceeding 2,000 acre feet \$250

plus \$40.00 for each additional c.f.s. or part thereof or 100 acre feet or part thereof over the first 1.0 c.f.s. or 100 acre feet.

4. For a quantity greater than 20.0 c.f.s. but not exceeding 100 c.f.s. or for a storage volume greater than 2,000 acre feet but not exceeding 10,000 acre feet \$1,010

plus \$20.00 for each additional c.f.s. or part thereof or 100 acre feet or part thereof over the first 20.0 c.f.s. or 2,000 acre feet.

5. For a quantity greater than 100.0 c.f.s. but not exceeding 500.0 c.f.s., or for a storage volume greater than 10,000 acre feet but not exceeding 50,000 acre feet \$2,610

plus \$10.00 for each additional c.f.s. or part thereof or 100 acre feet or part thereof over the first 100 c.f.s. or 10,000 acre feet.

6. For a quantity greater than 500 c.f.s., or for a storage volume greater than 50,000 acre feet \$6,610

plus \$2.00 for each additional 1.0 c.f.s. or part thereof or 100 acre feet or part thereof over the first 500.0 c.f.s. or 50,000 acre feet.

B. For filing an application for an extension of time within which to resume the use of water under a vested water right \$100

C. For filing application for amendment of permit \$50.00

D.1. For filing claim to use right under section 42-243, Idaho Code \$100

2. For filing a late claim to use a water right under section 42-243, Idaho Code, where the date filed with the department of water resources or, the postmark if mailed to the department of water resources, is:

i. After June 30, 1998 \$250

ii. After June 30, 2005 \$500

iii. For every ten (10) years after June 30, 2005, an additional .. \$500

E. For filing an assignment of permit \$25.00

F. For readvertising application for permit, change, exchange, or extension to resume use \$50.00

G. For certification, each document \$1.00

H. For making photo copies of office records, maps and documents for public use A reasonable charge as determined by the department.

I. For filing request for extension of time within which to submit proof of beneficial use on a water right permit \$50.00

J. For tasks requiring in excess of one (1) hour research or for computerized data provided for public use A reasonable charge as determined by the department.

K. For filing proof of beneficial use of water and requests for water right license examinations, a fee based upon the rate of diversion claimed in the proof of beneficial use:

1. For a quantity of 0.2 c.f.s. or less, or for a storage volume of 20 acre feet or less \$50.00

except no fee shall be charged for domestic use for which a permit is not required.

2. For a quantity greater than 0.2 c.f.s. but not exceeding 1.0 c.f.s., or for a storage volume greater than 20 acre feet, but not exceeding 100 acre feet \$100

3. For a quantity greater than 1.0 c.f.s., or for a storage volume greater than 100 acre feet \$100 plus \$25.00 for each additional c.f.s. or part thereof, or 100 acre feet or part thereof, over the first 1.0 c.f.s. or 100 acre feet with a maximum fee not to exceed \$600.

L. For filing a protest or request to intervene in a protested matter \$25.00

M. For filing an application to alter a stream channel pursuant to chapter 38, title 42, Idaho Code:

- 1. Application for recreational dredge permits by residents of the state \$10.00
- 2. Application for recreational dredge permits by nonresidents of the state \$30.00
- 3. Other applications \$20.00

N. For receipt of all notices of application within a designated area, a reasonable annual charge as determined by the department.

All fees received by the department of water resources under the provisions of this chapter shall be transmitted to the state treasurer for deposit in the water administration account. [1903, p. 223, § 10; am. 1905, p. 174, § 1; reen. R.C. & C.L., § 3263; C.S., § 5581; am. 1923, ch. 53, § 1, p. 60; I.C.A., § 41-215; am. 1941, ch. 116, § 1, p. 228; am. 1967, ch. 374, § 12, p. 1079; am. 1968 (2nd E.S.), ch. 25, § 1, p. 47; am. 1971, ch. 151, § 1, p. 750; am. 1978, ch. 143, § 1, p. 323; am. 1980, ch. 151, § 1, p. 320; am. 1981, ch. 147, § 2, p. 253; am. 1983, ch. 61, § 2, p. 141; am. 1985, ch. 226, § 1, p. 540; am. 1986, ch. 242, § 2, p. 657; am. 1986, ch. 313, § 4, p. 763; am 1990, ch. 319, § 2, p. 870; am. 1994, ch. 64, § 2, p. 121; am. 1997, ch. 305, § 1, p. 908; am. 1998, ch. 79, § 1, p. 282; am. 2000, ch. 177, § 1, p. 445.]

Compiler's notes. Sections 5 and 7 of S.L. 1980, ch. 238 are compiled as §§ 42-219 and 42-224 (now repealed), respectively.

Section 1 of S.L. 1981, ch. 147 is compiled as § 42-108.

Section 1 of S.L. 1983, ch. 61 is compiled as § 42-243.

Section 2 of S.L. 1985, ch. 226 is compiled as § 42-243.

Section 1 of S.L. 1986, ch. 242 is compiled as § 42-217.

Section 3 of S.L. 1986, ch. 313 is compiled as § 42-204.

Section 1 and 3 of S.L. 1990, ch. 319 are compiled as §§ 42-111 and 42-230, respectively.

Section 1 of S.L. 1994, ch. 64 is compiled as § 42-203A.

Section 2 of S.L. 1998, ch. 79 is compiled as § 42-243.

Section 3 of S.L. 1986, ch. 242 declared an emergency. Approved April 4, 1986.

Section 2 of S.L. 2000, ch. 177 provided that the act shall be in full force and effect on and after July 1, 2000.

Sec. to sec. ref. This section is referred to in §§ 42-111, 42-203A, 42-217, 42-238a, 42-243, 42-244, and 42-4201.

ANALYSIS

Construction.
Nature of water use.

Construction.

While conduit through which water user diverted water was not strictly a ditch or canal, nevertheless he was liable for fee based on capacity of his diversion works. Idaho Power & Transp. Co. v. Stephenson, 16 Idaho 418, 101 P. 821 (1909).

Nature of Water Use.

The director of the department of water resources has not been granted the authority to approve an application for a requested change in the nature of the use of water. Beker Indus., Inc. v. Georgetown Irrigation Dist., 101 Idaho 187, 610 P.2d 546 (1980).

42-222. Change in point of diversion, place of use, period of use, or nature of use of water under established rights — Forfeiture and extension — Appeals. — (1) Any person, entitled to the use of water whether represented by license issued by the department of water resources, by claims to water rights by reason of diversion and application to a beneficial use as filed under the provisions of this chapter, or by decree of the court, who shall desire to change the point of diversion, place of use, period of use or nature of use of all or part of the water, under the right shall first make application to the department of water resources for approval of such change. Such application shall be upon forms furnished by the department and shall describe the right licensed, claimed or decreed which is to be changed and the changes which are proposed, and shall be accompanied by the statutory filing fee as in this chapter provided. Upon receipt of such application it shall be the duty of the director of the department of water resources to examine same, obtain any consent required in section 42-108, Idaho Code, and if otherwise proper to provide notice of the proposed change in the same manner as applications under section 42-203A, Idaho Code. Such notice shall advise that anyone who desires to protest the proposed change shall file notice of protests with the department within ten (10) days of the last date of publication. Upon the receipt of any protest, accompanied by the statutory filing fee as provided in section 42-221, Idaho Code, it shall be the duty of the director of the department of water resources to investigate the same and to conduct a hearing thereon. He shall also advise the watermaster of the district in which such water is used of the proposed change and the watermaster shall notify the director of the department of water resources of his recommendation on the application, and the director of the department of water resources shall not finally determine the action on the application for change until he has received from such watermaster his recommendation thereof, which action of the watermaster shall be received and considered as other evidence.

When the nature of use of the water right is to be changed to municipal purposes and some or all of the right will be held by a municipal provider to serve reasonably anticipated future needs, the municipal provider shall provide to the department sufficient information and documentation to establish that the applicant qualifies as a municipal provider and that the reasonably anticipated future needs, the service area and the planning horizon are consistent with the definitions and requirements specified in this chapter. The service area need not be described by legal description nor by description of every intended use in detail, but the area must be described with sufficient information to identify the general location where the water under the water right is to be used and the types and quantity of uses that generally will be made.

When a water right or a portion thereof to be changed is held by a municipal provider for municipal purposes, as defined in section 42-202B, Idaho Code, that portion of the right held for reasonably anticipated future needs at the time of the change shall not be changed to a place of use outside the service area, as defined in section 42-202B, Idaho Code, or to a new nature of use.

The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-202B, Idaho Code, the change will not adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates, and the new use is a beneficial use, which in the case of a municipal provider shall be satisfied if the water right is necessary to serve reasonably anticipated future needs as provided in this chapter. The director may consider consumptive use, as defined in section 42-202B, Idaho Code, as a factor in determining whether a proposed change would constitute an enlargement in use of the original water right. The director shall not approve a change in the nature of use from agricultural use where such change would significantly affect the agricultural base of the local area. The transfer of the right to the use of stored water for irrigation purposes shall not constitute an enlargement in use of the original right even though more acres may be irrigated, if no other water rights are injured thereby. A copy of the approved application for change shall be returned to the applicant and he shall be authorized upon receipt thereof to make the change and the original water right shall be presumed to have been amended by reason of such authorized change. In the event the director of the department of water resources determines that a proposed change shall not be approved as provided in this section, he shall deny the same and forward notice of such action to the applicant by certified mail, which decision shall be subject to judicial review as hereafter set forth. Provided however, minimum stream flow water rights may not be established under the local public interest criterion, and may only be established pursuant to chapter 15, title 42, Idaho Code.

(2) All rights to the use of water acquired under this chapter or otherwise shall be lost and forfeited by a failure for the term of five (5) years to apply it to the beneficial use for which it was appropriated and when any right to the use of water shall be lost through nonuse or forfeiture such rights to such water shall revert to the state and be again subject to appropriation under this chapter; except that any right to the use of water shall not be lost through forfeiture by the failure to apply the water to beneficial use under certain circumstances as specified in section 42-223, Idaho Code.

(3) Upon proper showing before the director of the department of water resources of good and sufficient reason for nonapplication to beneficial use of such water for such term of five (5) years, the director of the department of water resources is hereby authorized to grant an extension of time extending the time for forfeiture of title for nonuse thereof, to such waters for a period of not to exceed five (5) additional years.

(4) Application for an extension shall be made before the end of the five (5) year period upon forms to be furnished by the department of water resources and shall fully describe the right on which an extension of time to

resume the use is requested and the reasons for such nonuse and shall be accompanied by the statutory filing fee; provided that water rights protected from forfeiture under the provisions of section 42-223, Idaho Code, are exempt from this requirement.

(a) Upon the receipt of such application it shall be the duty of the director of the department of water resources to examine the same and to provide notice of the application for an extension in the same manner as applications under section 42-203A, Idaho Code. The notice shall fully describe the right, the extension which is requested and the reason for such nonuse and shall state that any person desiring to object to the requested extension may submit a protest, accompanied by the statutory filing fee as provided in section 42-221, Idaho Code, to the director of the department of water resources within ten (10) days of the last date of publication.

(b) Upon receipt of a protest it shall be the duty of the director of the department of water resources to investigate and conduct a hearing thereon as in this chapter provided.

(c) The director of the department of water resources shall find from the evidence presented in any hearing, or from information available to the department, the reasons for such nonuse of water and where it appears to the satisfaction of the director of the department of water resources that other rights will not be impaired by granting an extension of time within which to resume the use of the water and good cause appearing for such nonuse, he may grant one (1) extension of five (5) years within which to resume such use.

(d) In his approval of the application for an extension of time under this section the director of the department of water resources shall set the date when the use of water is to be resumed. Sixty (60) days before such date the director of the department of water resources shall forward to the applicant at his address of record a notice by certified mail setting forth the date on which the use of water is to be resumed and a form for reporting the resumption of the use of the water right. If the use of the water has not been resumed and report thereon made on or before the date set for resumption of use such right shall revert to the state and again be subject to appropriation, as provided in this section.

(e) In the event the director of the department of water resources determines that a proposed extension of time within which to resume use of a water right shall not be approved as provided in this section, he shall deny same and forward notice of such action to the applicant by certified mail, which decision shall be subject to judicial review as hereafter provided.

(5) Any person or persons feeling themselves aggrieved by the determination of the department of water resources in approving or rejecting an application to change the point of diversion, place, period of use or nature of use of water under an established right or an application for an extension of time within which to resume the use of water as provided in this section, may, if a protest was filed and a hearing held thereon, seek judicial review pursuant to section 42-1701A(4), Idaho Code. If no protest was filed and no

hearing held, the applicant may request a hearing pursuant to section 42-1701A(3), Idaho Code, for the purpose of contesting the action of the director and may seek judicial review of the final order of the director following the hearing pursuant to section 42-1701A(4), Idaho Code. [1903, p. 223, § 1; am. 1905, p. 27, § 1; am. 1907, p. 507, § 1; reen. R.C., § 3264; am. 1915, ch. 34, § 1, p. 103; am. 1917, ch. 166, § 1, p. 495; C.L., § 3264; C.S., § 5582; am. 1921, ch. 146, § 1, p. 334; I. C.A., § 41-216; am. 1933, ch. 193, § 1, p. 382; am. 1943, ch. 53, § 2, p. 101; am. 1945, ch. 63, § 1, p. 79; rep. and reen. 1969, ch. 303, § 2, p. 905; am. 1980, ch. 238, § 6, p. 526; am. 1981, ch. 147, § 3, p. 253; am. 1982, ch. 202, § 1, p. 531; am. 1986, ch. 313, § 5, p. 763; am. 1988, ch. 153, § 1, p. 273; am. 1990, ch. 141, § 5, p. 316; am. 1994, ch. 64, § 3, p. 121; am. 1996, ch. 297, § 5, p. 967; am. 1996, ch. 333, § 1, p. 1128; am. 1997, ch. 373, § 2, p. 1188; am. 2000, ch. 85, § 1, p. 181; am. 2003, ch. 298, § 3, p. 806.]

Legislative Intent. Section 1 of S.L. 1990, ch. 141 read: "It is the intent of the legislature that passage of this act shall not affect existing appropriations of water that are used outside the state of Idaho nor affect the provisions of any interstate compact."

Compiler's notes. This section was amended by two 1996 acts — ch. 297, § 5, and ch. 333, § 1, both effective July 1, 1996 — which do not appear to conflict and have been compiled together. Whereas both acts added a third sentence to subsection (2), the sentence added by ch. 297, § 5, has been compiled as the present third sentence and the sentence added by ch. 333, § 1, has been compiled as the present fourth sentence.

The amendment by ch. 297, § 5, in subsection (1), added the present second and third paragraphs, and in the present last paragraph in the first sentence, deleted "and" preceding "the change is consistent", and substituted ", and the new use is a beneficial use, which in the case of a municipal provider shall be satisfied if the water right is necessary to serve reasonably anticipated future needs as provided in this chapter. The" for "; except the"; and in subsection (2) added the present third sentence.

The amendment by ch. 333, § 1, in subsection (2), added the present fourth sentence, and in the present sixth sentence inserted ", or covered by the waste provision of this section," following "set-aside program".

Section 1 of S.L. 1943, ch. 53 is compiled herein as § 42-108.

Section 1 of S.L. 1969, ch. 303 is compiled herein as § 42-108.

Section 6 of S.L. 1986, ch. 313 contains repeals and § 7 is compiled as § 42-311.

Section 4 of S.L. 1990, ch. 141 is compiled as § 42-203A.

Section 4 of S.L. 1994, ch. 64 is compiled as § 42-224 (now repealed).

Section 4 of S.L. 1996, ch. 297 is compiled as § 42-219.

Section 1 of S.L. 1997, ch. 373 is compiled as § 42-202B.

Section 6 of S.L. 1990, ch. 141 read: "The provisions of this act are hereby declared to be severable and if any provision of this act or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of remaining portions of this act."

Section 2 of S.L. 1945, ch. 63 declared an emergency. Approved Feb. 21, 1945.

Section 4 of S.L. 1981, ch. 147 declared an emergency. Approved March 27, 1981.

Sections 2 and 4 of S.L. 2003, ch. 298, are compiled as §§ 42-203A and 42-240, respectively.

Sec. to sec. ref. This section is referred to in §§ 42-108, 42-113, 42-219, 42-237, 42-248, 42-1409, 42-1421, 42-1425, 42-1764, 42-5225, 43-323, 43-341, 43-701I, 50-1030 and 50-1805A.

Cited in: *Almo Water Co. v. Darrington*, 95 Idaho 16, 501 P.2d 700 (1972); *Nettleton v. Higginson*, 98 Idaho 87, 558 P.2d 1048 (1977); *Crow v. Carlson*, 107 Idaho 461, 690 P.2d 916 (1984); *Feustel v. Stevenson*, 119 Idaho 698, 809 P.2d 1177 (Ct. App. 1991).

ANALYSIS

Abandonment.
Abandonment not favored.
Action to quiet title.
Appeals.
Application to split water rights.
Appurtenancy.
Beneficial use.
Burden of proof.
Change in nature of use.
Change of diversion.
Construction.
Determinations by director.
Effect of seepage.

Enlargement of existing right.
Estoppel to deny user's right.
Evidence insufficient.
Forfeiture.
Injury.
Jurisdiction.
Liability for bonded indebtedness.
Permissive use.
Persons entitled to change.
Pleadings.
Prescriptive title by adverse use.
Public interest.
Questions determined in separate action.
Relation to other law.
Remedy in equity.
Resumption of use.
Reversion to state.
Right acquired by purchaser.
Rights to seepage.
Standing to contest change.
Subsequent appropriators.
Water right decree.

Abandonment.

Abandonment is a question of intention and must be evidenced by a clear and decisive act. *Idaho Farms Co. v. North Side Canal Co.*, 24 F. Supp. 189 (D. Idaho 1938), rev'd on other grounds, 107 F.2d 481 (9th Cir. Idaho 1939).

Patentee of land, over which right of way for reservoir had been granted, or his successor in interest, may institute proceedings to declare forfeiture and quiet title in case of abandonment. *Carns v. Idaho-Iowa Lateral & Reservoir Co.*, 34 Idaho 330, 202 P. 1071 (1921); *Hurst v. Idaho-Iowa Lateral & Reservoir Co.*, 34 Idaho 342, 202 P. 1068 (1921).

Where it appeared from testimony of engineers that canal of prior appropriator lacked capacity to carry water decreed to it, and that the excess had been returned to stream and used by subsequent appropriators, abandonment resulted against such prior appropriator, a five-year period having elapsed. *Albrethsen v. Wood River Land Co.*, 40 Idaho 49, 231 P. 418 (1924).

An abandonment of a water right must have been continuous for five consecutive years. *Carrington v. Crandall*, 65 Idaho 525, 147 P.2d 1009 (1944).

Only when an appropriator abandons his water by failing to apply it to a beneficial use for the statutory period of five years can it be considered and treated as unappropriated public water of the state. *Colthorp v. Mountain Home Irrigation Dist.*, 66 Idaho 173, 157 P.2d 1005 (1945).

Water right was not forfeited even though abandoned for over five years where applicant for transfer resumed use of water prior to filing petition for transfer. In re Boyer, 73 Idaho 152, 248 P.2d 540 (1952).

No forfeiture or abandonment results if the nonuser is prevented from exercising his

rights by circumstances over which he has no control. *Hodges v. Trail Creek Irrigation Co.*, 78 Idaho 10, 297 P.2d 524 (1956).

Nonpayment of purported upkeep charge by plaintiff did not result in forfeiture or abandonment of plaintiff's water rights where the plaintiff received no notice or demand for payment from defendant irrigation company. *Hodges v. Trail Creek Irrigation Co.*, 78 Idaho 10, 297 P.2d 524 (1956).

An appropriator who fails to make beneficial use of his water for the statutory period may forfeit his rights, but title to such water right cannot be acquired by another, where such other claimant was the party who prevented the use. *Hodges v. Trail Creek Irrigation Co.*, 78 Idaho 10, 297 P.2d 524 (1956).

Where protestants asserted that water, which applicant had tried to appropriate by his permit, was seepage water to which they had superior rights through prior use and enjoyment, and there was no evidence as to the actual amount of water used by protestants over and above their decreed rights, or amount claimed at point of diversion that had not been adjudicated, the evidence was insufficient to establish that any of the protestants had abandoned any right to the use of their prior decreed rights. *Cantlin v. Carter*, 88 Idaho 179, 397 P.2d 761 (1964).

A senior appropriator did not lose by laches his right to object to a conflicting diversion by a junior appropriator by failure to assert his rights in previous rights where such diversion had not previously interfered with his use of the water to which he was entitled. *Martiny v. Wells*, 91 Idaho 215, 419 P.2d 470 (1966).

In an action brought by upstream landowners against downstream owners who possessed senior water appropriation rights fixed by judicial decree for a declaratory judgment that upstream owners had acquired greater water rights than those fixed in the decree, where the record did not identify any measurable five-year period of downstream owners' non-use of their senior rights, the trial court was correct in finding that no forfeiture occurred. *Gilbert v. Smith*, 97 Idaho 735, 552 P.2d 1220 (1976).

In an action brought by upstream landowners against downstream owners who possessed senior water appropriation rights fixed by judicial decree for a declaratory judgment that upstream owners had acquired greater water rights than those fixed in the decree, where the evidence established that downstream owners were often unable to continuously make beneficial use of their senior rights and that upstream owners occasionally interfered with those rights without apparent objection but did not establish a clear intention to abandon the water rights, there was substantial evidence to support the trial court's finding that upstream owners failed to

meet their burden of proving abandonment. *Gilbert v. Smith*, 97 Idaho 735, 552 P.2d 1220 (1976).

Mere evidence that beaver dams and sump holes or sinks had caused losses of creek water and difficulty in obtaining water to satisfy water rights of downstream landowner did not establish a case of abandonment or forfeiture, thus upstream landowner who sought to divert the water and apply it to beneficial use could not be permitted to interfere with senior water rights of downstream owner. *Gilbert v. Smith*, 97 Idaho 735, 552 P.2d 1220 (1976).

Where lessees had failed to use the full decreed water rights of the river appurtenant to leased farmland, the unused water rights could have been forfeited by non-use prior to the end of the lease to the substantial injury of lessor's reversionary interest. *Olson v. Bedke*, 97 Idaho 825, 555 P.2d 156 (1976).

Intent to abandon must be proved by clear and convincing evidence of unequivocal acts, and mere nonuse of a water right, standing alone, is not sufficient for a per se abandonment. *Jenkins v. State*, Dep't of Water Resources, 103 Idaho 384, 647 P.2d 1256 (1982).

Intent to abandon is a question of fact to be decided by the trier of fact. Therefore, where the record showed only nonuse, disclosing no intent to abandon, the property owner did not lose his water right by common-law abandonment. *Jenkins v. State*, Dep't of Water Resources, 103 Idaho 384, 647 P.2d 1256 (1982).

Under Section 27 of the Federal Power Act, 16 U.S.C. § 821, all state water law is preserved "relating to the control, appropriation, use, or distribution of water." Idaho's state water law, allowing subsequent appropriators to perfect a water right in water that has been abandoned or forfeited clearly relates to the control, appropriation, use or distribution of water; hence, neither the Federal Power Act nor a license issued pursuant to that authority has overridden Idaho's law of abandonment or forfeiture of water rights. *Idaho Power Co. v. State*, 104 Idaho 575, 661 P.2d 741 (1983).

While the language of §§ 61-327 to 61-331 is very broad in forbidding any transfer "directly or indirectly, in any manner whatsoever" of electric utility property (§ 61-328), such sections are inapplicable to abandonment or forfeiture of a water right. If those sections were applied to abandonment or forfeiture of a water right used to generate electricity, the attorney general would be required to file an action to have such an escheat decreed, and thereafter there would be a court ordered sale of the property; such a scheme is totally inconsistent with subsection (2) of this section, which provides that if a water right is abandoned or forfeited it reverts to the state, following which third parties may perfect an

interest therein. *Idaho Power Co. v. State*, 104 Idaho 575, 661 P.2d 741 (1983).

Abandonment Not Favored.

If no public interest is forwarded by the abandonment, equity is against declaring a forfeiture. *Idaho Farms Co. v. North Side Canal Co.*, 24 F. Supp. 189 (D. Idaho 1938), *rev'd* on other grounds, 107 F.2d 481 (9th Cir. Idaho 1939).

Abandonment and forfeitures of water rights are not favored, and, even though forfeited and abandoned for five years prior to the time that subsequent appropriators initiated their right, if, subsequent to such five-year period, and prior to such subsequent appropriators' initiation of their right, the first appropriators and their predecessors in interest under claim of right and continuity of interest again began to exercise their water rights, there would be no abandonment which could inure to the benefit of subsequent appropriators. *Zezi v. Lightfoot*, 57 Idaho 707, 68 P.2d 50 (1937).

Forfeiture of water rights is not favored, and all intendments are to be indulged in against a forfeiture. *Hodges v. Trail Creek Irrigation Co.*, 78 Idaho 10, 297 P.2d 524 (1956).

Action to Quiet Title.

Where predecessor in title of both plaintiff and defendant had transferred water right from ranch now owned by defendant to ranch now owned by plaintiff, latter could maintain action to quiet title to such water right although predecessor in title had not had statutory authority to make such change. *Federal Land Bank v. Union Cent. Life Ins. Co.*, 51 Idaho 490, 6 P.2d 486 (1931).

Appeals.

Any party aggrieved by decision of commissioner may either appeal to district court or commence original action in said court. *Crockett v. Jones*, 42 Idaho 652, 249 P. 483 (1926).

Hearing on appeal to district court from reclamation commissioner must be reviewed by Supreme Court on appeal and not by writ of review. *State v. Adair*, 49 Idaho 271, 287 P. 950 (1930).

Proceedings before district court under this section are de novo. *First Secur. Bank v. State*, 49 Idaho 740, 291 P. 1064 (1930).

On appeal from action of department of reclamation (now department of water resources), district court acquires full equitable jurisdiction over entire controversy. *In re Rice*, 50 Idaho 660, 299 P. 664 (1931).

District court acquired full equitable jurisdiction on appeal from reclamation commissioner order and had full authority to impose reasonable conditions to avoid injury. *Beecher*

v. Cassia Creek Irrigation Co., 66 Idaho 1, 154 P.2d 507 (1944).

Use of a summary judgment procedure is permissible on an appeal from a ruling by the director of the Department of Water Resources. *Beker Indus., Inc. v. Georgetown Irrigation Dist.*, 101 Idaho 187, 610 P.2d 546 (1980).

Application to Split Water Rights.

Application to split a water right was properly denied where the transfer would have resulted in an illegal enlargement of the right above its historical beneficial use, and the watermaster expressed his concern that without stringent regulation, the proposed transfer would damage downstream rights. *Barron v. Idaho Dep't of Water Resources*, 135 Idaho 414, 18 P.3d 219 (2001).

Appurtenancy.

Water right was not necessarily appurtenant to land on which it was used, and could be separated therefrom. *First Sec. Bank v. State*, 49 Idaho 740, 291 P. 1064 (1930).

When a Civilian Conservation Corps camp was dismantled and a waterline by which it received water from a nearby creek was abandoned, such waterline became the property of the state of Idaho and was not included in a deed of land which included in its habendum clause "the appurtenances thereon." *Sutton v. Brown*, 91 Idaho 396, 422 P.2d 63 (1966).

Beneficial Use.

Although the doctrine of beneficial use is a concept that is constitutionally recognized and that permeates Idaho's water code, the Idaho Constitution does not mandate that non-application to a beneficial use, for any period of time no matter how small, results in the loss or reduction of water rights. *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 947 P.2d 409 (1997).

Water rights in Idaho are not subject to statutory forfeiture for failure to beneficially apply water for a duration less than that provided for in subdivision (2) of this section. *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 947 P.2d 409 (1997).

Burden of Proof.

In an action to quiet title, brought by subsequent appropriators on the theory that the former appropriators had abandoned the use of water, the burden of proof was on the subsequent appropriators to show that persons who had used the water by permission used more than that for which they had permission. *Zezi v. Lightfoot*, 57 Idaho 707, 68 P.2d 50 (1937).

Change in Nature of Use.

The director of the Department of Water Resources has not been granted the authority to approve an application for a requested

change in the nature of the use of water. *Beker Indus., Inc. v. Georgetown Irrigation Dist.*, 101 Idaho 187, 610 P.2d 546 (1980).

Change of Diversion.

The owner of a water right had the statutory right to change his point of diversion provided that the rights of others were not injured, and such change did not work a forfeiture or an abandonment of such right. *Graham v. Leek*, 65 Idaho 279, 144 P.2d 475 (1944).

A change in point of use will not be permitted without limitations if the enlarged use in time or amount increases the burden on the stream, or decreases the volume of water in the stream to the injury of appropriators on the stream. *Beecher v. Cassia Creek Irrigation Co.*, 66 Idaho 1, 154 P.2d 507 (1944).

Where the original permit incorrectly located the point of diversion, a subsequent petition to correct this designation to conform to the actual point of diversion was not a petition to change the point of diversion. *Keller v. Magic Water Co.*, 92 Idaho 276, 441 P.2d 725 (1968).

It was error for the district court to enjoin landowners from changing the point of diversion of water from a well located on one section of their land to another, where such owners had filed a proper application for such change with the state reclamation engineer (now director of the department of water resources), who declined to hear or process the application. *State ex rel. Tappan v. Smith*, 92 Idaho 451, 444 P.2d 412 (1968).

Construction.

Where one secures permit under this chapter and appropriates water thereunder, it is a statutory appropriation, and to change the point of diversion there must be a substantial compliance with this section. *Washington State Sugar Co. v. Goodrich*, 27 Idaho 26, 147 P. 1073 (1915).

This section is not in conflict with § 42-108. *Washington State Sugar Co. v. Goodrich*, 27 Idaho 26, 147 P. 1073 (1915).

This section neither adds to nor detracts from property rights already existing. *First Sec. Bank v. State*, 49 Idaho 740, 291 P. 1064 (1930).

This section is remedial and should be construed liberally. *In re Rice*, 50 Idaho 660, 299 P. 664 (1931).

Determinations by Director.

The director of the department of water resources has jurisdiction to determine the question of abandonment and forfeiture and such is required as a preliminary step to performance of his statutory duty in determining whether or not a proposed transfer would injure other water rights. *Jenkins v. State, Dep't of Water Resources*, 103 Idaho

384, 647 P.2d 1256 (1982).

Effect of Seepage.

So long as that water which arrived at its destination was put to a beneficial use, and so long as the amount of water lost through seepage during the transportation of that water from its place of origin to its place of use was reasonable, it could not be said that the mere fact of seepage transformed it into water not beneficially used. *Hidden Springs Trout Ranch, Inc. v. Hagerman Water Users, Inc.*, 101 Idaho 677, 619 P.2d 1130 (1980).

Enlargement of Existing Right.

Transfer of water right to divert 1.6 cfs of water to three separate fields did not result in an enlargement of the existing right even though consumptive use to one of the fields had been forfeited by nonuse. *Dovel v. Dobson*, 122 Idaho 59, 831 P.2d 527 (1992).

Estoppel to Deny User's Right.

Where it appeared that a water user's title may have been originally questionable or uncertain, and where one who had a superior right thereto stood by with full knowledge of the facts for more than twenty years and allowed an adverse claimant to proceed to use the water on the theory that such adverse user had a valid title to the water, and such adverse user, in the meantime, incurred large indebtedness on the strength of title to the water, the one who formerly had a superior right is estopped to assert it. *Hillcrest Irrigation Dist. v. Nampa & Meridian Irrigation Dist.*, 57 Idaho 403, 66 P.2d 115 (1937).

Evidence Insufficient.

Plaintiff's application for transfer of water rights was properly denied where the applicant did not present sufficient evidence of non-injury, no enlargement of right, and favorable public interest concerning the transfer. *Barron v. Idaho Dep't of Water Resources*, 135 Idaho 414, 18 P.3d 219 (2001).

Forfeiture.

Where plaintiffs attempted to establish, at trial, that they had established a right to disputed water with the original priority dates of 1872, 1873 and 1879, it was inconsistent for them to argue on appeal that the rights were forfeited under this section, since under a forfeiture theory the priority date of the original appropriator is lost, the water rights revert to the state and the subsequent appropriator does not obtain title to the rights dating back to the original user's priority date; thus, since plaintiff began using defendant's water in 1939 the forfeiture period under this section would run to 1944 and the water rights would then have reverted to the state, to become available to plaintiffs for appropriation. *Sears v. Berryman*, 101 Idaho 843, 623 P.2d 455 (1981).

Forfeitures are not favored, and clear and convincing proof is required to support a forfeiture. *Jenkins v. State*, Dep't of Water Resources, 103 Idaho 384, 647 P.2d 1256 (1982).

Wrongful interference with a water right or failure to use the water because of circumstances over which the water right holder had no control have been recognized as defenses to forfeiture. *Jenkins v. State*, Dep't of Water Resources, 103 Idaho 384, 647 P.2d 1256 (1982).

Where there was substantial, albeit conflicting, evidence indicating that property owner had failed to use any creek water for a beneficial use between 1961 and 1979, a period of 18 years, and the local water master testified that he had delivered water from the creek for those 18 years, but had not delivered nor been requested to deliver any of the creek water to said property owner, the trial court finding that the channels from the creek to a second creek did not carry a regular flow of water except during the spring runoff, supported the conclusion of a statutory forfeiture and the denial of the property owner's application for transfer of point of diversion. *Jenkins v. State*, Dep't of Water Resources, 103 Idaho 384, 647 P.2d 1256 (1982).

Forfeiture of water rights is conceptually distinct from common-law abandonment. While abandonment is predicated upon the elements of intent and conduct, and it requires an intent to abandon and the actual surrender or relinquishment of water rights, statutory forfeiture provides that all rights to water are lost where the appropriator fails to make "beneficial use" of the water for a continuous five-year period regardless of intent. *McAtee v. Faulkner Land & Livestock, Inc.*, 113 Idaho 393, 744 P.2d 121 (Ct. App. 1987).

Partial forfeiture is provided for by subdivision (2) of this section. *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 727, 947 P.2d 400 (1997).

Where stockholders wished to use forfeiture only to avoid paying maintenance assessments, the adjudication court's determination that no water rights were forfeited was affirmed; a finding of forfeiture by an appropriator who did nothing to cause the nonuse of the water would have done nothing to advance the policy behind the statute to secure the maximum use and benefit of the state's water resources. *Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 982 P.2d 917 (1999).

Where the majority of the property had not been irrigated for more than five consecutive years, it resulted in a forfeiture under subsection (2) of this section. *McCray v. Rosenkrance*, 135 Idaho 509, 20 P.3d 693 (2001).

Injury.

Injury to one owner of drainage canal by coowners' abandonment thereof does not pre-

vent latter from selling water right, or changing place of conveyance, point of diversion, or place of use. In re Johnson, 50 Idaho 573, 300 P. 492 (1931).

If transfer of water right by petitioner did not injure any other person it was no defense to petition that if other persons transferred their rights there would be a resulting injury. In re Boyer, 73 Idaho 152, 248 P.2d 540 (1952).

The director is statutorily required to examine all evidence of whether a proposed transfer will injure other water rights or constitute an enlargement of the original right, and evidence which demonstrates that the right sought to be transferred has been abandoned or forfeited, is probative as to whether that transfer would injure other water rights. Jenkins v. State, Dep't of Water Resources, 103 Idaho 384, 647 P.2d 1256 (1982).

Jurisdiction.

Where plaintiff sought judicial review of a water use decision of the Idaho Department of Water Resources (IDWR) in the district court of the seventh judicial district, the district court lacked jurisdiction to review the IDWR decision. The district court's decision was vacated and the case remanded to the Snake River Basin Adjudication district court. Sagewillow, Inc. v. Idaho Dep't of Water Resources, 135 Idaho 24, 13 P.3d 855 (2000).

Liability for Bonded Indebtedness.

District bonds were not affected by transfer of petitioner's water rights where trial court held that proportionate liability of bonded indebtedness in district remained regardless of transfer. In re Boyer, 73 Idaho 152, 248 P.2d 540 (1952).

Permissive Use.

Permissive use was sufficient to inure to the benefit of the true owners of water or persons entitled to its use and to prevent the operation of the abandonment statute. Zezi v. Lightfoot, 57 Idaho 707, 68 P.2d 50 (1937).

Persons Entitled to Change.

Right to change point of diversion belongs to stockholding consumer in mutual ditch company as fully as to any other appropriator, so long as rights of others are not injuriously affected. Twin Falls Canal Co. v. Shippen, 46 Idaho 787, 271 P. 578 (1928).

An irrigation company has the right to purchase water rights and change points of diversion provided such action will not result in substantial injury to water rights of others. Beecher v. Cassia Creek Irrigation Co., 66 Idaho 1, 154 P.2d 507 (1944).

Pleadings.

Complaint alleging abandonment should allege that specific quantities of water have been used or are claimed by plaintiff. Inman v.

Round Valley Irrigation Co., 41 Idaho 482, 238 P. 1018 (1925).

Prescriptive Title by Adverse Use.

Where evidence established that upstream landowners and their predecessors interfered with senior water rights of downstream landowners, but where the evidence indicated that upstream owners' use was intermittent, interrupted and not wholly under an assertion of right, upstream owners failed to show any rights in themselves to the water by adverse possession. Gilbert v. Smith, 97 Idaho 735, 552 P.2d 1220 (1976).

Public Interest.

Under § 42-203A, any application to appropriate water in Idaho is subject to the local public interest standard. Likewise, any change to a water right under this section is also subject to a determination that the change is in the local public interest as stated in § 42-203A; as is an amendment to a water permit under § 42-211. Hardy v. Higginson, 123 Idaho 485, 849 P.2d 946 (1993).

Questions Determined in Separate Action.

In proceeding to change point of diversion of water, question of abandonment of priority was not before court if proper objection was made thereto, and such right should be settled in some other proceeding. Twin Falls Canal Co. v. Shippen, 46 Idaho 787, 271 P. 578 (1928).

If ownership of water, or right to change, is disputed in proceeding under this section, such question must be determined in action for that purpose. Federal Land Bank v. Union Cent. Life Ins. Co., 51 Idaho 490, 6 P.2d 486 (1931).

Relation to Other Law.

The purpose of § 42-1425 is to streamline the adjudication process by providing a substitute for the transfer process required by this section and to protect existing water uses which were the result of past transfers, regardless of compliance with statutory mandates. Fremont-Madison Irrigation Dist. & Mitigation Group v. Idaho Ground Water Appropriators, Inc., 129 Idaho 454, 926 P.2d 1301 (1996).

Remedy in Equity.

Where applicant for change of place in use of water was not owner of land to which water had been made appurtenant, he could proceed in equity rather than under this section. First Sec. Bank v. State, 49 Idaho 740, 291 P. 1064 (1930).

Resumption of Use.

Forfeiture of water right was not effective although statutory abandonment had occurred, if the original owner resumed the use

prior to a claim of right by a third person. *Carrington v. Crandall*, 65 Idaho 525, 147 P.2d 1009 (1944).

If use of water right is resumed after the five-year period, but before any third parties make a claim in the water, then the courts will decline to declare a forfeiture. *Jenkins v. State*, Dep't of Water Resources, 103 Idaho 384, 647 P.2d 1256 (1982).

Idaho Department of Water Resources applied the resumption-of-use doctrine incorrectly, necessitating vacation of its order and remand, where although the findings indicated that the owner of senior water rights had failed to use them for a period longer than five years, there was no indication that the junior rights holders had commenced their use before the senior holder had resumed its use. *Sagewillow, Inc. v. Idaho Dep't of Water Res.*, — Idaho —, 70 P.3d 669 (2003).

Reversion to State.

Abandonment of water right began when owner ceased to apply water to beneficial use, and where he failed to so apply it for five years, it reverted to state and again became subject to appropriation. *Chill v. Jarvis*, 50 Idaho 531, 298 P. 373 (1931).

When the right to the use of water has been lost through nonuse or abandonment, the right to such use reverts to the state and is again subject to appropriation. *Graham v. Leek*, 65 Idaho 279, 144 P.2d 475 (1944).

If a water right has indeed been lost through abandonment or forfeiture, the right to use that water reverts to the state and is subject to further appropriation. Other parties may then perfect a water right in those waters. *Jenkins v. State*, Dep't of Water Resources, 103 Idaho 384, 647 P.2d 1256 (1982).

Right Acquired by Purchaser.

Where purchaser acquired land after the rendition of water right decree, he received only that which the vendor had for sale and if the right to correct the decree had been lost by laches or otherwise, the purchaser was in no better position than the vendor. *Albion-Idaho Land Co. v. Adams*, 58 F. Supp. 579 (D. Idaho 1945).

Rights to Seepage.

Where appropriator had tried repeatedly to reduce the seepage loss from an open ditch and such efforts culminated in the placement of a steel pipe, it was clear that appropriator never intended to abandon the water nor did appropriator forfeit its rights to seepage water. *Hidden Springs Trout Ranch, Inc. v. Hagerman Water Users, Inc.*, 101 Idaho 677, 619 P.2d 1130 (1980).

Standing to Contest Change.

Where the Box Canyon area was designated by the Bureau of Land Management

(BLM) as an Area of Critical Environmental Concern (ACEC), and where the values justifying the ACEC designation included the identification of four candidate threatened and endangered aquatic species and the scenic and unique natural qualities of the area, the protection of this habitat fell within the local public interest as defined in *Shokal v. Dunn*, 109 Idaho 330, 770 P.2d 441 (1985); therefore, the protestants, although having no water rights within Box Canyon, sought to protect these locally important factors and thus their interests were properly considered by the Director of the Idaho Department of Water Resources. *Hardy v. Higginson*, 123 Idaho 485, 849 P.2d 946 (1993).

Subsequent Appropriators.

Rule as to change of place of application cannot inure to the aid of subsequent appropriators because, not being appropriators during the time, it was no concern of theirs, except as it bears on the question of abandonment, where or how the water was diverted or applied. *Zezi v. Lightfoot*, 57 Idaho 707, 68 P.2d 50 (1937).

If a senior right has been abandoned or forfeited, the priority of the original appropriator is lost, and the junior appropriators move up the ladder of priority. Hence if a senior right which had been forfeited or abandoned were allowed to be reinstated through a transfer proceeding, clearly injury would result to otherwise junior appropriators. *Jenkins v. State*, Dep't of Water Resources, 103 Idaho 384, 647 P.2d 1256 (1982).

Water Right Decree.

Right based upon decree of court was not immune from showing that it had been abandoned, and such showing did not impeach decree upon which such right was based where evidence of abandonment related to time subsequent to decree. *Albrethsen v. Wood River Land Co.*, 40 Idaho 49, 231 P. 418 (1924).

A decreed water right was not immune from a showing that it had been abandoned, and such showing did not impeach the decree upon which the right was based, where the evidence received with reference to the abandonment related to a time subsequent to the decree. *Graham v. Leek*, 65 Idaho 279, 144 P.2d 475 (1944).

The equitable principle of laches and negligence barred the correction of water right decree which had been entered 16 years prior and 7 years had elapsed after petitioner had purchased the land, during which time the rights of other owners of water rights had intervened. *Albion-Idaho Land Co. v. Adams*, 58 F. Supp. 579 (D. Idaho 1945).

Opinions of Attorney General. On its face, this section seems to require that a water right be accepted and subsequently

rented out in order to toll the forfeiture provisions of subsection (2); however, when § 42-1764 is interpreted in light of the entire Water Supply Bank Act, it is possible to argue that the forfeiture period should be tolled whenever a water right is placed into the bank. Because of the ambiguity within the Act, it is not possible to predict which interpretation a court might adopt. OAG 88-4.

The filing of an application for change in point of diversion, place of use, period of use, or nature of use of a water right does not toll the running of the forfeiture period for nonuse of a water right established by subsection (2). OAG 88-4.

Collateral References. 78 Am. Jur. 2d, Waters, §§ 355-358, 363-366.

93 C.J.S., Waters, §§ 134-169, 380-382.

42-222A. Temporary changes during drought conditions. —

(1) Upon declaration of a drought emergency for an area designated by the director of the department of water resources and approved by the governor of the state of Idaho, the director of the department of water resources is authorized to allow temporary changes to the use of water rights consisting of temporary transfers to change point of diversion, place and purpose of use of valid existing water rights or temporary exchanges of water authorized to be diverted under water rights, as provided in section 42-240, Idaho Code, when the director of the department of water resources determines that such change(s) can be accomplished in accordance with the provisions of this section.

(2) Application for a temporary change shall be made upon forms provided by the department of water resources and shall be accompanied by an application fee of fifty dollars (\$50.00) per application.

(3) The director of the department of water resources is not required to publish notice of the proposed change pursuant to the provisions of section 42-211, 42-222(1) or 42-240, Idaho Code, and is not required to make findings as provided in said sections. A temporary change may be approved upon completion of the application form, payment of the filing fee and a determination by the director of the department of water resources that the proposed change can be properly administered and there is no information that the change will injure any other water right. If the water right to be changed is administered by a watermaster within a water district, the director of the department of water resources shall obtain and consider the recommendations of the watermaster before approving the temporary change application.

(4) All temporary changes approved pursuant to the provisions of this section shall expire on the date shown in the approval which shall not be later than December 31 of the year in which the emergency transfer approval is made and thereafter the water right shall revert to the point of diversion and place of use existing prior to the temporary change. Nothing herein shall be construed as approval to authorize the construction of a new well as a new point of diversion.

(5) The recipient of an approved temporary change issued pursuant to this section shall assume all risk that the diversion and use of the water may cause injury to other water rights, that the change constitutes an enlargement in use of the original right, that the use is not consistent with the conservation of water resources within the state of Idaho and that such use is not in the local public interest. Any applicant for a temporary change who is aggrieved by a denial by the director of the department of water

resources of a temporary change pursuant to this section may request a hearing pursuant to the provisions of section 42-1701A(3), Idaho Code, and may seek judicial review of the final order of the director pursuant to the provisions of section 42-1701A(4), Idaho Code.

(6) Temporary changes shall only be approved for the purpose of providing a replacement water supply to lands or other uses which normally have a full water supply except for a drought condition. Temporary changes may not be approved to provide water for new projects or to allow expansion of the use of water under existing water rights. If the right to use the water, the diversion works or the water delivery system is represented by shares of stock in a corporation or if such right, diversion works or delivery system is owned or managed by an irrigation district, no change in point of diversion or place or nature of use of such water shall be made or allowed without the written consent of such corporation or irrigation district. [I.C., § 42-222A, as added by 1993, ch. 161, § 1, p. 410; am. 2001, ch. 126, § 1, p. 447.]

Compiler's notes. Section 2 of S.L. 1993, ch. 161 declared an emergency. Approved March 25, 1993.

Section 2 of S.L. 2001, ch. 126 declared an emergency. Approved March 23, 2001.

42-223. Exceptions or defenses to forfeiture. — A right to the use of water shall not be lost by forfeiture pursuant to the provisions of section 42-222, Idaho Code, for a failure to apply the water to beneficial use under the conditions specified in any subsection of this section. The legislature does not intend through enactment of this section to diminish or impair any statutory or common law exception or defense to forfeiture existing on the date of enactment or amendment of this section, or to preclude judicial or administrative recognition of other exceptions or defenses to forfeiture recognized in Idaho case law or other provisions of the Idaho Code. No provision of this section shall be construed to imply that the legislature does not recognize the existence or validity of any common law exception or defense to forfeiture existing on the date of enactment or amendment of this section.

(1) A water right appurtenant to land contracted in a federal cropland set-aside program shall not be lost or forfeited for nonuse during the contracted period. The running of any five (5) year period of nonuse for forfeiture of a water right shall be tolled during the time that the land remains in the cropland set-aside program.

(2) A water right held by a municipal provider to meet reasonably anticipated future needs shall be deemed to constitute beneficial use, and such rights shall not be lost or forfeited for nonuse unless the planning horizon specified in the license has expired and the quantity of water authorized for use under the license is no longer needed to meet reasonably anticipated future needs.

(3) A water right shall not be lost or forfeited by a failure to divert and apply the water to beneficial use if the water is not needed to maintain full beneficial use under the right because of land application of waste for disposal purposes including, but not limited to, discharge from dairy lagoons

used in combination with or substituted for water diverted under the water right.

(4) A water right shall not be lost or forfeited by a failure to divert and apply the water to beneficial use if the reason for the nonuse of the water is to comply with the provisions of a ground water management plan approved by the director of the department of water resources pursuant to section 42-233a or 42-233b, Idaho Code.

(5) A water right shall not be lost or forfeited by a failure of the owner of the right to divert and apply the water to beneficial use while the water right is placed in the water supply bank or is retained in or rented from the water supply bank pursuant to sections 42-1761 through 42-1765A, Idaho Code, or while the water right is leased pursuant to sections 43-335 through 43-342, Idaho Code, or sections 42-2501 through 42-2509, Idaho Code, or while use of the water is made under any other provision of law authorizing the rental or lease of water rights.

(6) No portion of any water right shall be lost or forfeited for nonuse if the nonuse results from circumstances over which the water right owner has no control. Whether the water right owner has control over nonuse of water shall be determined on a case-by-case basis.

(7) No portion of a water right held by an irrigation district, a Carey Act operating company, or any other company, corporation, association, or entity which holds water rights for distribution to its landowners, shareholders or members shall be lost or forfeited due to nonuse by such landowners, shareholders or members, unless the nonuse is subject to the control of such entity.

(8) No portion of a water right held by an irrigation district shall be lost, forfeited or subject to forfeiture as a result of the exclusion of land from the district pursuant to chapter 11, title 43, Idaho Code, so long as any five (5) year period of nonuse following the exclusion does not result from circumstances over which the district has control.

(9) No portion of any water right shall be lost or forfeited for nonuse if the nonuse results from a water conservation practice, which maintains the full beneficial use authorized by the water right, as defined in section 42-250, Idaho Code. [I.C., § 42-223, as added by 2000, ch. 85, § 3, p. 181; am. 2002, ch. 343, § 1, p. 961; am. 2003, ch. 166, § 1, p. 470.]

Compiler's notes. Former § 42-223, which comprised 1945, ch. 97, § 1, p. 147, was repealed by S.L. 2000, ch. 85, § 2, effective July 1, 2000.

Section 2 of S.L. 2003, ch. 166, is compiled as § 42-250.

Section 3 of S.L. 2003, ch. 166 declared an emergency. Approved March 27, 2003.

42-224. Protest against license — Appeal from decision. [Repealed.]

Compiler's notes. This section, which comprised 1903, p. 223, § 12; reen. R.C. & C.L., § 3265; C.S., § 5583; I.C.A., § 41-217;

am. 1980, ch. 238, § 7, p. 526; am. 1994, ch. 64, § 4, p. 121, was repealed by S.L. 2000, ch. 85, § 4, effective July 1, 2000.

42-225. Survey of appropriations — Duty of department. [Repealed.]

Compiler's notes. This section which comprised S.L. 1903, p. 223, § 33; reen. R.C., § 3266; compiled and reen. C.L., § 3266; C.S., § 5604; I.C.A., § 41-218; 1967, ch. 338, § 1, p. 974 was repealed by S.L. 1978, ch. 345, § 3.

42-225a. [Amended and Redesignated.]

Compiler's notes. This section was amended and redesignated as § 42-243 by S.L. 1978, ch. 345, § 6.

42-225b. [Amended and Redesignated.]

Compiler's notes. This section was amended and redesignated as § 42-244 by S.L. 1978, ch. 345, § 7.

42-226. Ground waters are public waters. — The traditional policy of the state of Idaho, requiring the water resources of this state to be devoted to beneficial use in reasonable amounts through appropriation, is affirmed with respect to the ground water resources of this state as said term is hereinafter defined and, while the doctrine of "first in time is first in right" is recognized, a reasonable exercise of this right shall not block full economic development of underground water resources. Prior appropriators of underground water shall be protected in the maintenance of reasonable ground water pumping levels as may be established by the director of the department of water resources as herein provided. In determining a reasonable ground water pumping level or levels, the director of the department of water resources shall consider and protect the thermal and/or artesian pressure values for low temperature geothermal resources and for geothermal resources to the extent that he determines such protection is in the public interest. All ground waters in this state are declared to be the property of the state, whose duty it shall be to supervise their appropriation and allotment to those diverting the same for beneficial use. This act shall not affect the rights to the use of ground water in this state acquired before its enactment.

Any application for a water permit that seeks to transfer ground water outside the immediate ground water basin as defined by the director of the department of water resources for the purpose of irrigating five thousand (5,000) or more acres on a continuing basis or for a total volume in excess of ten thousand (10,000) acre feet per year, the application must first be approved by the director of the department of water resources and then by the Idaho legislature. Each shall give due consideration to the local economic and ecological impact of the project or development so proposed. [1951, ch. 200, § 1, p. 423; am. 1953, ch. 182, § 1, p. 277; am. 1980, ch. 186, § 1, p. 413; am. 1987, ch. 347, § 1, p. 741.]

Compiler's notes. Section 2 of S.L. 1953, ch. 182, is compiled herein as § 42-231.

Section 2 of S.L. 1987, ch. 347 is compiled as § 42-230.

Cited in: *Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994).

ANALYSIS

Applicability.
Change of diversion.
Constitutionality.
Exemption for domestic wells.
Prior appropriation rights.
Public policy.
Pumping level unreasonable.
Use of underground water.
Water from mining activity.

Applicability.

Domestic wells drilled prior to 1978 are exempt from the provisions of this section. *Parker v. Wallentine*, 103 Idaho 506, 650 P.2d 648 (1982).

Change of Diversion.

It was error for the district court to enjoin landowners from changing the point of diversion of water from a well on one section of their land to another, where such owners had filed a proper application for such change with the state reclamation engineer (now the director of the department of water resources), who had declined to hear or process the application. *State ex rel. Tappan v. Smith*, 92 Idaho 451, 444 P.2d 412 (1968).

A perpetual injunction should not be granted if, by changing the prior appropriator's method or means of diversion, both parties can be supplied with water. The expense of changing the method or means of diversion, however, must be paid by the subsequent appropriator. *Parker v. Wallentine*, 103 Idaho 506, 650 P.2d 648 (1982).

Constitutionality.

The Ground Water Act is consistent with the constitutionally enunciated policy of promoting optimum development of water resources in the public interest. *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 513 P.2d 627 (1973).

Exemption for Domestic Wells.

Under the plain language of the 1951 Ground Water Act, domestic wells were exempt from the provisions of that act and the exemption for domestic wells was not modified by the 1953 amendment to this section which established the reasonable pumping level limitation on the doctrine of first in time is first in right. *Parker v. Wallentine*, 103 Idaho 506, 650 P.2d 648 (1982).

The mere fact that the words "to clarify that domestic wells are exempted from the provisions of § 42-229" appeared in the title of the 1978 amendment of § 42-227 did not mean that the legislature never intended domestic wells to be exempt from the policy statements contained in this section. *Parker v.*

Wallentine, 103 Idaho 506, 650 P.2d 648 (1982).

Prior Appropriation Rights.

Prior to the enactment of the Ground Water Act in 1951, the doctrine of prior appropriation, i.e., first in time is first in right, governed the appropriation of ground water in this state, and although this doctrine was modified in certain respects by the enactment of the Ground Water Act, the law applicable to ground water used for domestic purposes was not significantly modified by the act. *Parker v. Wallentine*, 103 Idaho 506, 650 P.2d 648 (1982).

Under the doctrine of prior appropriation, because the plaintiff's domestic well was drilled prior to the defendant's irrigation well, the plaintiff had a vested right to use the water for his domestic well. That right included the right to have the water available at the historic pumping level or to be compensated for expenses incurred if the defendant subsequent appropriator was allowed to lower the water table and the plaintiff was required to change his method or means of diversion in order to maintain his right to use the water. *Parker v. Wallentine*, 103 Idaho 506, 650 P.2d 648 (1982).

Public Policy.

In the enactment of the Ground Water Act, the legislature decided, as a matter of public policy, that it sometimes may be necessary to modify private property rights in ground water in order to promote full economic development of the resource. *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 513 P.2d 627 (1973).

Pumping Level Unreasonable.

Although a senior appropriator may have had a prior right to ground water, if his means of appropriation demanded an unreasonable pumping level, his historic means of appropriation would not be protected. *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 513 P.2d 627 (1973).

Use of Underground Water.

Evidence that there was a dangerous depletion of the underground water in the area of the wells in question, although contradicted, was sufficient to support action of the trial court in enjoining landowners from using water from a newly constructed well on their land and requiring them to cap the well and remove the pump therefrom. *State ex rel. Tappan v. Smith*, 92 Idaho 451, 444 P.2d 412 (1968).

The total annual withdrawal of water from an aquifer is limited to the average annual recharge of the aquifer. *Briggs v. Golden Valley Land & Cattle Co.*, 97 Idaho 427, 546 P.2d 382 (1976).

Water From Mining Activity.

Water emanating from a mine portal falls clearly within the definition of public ground

water which is subject to appropriation; the water is from an underground source which has been brought to the surface through the

excavation of the mine. *Branson v. Miracle*, 107 Idaho 221, 687 P.2d 1348 (1984).

42-227. Drilling and use of wells for domestic purposes excepted.

— The excavation and opening of wells and the withdrawal of water therefrom for domestic purposes shall not be subject to the permit requirement under section 42-229, Idaho Code; providing such wells and withdrawal devices are subject to inspection by the department of water resources and the department of environmental quality and providing further that the drilling of such wells shall be subject to the licensing provisions of section 42-238, Idaho Code. Rights to ground water for such domestic purposes may be acquired by withdrawal and use. [1951, ch. 200, § 2, p. 423; am. 1970, ch. 187, § 1, p. 541; am. 1978, ch. 324, § 1, p. 819; am. 2001, ch. 103, § 79, p. 253.]

Compiler's notes. Sections 78 and 80 of S.L. 2001, ch. 103 are compiled as §§ 41-4947 and 42-1503, respectively.

Sec. to sec. ref. This section is referred to in §§ 42-111 and 42-238.

ANALYSIS

In general.

Legislative intent.

Prior appropriation rights.

Subsequent appropriators.

In General.

Under the plain language of the 1951 Ground Water Act, domestic wells were exempt from the provisions of that act and the exemption for domestic wells was not modified by the 1953 amendment to § 42-226 which established the reasonable pumping level limitation on the doctrine of first in time is first in right. *Parker v. Wallentine*, 103 Idaho 506, 650 P.2d 648 (1982).

Domestic wells drilled prior to 1978 are exempt from the provisions of § 42-226. *Parker v. Wallentine*, 103 Idaho 506, 650 P.2d 648 (1982).

Legislative Intent.

The mere fact that the words "to clarify that domestic wells are exempted from the provisions of § 42-229" appeared in the title of the 1978 amendment to this section did not mean that the legislature never intended domestic wells to be exempt from the policy statements contained in § 42-226. *Parker v. Wallentine*, 103 Idaho 506, 650 P.2d 648 (1982).

Prior Appropriation Rights.

Prior to the enactment of the Ground Water Act in 1951, the doctrine of prior appropriation, i.e., first in time is first in right, governed the appropriation of ground water in this state, and although this doctrine was modified in certain respects by the enactment of the Ground Water Act, the law applicable to ground water used for domestic purposes was not significantly modified by the act. *Parker v. Wallentine*, 103 Idaho 506, 650 P.2d 648 (1982).

Under the doctrine of prior appropriation, because the plaintiff's domestic well was drilled prior to the defendant's irrigation well, the plaintiff had a vested right to use the water for his domestic well. That right included the right to have the water available at the historic pumping level or to be compensated for expenses incurred if the defendant subsequent appropriator was allowed to lower the water table and the plaintiff was required to change his method or means of diversion in order to maintain his right to use the water. *Parker v. Wallentine*, 103 Idaho 506, 650 P.2d 648 (1982).

Subsequent Appropriators.

A perpetual injunction should not be granted if, by changing the prior appropriator's method or means of diversion, both parties can be supplied with water. The expense of changing the method or means of diversion, however, must be paid by the subsequent appropriator. *Parker v. Wallentine*, 103 Idaho 506, 650 P.2d 648 (1982).

42-228. Drilling and use of wells for drainage or recovery purposes excepted. — The excavation and opening of wells and the withdrawal of water therefrom for the sole purpose of improving or preserving the utility of land by draining them shall not be forbidden or governed by this act, and, likewise, there shall be excepted from the provisions of this act

the excavation and opening of wells and withdrawal of water therefrom by canal companies, irrigation districts, and other owners of irrigation works for the sole purpose of recovering ground water resulting from irrigation under such irrigation works for further use on or drainage of lands to which the established water rights of the parties constructing the wells are appurtenant; providing that the drilling of such wells shall be subject to the licensing provisions of section 42-238, Idaho Code. [1951, ch. 200, § 3, p. 423; am. 1970, ch. 187, § 2, p. 541.]

Sec. to sec. ref. This section is referred to in § 42-238.

42-229. Methods of appropriation. — The right to the use of ground water of this state may be acquired only by appropriation. Such appropriation may be perfected by means of the application permit and license procedure as provided in this act; provided, however, that in the event an appropriation has been commenced by diversion and application to beneficial use prior to the effective date of this act it may be perfected under such method of appropriation. All proceedings commenced prior to the effective date of this act for the acquisition of rights to the use of ground water under the provisions of sections 42-201 — 42-225, Idaho Code, may be completed under the provisions of said sections and rights to the use of ground water may be thereby acquired. But the administration of all rights to the use of ground water, whenever or however acquired or to be acquired, shall, unless specifically excepted herefrom, be governed by the provisions of this act. [1951, ch. 200, § 4, p. 423; am. 1963, ch. 216, § 1, p. 623.]

Compiler's notes. Section 42-225, referred to in the third sentence, was repealed by S.L. 1978, ch. 345, § 3.

Section 2 of S.L. 1963, ch. 216 is compiled herein as § 42-233a.

Sec. to sec. ref. This section is referred to in §§ 42-227, 42-1426.

Cited in: *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 513 P.2d 627 (1973); *Parker v. Wallentine*, 103 Idaho 506, 650 P.2d 648 (1982).

ANALYSIS

Injunction to prevent appropriation.
Relation to other law.

Injunction to Prevent Appropriation.

Landowners could not use water from a well located on a section of their land without perfecting their appropriation of such water as required by this act and, where their application for such appropriation was denied

by the state reclamation engineer (now the director of the department of water resources) and there was evidence, although contradicted, that there was a dangerous depletion of the underground water in the area, the district court could, on application of the state reclamation engineer (now the director of the department of water resources), enjoin their use of such water and require them to cap the well and remove the pump therefrom. *State ex rel. Tappan v. Smith*, 92 Idaho 451, 444 P.2d 412 (1968).

Relation to Other Law.

Section 42-1426 provides for a waiver of the mandatory permit requirements of §§ 42-201 and/or this section and a decree of a new water right for an enlarged use of the original water right. *Fremont-Madison Irrigation Dist. & Mitigation Group v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 926 P.2d 1301 (1996).

42-230. Definitions. — (a) "Ground water" is all water under the surface of the ground whatever may be the geological structure in which it is standing or moving.

(1) All ground water having a temperature of greater than eighty-five (85) degrees Fahrenheit and less than two hundred twelve (212) degrees Fahrenheit in the bottom of a well shall be classified and administered as a low temperature geothermal resource pursuant to section 42-233, Idaho Code.

(2) All ground water having a temperature of two hundred twelve (212) degrees Fahrenheit or more in the bottom of a well shall be classified as a geothermal resource pursuant to section 42-4002, Idaho Code, and shall be administered as a geothermal resource pursuant to chapter 40, title 42, Idaho Code.

(b) "Well" is an artificial excavation or opening in the ground more than eighteen (18) feet in vertical depth below land surface by which ground water of any temperature is sought or obtained.

(c) "Well driller" is any person or group of persons who excavate or open a well or wells for compensation or otherwise upon the land of the well driller or upon other land. Well driller does not include those persons who construct a well on their own property for their own use without the aid of any power driven mechanical equipment.

(d) "Well drilling" or "drilling" for purposes of this chapter is the act of constructing a new well or deepening or modifying an existing well by any percussion, rotary, boring, digging, jetting, or augering method.

(e) "Water right" is the legal right, however acquired, to the use of water for beneficial purposes.

(f) "Operator" is the employee of the well driller who, through his work at the drilling site, causes the well to be drilled.

(g) "Low temperature geothermal resource well" means a well which is capable of producing a low temperature geothermal resource from which fluids can be produced which have value by virtue of the heat contained therein. [1951, ch. 200, § 5, p. 423; am. 1970, ch. 187, § 3, p. 541; am. 1971, ch. 149, § 1, p. 739; am. 1980, ch. 209, § 1, p. 479; am. 1987, ch. 347, § 2, p. 741; am. 1990, ch. 319, § 3, p. 870.]

Compiler's notes. Section 1 of S.L. 1987, ch. 347 is compiled as § 42-226, and § 3 is compiled as § 42-233.

Sections 2 and 4 of S.L. 1990, ch. 319 are compiled as §§ 42-221 and 42-242, respectively.

Cross ref. General definition of "domestic purposes," § 42-111.

Sec. to sec. ref. This section is referred to in §§ 42-111, 42-1604, 42-5201.

Cited in: State ex rel. Tappan v. Smith, 92 Idaho 451, 444 P.2d 412 (1968).

ANALYSIS

Decrees.

Water from mining activity.

Decrees.

Nowhere in this title is the Director obligated to accept a prior decree issued in a

private adjudication as being conclusive proof of the nature of a water right. Although a decree evidences a legal right to the use of water, it does not obligate the Director to make a recommendation contrary to his findings. *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 947 P.2d 409 (1997).

Water From Mining Activity.

Water emanating from a mine portal falls clearly within the definition of public ground water which is subject to appropriation; the water is from an underground source which has been brought to the surface through the excavation of the mine. *Branson v. Miracle*, 107 Idaho 221, 687 P.2d 1348 (1984).

42-231. Duties of the director of the department of water resources. — In addition to other duties prescribed by law, it shall be the duty of the director of the department of water resources to conduct investigations, surveys and studies relative to the extent, nature and location of the ground water resources of this state; and to this end, the director of the department of water resources may, on behalf of the state of Idaho enter into cooperative investigations, researches, and studies with any agency or department of the government of the United States, or any other state or public authority of this state, or private agencies or individuals. It shall likewise be the duty of the director of the department of water resources to control the appropriation and use of the ground water of this state as in this act provided and to do all things reasonably necessary or appropriate to protect the people of the state from depletion of ground water resources contrary to the public policy expressed in this act. [1951, ch. 200, § 6, p. 423; am. 1953, ch. 182, § 2, p. 277.]

Compiler's notes. The name of the director of the department of water administration (formerly the state reclamation engineer) has been changed to the director of the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

Section 1 of S.L. 1953, ch. 182, is compiled herein as § 42-226.

Cited in: State ex rel. Tappan v. Smith, 92 Idaho 451, 444 P.2d 412 (1968).

42-232. Ground water recharge program — Negotiations with bureau of reclamation. — The director of the department of water resources is hereby authorized and directed to institute negotiations with the United States bureau of reclamation and the senators and representatives representing the state of Idaho in the congress of the United States for purposes of examining the possibility of incorporating an artificial ground water recharge program or project into those water projects for withdrawal of waters from ground water basins in the Coltman area of Bonneville County, the Menan Buttes area in Madison county, or any other area contemplated by the bureau of reclamation, which have been authorized by congress as a part of the Salmon Falls Creek irrigation project located in Twin Falls county. [I.C., § 42-232, as added by 1978, ch. 366, § 3, p. 955.]

Compiler's notes. A former § 42-232, which comprised S.L. 1951, ch. 200, § 7, p. 423; am. 1953, ch. 182, § 3, p. 277, was

repealed by S.L. 1967, ch. 374, § 13.

Section 2 of S.L. 1978, ch. 366 is compiled as § 42-233a.

42-233. Low temperature geothermal resource. — (1) The right to the use of low temperature geothermal resources of this state shall be acquired by appropriation. The appropriation may be perfected by means of the application, permit and license procedure as provided in this chapter for ground water, provided that low temperature geothermal resources shall be utilized primarily for heat value and secondarily for the value as water. Usage of a low temperature geothermal resource primarily for reasons other than heat value is not a beneficial use of the resource, unless the director of the department of water resources exempts the proposed use. The director may exempt a proposed use if the director finds that the proposed use

satisfies the following criteria: (i) there is no feasible alternative use of the resource; (ii) there is no economically viable source of water having a bottom hole temperature of eighty-five (85) degrees or less in a well available; (iii) the exemption is in the public interest.

(2) Any owner of a well who engages in the drilling, redrilling, modifying or deepening of any low temperature geothermal well shall file with the director of the department of water resources a surety bond or cash bond in the penal sum of not less than five thousand dollars (\$5,000) or more than twenty thousand dollars (\$20,000) as determined by the director of the department of water resources based on the temperature, depth and pressure of the resource, the size and depth of the well, and any other relevant factors. The surety or cash bond shall be conditioned upon the proper compliance with the provisions of this chapter and chapter 40, title 42, Idaho Code, and rules and regulations promulgated pursuant thereto. The bond shall remain in effect for one (1) year following completion of drilling, redrilling, modifying or deepening of the well or until released in writing by the director, whichever occurs first.

(3) All permits, licenses, decreed rights and valid claims to a right to the use of ground water which would be classified as a low temperature geothermal resource having a priority date prior to July 1, 1987, remain valid and the bond provisions of subsection (2) of this section are not applicable unless the well from which the right diverts water is modified or deepened. The provisions of this section shall not be applicable to all permits, licenses and rights to the use of geothermal resources as defined in chapter 40, title 42, Idaho Code, which would be classified as a low temperature geothermal resource under this section, issued or proclaimed prior to July 1, 1987, and the bond provisions of subsection (2) of this section are not applicable to such wells. [I.C., § 42-233, as added by 1987, ch. 347, § 3, p. 741; am. 1988, ch. 311, § 1, p. 967.]

Compiler's notes. A former § 42-233, which comprised S.L. 1951, ch. 200, § 8, p. 423; am. 1953, ch. 182, § 4, p. 277, was repealed by S.L. 1967, ch. 374, § 14.

Section 2 of S.L. 1987, ch. 347 is compiled as § 42-230 and § 4 is compiled as § 42-235.

Sec. to sec. ref. This section is referred to in §§ 42-230 and 42-238.

42-233a. "Critical ground water area" defined — Public hearings — Publication of notice — Granting or denial of application — Appeal. — "Critical ground water area" is defined as any ground water basin, or designated part thereof, not having sufficient ground water to provide a reasonably safe supply for irrigation of cultivated lands, or other uses in the basin at the then current rates of withdrawal, or rates of withdrawal projected by consideration of valid and outstanding applications and permits, as may be determined and designated, from time to time, by the director of the department of water resources.

Upon the designation of a "critical ground water area" it shall be the duty of the director of the department of water resources to conduct a public hearing in the area concerned to apprise the public of such designation and the reasons therefor. Notice of the hearing shall be published in two (2)

consecutive weekly issues of a newspaper of general circulation in the area immediately prior to the date set for hearing.

In the event an area has been designated as a "critical ground water area" and the director of the department of water resources desires to remove such designation or modify the boundaries thereof, he shall likewise conduct a public hearing following similar publication of notice prior to taking such action.

When a "critical ground water area" is designated by the director of the department of water resources, or at any time thereafter during the existence of the designation, the director may approve a ground water management plan for the area. The ground water management plan shall provide for managing the effects of ground water withdrawals on the aquifer from which withdrawals are made and on any other hydraulically connected sources of water.

In the event an application for permit is made with respect to an area that has not been designated as a critical ground water area the director of the department of water resources shall forthwith issue a permit in accordance with the provisions of section 42-203A and section 42-204, Idaho Code, provided said application otherwise meets the requirements of such sections; and further provided that if the applicant proposes to appropriate water from a ground water basin or basins in an amount which exceeds ten thousand (10,000) acre-feet per year either from a single or a combination of diversion points, and the director determines that the withdrawal of such amount will substantially and adversely affect existing pumping levels of appropriators pumping from such basin or basins, or will substantially and adversely affect the amount of water available for withdrawal from such basin or basins under existing water rights, the director may require that the applicant undertake such recharge of the ground water basin or basins as will offset that withdrawal adversely affecting existing pumping levels or water rights.

In the event an application for permit is made in an area which has been designated as a critical ground water area, if the director of the department of water resources from the investigation made by him on said application as herein provided, or from the investigation made by him in determining the area to be critical, or from other information that has come officially to his attention, has reason to believe that there is insufficient water available subject to appropriation at the location of the proposed well described in the application, the director of the department of water resources may forthwith deny said application; provided, however, that if ground water at such location is available in a lesser amount than that applied for the director of the department of water resources may issue a permit for the use of such water to the extent that such water is available for such appropriation.

The director may require all water right holders within a critical ground water area to report withdrawals of ground water and other necessary information for the purpose of assisting him in determining available ground water supplies and their usage.

The director, upon determination that the ground water supply is insufficient to meet the demands of water rights within all or portions of a critical

ground water area, shall order those water right holders on a time priority basis, within the area determined by the director, to cease or reduce withdrawal of water until such time as the director determines there is sufficient ground water. Such order shall be given only before September 1 and shall be effective for the growing season during the year following the date the order is given.

Any applicant dissatisfied with the decision of the director of the department of water resources may appeal to the district court in the manner provided for in section 42-237e, Idaho Code. [1951, ch. 200, § 9, as added by 1953, ch. 182, § 5, p. 277; am. 1963, ch. 216, § 2, p. 623; am. 1967, ch. 187, § 1, p. 616; am. 1978, ch. 366, § 2, p. 955; am. 1995, ch. 286, § 1, p. 949; am. 2000, ch. 85, § 5, p. 181.]

Compiler's notes. Section 3 of S.L. 1963, ch. 216 is compiled herein as § 42-237g.

Sections 1 and 3 of S.L. 1978, ch. 366 are compiled as §§ 42-234 and 42-232, respectively.

Sec. to sec. ref. This section is referred to in § 42-5101.

Cited in: Carter v. Rich, 111 Idaho 684, 726 P.2d 1135 (1986).

permit for the use of which had been denied by the state reclamation engineer (now the director of the department of water resources) because located in a critical ground water area, upon evidence, although contradicted, that there was a dangerous depletion of ground water in the area. State ex rel. Tappan v. Smith, 92 Idaho 451, 444 P.2d 412 (1968).

Injunction to Prevent Use.

The district court properly enjoined landowners from pumping water from a well, a

42-233b. Ground water management area. — "Ground water management area" is defined as any ground water basin or designated part thereof which the director of the department of water resources has determined may be approaching the conditions of a critical ground water area. Upon designation of a ground water management area the director shall publish notice in two (2) consecutive weekly issues of a newspaper of general circulation in the area.

When a ground water management area is designated by the director of the department of water resources, or at any time thereafter during the existence of the designation, the director may approve a ground water management plan for the area. The ground water management plan shall provide for managing the effects of ground water withdrawals on the aquifer from which withdrawals are made and on any other hydraulically connected sources of water.

Applications for permits made within a ground water management area shall be approved by the director only after he has determined on an individual basis that sufficient water is available and that other prior water rights will not be injured.

The director may require all water right holders within a designated water management area to report withdrawals of ground water and other necessary information for the purpose of assisting him in determining available ground water supplies and their usage.

The director, upon determination that the ground water supply is insufficient to meet the demands of water rights within all or portions of a water management area, shall order those water right holders on a time priority

basis, within the area determined by the director, to cease or reduce withdrawal of water until such time as the director determines there is sufficient ground water. Such order shall be given only before September 1 and shall be effective for the growing season during the year following the date the order is given. [I.C., § 42-233b, as added by 1982, ch. 90, § 1, p. 164; am. 2000, ch. 85, § 6, p. 181.]

Compiler's notes. Former § 42-233b, which comprised S.L. 1910, ch. 200, § 10, as added by 1953, ch. 182, § 5, p. 277, was repealed by S.L. 1963, ch. 216, § 4.

Section 2 of S.L. 1982, ch. 90 declared an emergency. Approved March 17, 1982.

Sec. to sec. ref. This section is referred to in § 42-5101.

42-234. Ground water recharge projects — Authority of department to grant permit. — (1) It is the policy of the state of Idaho to promote and encourage the optimum development and augmentation of the water resources of this state. The legislature deems it essential, therefore, that water projects designed to advance this policy be given maximum support. The legislature finds that the projects to recharge ground water basins in Idaho, may enhance the full realization of our water resource potential by furthering water conservation and increasing the water available for beneficial use.

(2) The legislature hereby declares that the appropriation and underground storage of water for purposes of ground water recharge shall constitute a beneficial use and hereby authorizes the department of water resources to issue a permit for the appropriation and underground storage of unappropriated waters in an area of recharge. The rights acquired pursuant to any permit and license obtained as herein authorized shall be secondary to all prior perfected water rights, including those water rights for power purposes that may otherwise be subordinated by contract entered into by the governor and Idaho power company on October 25, 1984, and ratified by the legislature pursuant to section 42-203B, Idaho Code. Any right so granted shall be subject to depletion for surface storage or direct uses after a period of years sufficient to amortize the investment of the appropriator.

(3) The legislature further recognizes that incidental ground water recharge benefits are often obtained from the diversion and use of water for various beneficial purposes. However, such incidental recharge may not be used as the basis for claim of a separate or expanded water right. Incidental recharge of aquifers which occurs as a result of water diversion and use that does not exceed the vested water right of water right holders is in the public interest. The values of such incidental recharge shall be considered in the management of the state's water resources. [I.C., § 42-234, as added by 1978, ch. 366, § 1, p. 955; am. 1994, ch. 433, § 1, p. 1397.]

Compiler's notes. Concerning the contract of October 25, 1984, referred to in subsection (2), see S.L. 1985, ch. 14.

A former § 42-234, which comprised S.L. 1951, ch. 200, § 9(11), p. 423; am. 1953, ch. 182, § 6, p. 277, was repealed by S.L. 1967, ch. 374, § 15.

Section 2 of S.L. 1978, ch. 366 is compiled as § 42-233a.

Section 2 of S.L. 1994, ch. 433 declared an emergency. Approved April 7, 1994.

42-235. Drilling permits. — Prior to beginning construction of any well, or changing the construction of any well, the driller or well owner shall obtain a permit from the director of the department of water resources to protect the public health, safety and welfare and the environment, and to prevent the waste of water or mixture of water from different aquifers. There shall be a seventy-five dollar (\$75.00) charge for the permit if the well is to be used for domestic or monitoring purposes. If the well is to be used for other than domestic or monitoring purposes, the charge for the permit shall be two hundred dollars (\$200). All moneys received pursuant to this section shall be credited to the water administration account. The director may provide a blanket drilling permit for site specific monitoring programs which will determine the quality, quantity, temperature, pressure or other attributes of aquifers. The application for a blanket permit shall include a design proposal prepared by a licensed engineer or licensed geologist which shall describe the overall drilling program and all relevant technical features of the wells to the satisfaction of the director. Progress reports, completion and other data may be required as provided by rule. The fee for the blanket permit shall be one hundred dollars (\$100) plus an additional fifty dollars (\$50.00) per well. A driller or well owner violating any provision of this section shall be guilty of a misdemeanor and shall also be subject to the enforcement procedures of section 42-1701B, Idaho Code. [I.C., § 42-235, as added by 1987, ch. 347, § 4, p. 741; am. 1990, ch. 164, § 1, p. 361; am. 1996, ch. 267, § 1, p. 868; am. 1998, ch. 173, § 1, p. 595.]

Compiler's notes. A former § 42-235, which comprised S.L. 1951, ch. 200, § 10(12), p. 423; am. 1953, ch. 182, § 7, p. 277, was repealed by S.L. 1967, ch. 374, § 16.

Section 3 of S.L. 1987, ch. 347 is compiled as § 42-233, and § 5 is compiled as § 42-237a.

Section 2 of S.L. 1996, ch. 267 is compiled as § 42-238b (now repealed).

Section 2 of S.L. 1998, ch. 173 is compiled as § 42-238.

Sec. to sec. ref. This section is referred to in § 42-111.

42-236. Form and effect of license. [Repealed.]

Compiler's notes. This section, which comprised 1951, ch. 200, § 11(13), p. 423, was repealed by S.L. 1967, ch. 374, § 17.

42-237. Abandonment of water right — Change of point of diversion and place of use. — The provisions relating to loss of water rights by nonuse and abandonment, as set forth in section 42-222, shall apply to ground water rights. The provisions of section 42-222, relating to change of point of diversion and change of place of use of water, shall be applicable to waters accruing from water rights, provided, that the withdrawal of waters from the same ground water supply at another location in lieu of withdrawal at the original location shall be considered a change of point of diversion. [1951, ch. 200, § 12(14), p. 423; am. 1953, ch. 182, § 7, p. 277.]

Compiler's notes. As amended by S.L. 1953, ch. 182, § 7, this section, originally numbered 12, was amended to become § 14 of S.L. 1951, ch. 200.

Change of Diversion.

It was error for the district court to enjoin landowners from changing the point of diversion of water from a well on one section of

their land to another, where such owners had filed a proper application for such change with the state reclamation engineer (now the director of the department of water resourc-

es), who had declined to hear or process the application. State ex rel. Tappan v. Smith, 92 Idaho 451, 444 P.2d 412 (1968).

42-237a. Powers of the director of the department of water resources. — In the administration and enforcement of this act and in the effectuation of the policy of this state to conserve its ground water resources, the director of the department of water resources in his sole discretion, is empowered:

a. To require all flowing wells to be so capped or equipped with valves that the flow of water can be completely stopped when the wells are not in use.

b. To require both flowing and nonflowing wells to be so constructed and maintained as to prevent the waste of ground waters through leaky wells, casings, pipes, fittings, valves or pumps either above or below the land surface.

c. To prescribe uniform scientific methods to determine water levels in and calculate waters withdrawn from wells.

d. To go upon all lands, both public and private, for the purpose of inspecting wells, pumps, casings, pipes, and fittings, including wells used or claimed to be used for domestic purposes.

e. To order the cessation of use of a well pending the correction of any defect that the director of the department of water resources has ordered corrected.

f. To commence actions to enjoin the illegal opening or excavation of wells or withdrawal or use of water therefrom and to appear and become a party to any action or proceeding pending in any court or administrative agency when it appears to the director of the department of water resources that the determination of such action or proceeding might result in depletion of the ground water resources of the state contrary to the public policy expressed in this act.

g. To supervise and control the exercise and administration of all rights to the use of ground waters and in the exercise of this discretionary power he may initiate administrative proceedings to prohibit or limit the withdrawal of water from any well during any period that he determines that water to fill any water right in said well is not there available. To assist the director of the department of water resources in the administration and enforcement of this act, and in making determinations upon which said orders shall be based, he may establish a ground water pumping level or levels in an area or areas having a common ground water supply as determined by him as hereinafter provided. Water in a well shall not be deemed available to fill a water right therein if withdrawal therefrom of the amount called for by such right would affect, contrary to the declared policy of this act, the present or future use of any prior surface or ground water right or result in the withdrawing of the ground water supply at a rate beyond the reasonably anticipated average rate of future natural recharge. However, the director may allow withdrawal at a rate exceeding the reasonably anticipated rate of future natural recharge if the director finds it is in the public interest and if it satisfies the following criteria:

1. A program exists or likely will exist which will increase recharge or decrease withdrawals within a time period acceptable to the director to bring withdrawals into balance with recharge.
2. Holders of senior rights to use ground water will not be caused thereby to pump water from below the established reasonable pumping level or levels.

In connection with his supervision and control of the exercise of ground water rights the director of the department of water resources shall also have the power to determine what areas of the state have a common ground water supply and whenever it is determined that any area has a ground water supply which affects the flow of water in any stream or streams in an organized water district, to incorporate such area in said water district; and whenever it is determined that the ground water in an area having a common ground water supply does not affect the flow of water in any stream in an organized water district, to incorporate such area in a separate water district to be created in the same manner provided for in section 42-604 of title 42, Idaho Code. The administration of water rights within water districts created or enlarged pursuant to this act shall be carried out in accordance with the provisions of title 42, Idaho Code, as the same have been or may hereafter be amended, except that in the administration of ground water rights either the director of the department of water resources or the watermaster in a water district or the director of the department of water resources outside of a water district shall, upon determining that there is not sufficient water in a well to fill a particular ground water right therein by order, limit or prohibit further withdrawals of water under such right as hereinabove provided, and post a copy of said order at the place where such water is withdrawn; provided, that land, not irrigated with underground water, shall not be subject to any allotment, charge, assessment, levy, or budget for, or in connection with, the distribution or delivery of water.

h. To order the installation and maintenance of approved measuring devices consistent with the purposes of section 42-701, Idaho Code. [1951, ch. 200, § 15, as added by 1953, ch. 182, § 8, p. 277; am. 1977, ch. 258, § 1, p. 757; am. 1987, ch. 347, § 5, p. 741; am. 1994, ch. 430, § 2, p. 1388; am. 1994, ch. 450, § 3, p. 1434.]

Compiler's notes. This section was amended by two 1994 acts — ch. 430, § 2, effective April 7, 1994, and ch. 450, § 3, effective April 11, 1994 — which do not appear to conflict and have been compiled together.

The amendment by ch. 430, § 2 added subdivision h.

The amendment by ch. 450, § 3 in the introductory paragraph added "in his sole discretion,"; and in the first sentence of subdivision g., deleted "hereafter acquired" preceding "to the use of"; added "discretionary" preceding "power"; and substituted "initiate administrative proceedings to" for "by summary order,".

Section 4 of S.L. 1987, ch. 347 is compiled

as § 42-235, and § 6 is compiled as § 42-237g.

Section 1 of S.L. 1994, ch. 430 is compiled as § 42-701.

Sections 2 and 4 of S.L. 1994, ch. 450 are compiled as §§ 42-1701A and 42-237g, respectively.

Section 3 of S.L. 1994, ch. 430 declared an emergency. Approved April 7, 1994.

Section 6 of S.L. 1994, ch. 450 declared an emergency and provided that this act shall apply to all calls for distribution of water pending at the time of passage and approval. Approved April 11, 1994.

Sec. to sec. ref. This section is referred to in § 42-111.

Injunction to Prevent Use.

The district court properly enjoined land-owners from pumping water from a well, a permit for the use of which had been denied by the state reclamation engineer (now the director of the department of water resources) because located in a critical ground water area, upon evidence, although contradicted, that there was a dangerous depletion of ground water in the area. *State ex rel. Tappan*

v. Smith, 92 Idaho 451, 444 P.2d 412 (1968).

Since mining of an aquifer was explicitly forbidden by this statute, the district court did not err in enjoining pumping beyond the reasonably anticipated average rate of future natural recharge. *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 513 P.2d 627 (1973); see also *Briggs v. Golden Valley Land and Cattle Co.*, 97 Idaho 427, 546 P.2d 382 (1976).

42-237b. Administrative determination of adverse claims. —

Whenever any person owning or claiming the right to the use of any surface or ground water right believes that the use of such right is being adversely affected by one or more user[s] of ground water rights of later priority, or whenever any person owning or having the right to use a ground water right believes that the use of such right is being adversely affected by another's use of any other water right which is of later priority, such person, as claimant, may make a written statement under oath of such claim to the director of the department of water resources.

Such statement shall include:

1. The name and post-office address of the claimant.
2. A description of the water right claimed by the claimant, with amount of water, date of priority, mode of acquisition, and place of use of said right, if said right is for irrigation, a legal description of the lands to which such right is appurtenant.
3. A similar description of the respondent's water right so far as is known to the claimant.
4. A detailed statement in concise language of the facts upon which the claimant founds his belief that the use of his right is being adversely affected.

Upon receipt of such statement, if the director of the department of water resources deems the statement sufficient and meets the above requirements, the director of the department of water resources shall issue a notice setting the matter for hearing before a local ground water board, constituted and formed as in this act provided. The person or persons against whom such claim is directed and who are asserted to be interfering with the claimant's rights shall in such proceedings be known as respondents. The notice shall be returned to the claimant who shall cause the same to be served upon the respondent together with a copy of the statement. Such service shall be made at least five (5) days before the time fixed for hearing and in the same manner that service of summons is made in a civil action. Proof of service of notice shall be made to the director of the department of water resources by the claimant at least two (2) days before the hearing. [1951, ch. 200, § 16, as added by 1953, ch. 182, § 8, p. 277.]

Compiler's notes. The bracketed letter "s" in the first paragraph was inserted by the compiler.

The name of the director of the department of water administration (formerly the state reclamation engineer) has been changed to

the director of the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

Sec. to sec. ref. This section is referred to in § 42-237d.

42-237c. Hearing and order. — Hearing on the statement and any answer filed by the respondent shall be had in the county for which such local ground water board was appointed. The hearing shall be conducted before the board under reasonable rules and regulations of procedure prescribed by the director of the department of water resources. All parties to the hearing as well as the board itself shall have the right to subpoena witnesses who shall be sworn by the board and testify under oath at the hearing. All parties to the hearing shall be entitled to be heard in person or by attorney. Upon such hearing the board shall have authority to determine the existence and nature of the respective water rights claimed by the parties and whether the use of the junior right affects, contrary to the declared policy of this act, the use of the senior right. If the board finds that the use of any junior right or rights so affect the use of senior rights, it may order the holders of the junior right or rights to cease using their right during such period or periods as the board may determine and may provide such cessation shall be either in whole or in part or under such conditions for the repayment of water to senior right holders as the board may determine. Any person violating such an order made hereunder shall be guilty of a misdemeanor. [1951, ch. 200, § 17, as added by 1953, ch. 182, § 8, p. 277.]

Compiler's notes. The name of the director of the department of water administration (formerly the state reclamation engineer) has been changed to the director of the department of water resources on the authority of

S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

Cited in: *Stevenson v. Steele*, 93 Idaho 4, 453 P.2d 819 (1969).

42-237d. Local ground water boards. — Whenever a written statement of claim as provided in section 42-237b hereof is filed with the director of the department of water resources, if the statement of the claimant is deemed sufficient by the director of the department of water resources and meets the requirements of section 42-237b, the said director of the department of water resources shall forthwith proceed to form a local ground water board for the purpose of hearing such claim. The said local ground water board shall consist of the director of the department of water resources, and a person who is a qualified engineer or geologist, appointed by the district judge of the judicial district which includes the county in which the well of respondent, or one of the respondents if there be more than one, is located, and a third member to be appointed by the other two, who shall be a resident irrigation farmer of the county in which the well of respondent, or one of the respondents if there be more than one, is located. None of such members shall be persons owning or claiming water right which may be affected by such claim, nor members of the board of directors of any irrigation district or canal company owning or claiming water rights affected by such claims. No employee of the state of Idaho other than said director of the department of water resources is eligible for appointment to a ground water board. Members of the board shall hold office until the board has finally disposed of the claim which it was appointed to hear. Such members shall serve without pay except that members other than the director of the department of water resources shall receive per diem of \$25.00 together with reimbursement of expenses actually incurred during the time actually spent in the perfor-

mance of official duties, such per diem and expenses to be paid from the ground water administration fund hereinafter created. Whenever such a local ground water board is needed to be formed in any county, the director of the department of water resources shall give notice of that fact to the district judge of the judicial district which includes the county in which the well of respondents, or one of the respondents if there be more than one, is located, and thereupon such judge shall appoint a person to be a member of such board. Upon qualification by such member, the third member shall be selected. The director of the department of water resources shall be the chairman of the board and custodian of all its records. He may be represented at any board meeting by a duly appointed, qualified and acting deputy director of the department of water resources. [1951, ch. 200, § 18, as added by 1953, ch. 182, § 8, p. 277.]

Compiler's notes. The name of the director of the department of water administration (formerly the state reclamation engineer) has been changed to the director of the depart-

ment of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

42-237e. Appeals from actions of the director of the department of water resources. — Any person dissatisfied with any decision, determination, order or action of the director of the department of water resources, watermaster, or of any local ground water board made pursuant to this act may, if a hearing on the matter already has been held, seek judicial review pursuant to section 42-1701A(4), Idaho Code. If a hearing has not been held, any person aggrieved by the action of the director or watermaster may contest such action pursuant to section 42-1701A(3), Idaho Code. [1951, ch. 200, § 19, as added by 1953, ch. 182, § 8, p. 277; am. 1980, ch. 238, § 8, p. 526.]

Compiler's notes. Sections 7 and 9 of S.L. 1980, ch. 238 are compiled as §§ 42-224 (now repealed) and 42-238, respectively.

Sec. to sec. ref. This section is referred to in § 42-233a.

ANALYSIS

Appeals to district court.
Issues on appeal.
Motion for rehearing.

Appeals to District Court.

Appeals to district courts from water board decisions must be tried de novo requiring case be remanded to district court where a plaintiff's appeal for summary judgment was dismissed. *Hart v. Stewart*, 95 Idaho 781, 519 P.2d 1171 (1974).

Before a district court can obtain jurisdiction to hear an appeal from the decision of the director of the department of water resources, it must be shown that the appeal was properly perfected by serving notice on the director. *Briggs v. Golden Valley Land & Cattle Co.*, 97 Idaho 427, 546 P.2d 382 (1976).

Issues on Appeal.

Where defendants claimed that issue of effect of their pumping on the ground water supply should not have been considered on their appeal to the district court of order following hearing before department of reclamation (department of water resources), because issue had been considered in a previous hearing before ground water board which was not appealed, claim was rejected because defendants had themselves raised the issue in their notice of appeal to district court and pretrial order of district court judge appeared to indicate that the extent of the ground water supply and the effects of pumping upon that supply were issues to be tried. *Stevenson v. Steele*, 93 Idaho 4, 453 P.2d 819 (1969).

Motion for Rehearing.

Although the rules of the department of water resources do not so provide, the court held that a motion for rehearing operated to toll the sixty-day time limit for appeals from water board decisions. *Hart v. Stewart*, 95 Idaho 781, 519 P.2d 1171 (1974).

42-237f. Adjudication of water right. — The provisions of §§ 42-1401 — 42-1405, relative to adjudication of water rights shall be applicable to all water rights acquired under this act. [1951, ch. 200, § 20, as added by 1953, ch. 182, § 8, p. 277.]

42-237g. Penalties. — Any person violating any provision of this chapter, or any decision of the director of the department of water resources, or order of a local ground water board, shall be guilty of a misdemeanor and any continuing violation shall constitute a separate offense for each day during which such violation occurs, but nothing in this section or in the pendency or completion of any criminal action for enforcement hereof shall be construed to prevent the institution of any administrative enforcement action or civil action for injunctive or other relief for the enforcement of this chapter or the protection of rights to the lawful use of water. [1951, ch. 200, § 15, as added by 1953, ch. 182, § 8, p. 277; am. 1963, ch. 216, § 3, p. 623; am. 1987, ch. 347, § 6, p. 741; am. 1994, ch. 450, § 4, p. 1434.]

Compiler's notes. Section 5 of S.L. 1987, ch. 347 is compiled as § 42-237a.

Sections 3 and 5 of S.L. 1994, ch. 450 are compiled as §§ 42-237a and 42-351, respectively.

Section 5 of S.L. 1963, ch. 216 declared an emergency. Approved March 25, 1963.

Section 6 of S.L. 1994, ch. 450 declared an emergency and provided that this act shall apply to all calls for distribution of water pending at the time of passage and approval. Approved April 11, 1994.

Sec. to sec. ref. This section is referred to in § 42-238a.

42-237h. Duties of the attorney general. — It shall be the duty of the attorney general to institute and prosecute civil enforcement actions or injunctive actions as provided in this chapter and to prosecute actions or proceedings for the enforcement of any criminal provisions of this chapter. The attorney general may delegate the authority and duty under this section to prosecute criminal actions to the prosecuting attorney of the county in which such a criminal action may arise. [I.C., § 42-237h, as added by 1987, ch. 347, § 7, p. 741.]

42-238. Well drillers' licenses and operator permits. — (1) The director of the department of water resources is hereby vested with the duties relating to the licensing of well drillers and operators of well drilling equipment as provided for in this act so as to protect the ground water resources against waste and contamination. Qualifications for well drillers and operators of well drilling equipment shall be adopted by rule of the water resource board.

(2) It shall be unlawful for any person to drill a well in Idaho, including wells excepted under sections 42-227 and 42-228, Idaho Code, without first complying with the provisions of this chapter. It shall be unlawful for any person to abandon a well in Idaho without first obtaining a driller's license or receiving a waiver of the license requirement from the director of the department of water resources. Authorization is required from the director prior to the abandonment and the person abandoning the well shall submit to the director a report describing the abandonment.

(3) For the purpose of this act, a "person" shall be defined as any individual who drills or abandons any well for himself or another in this

state; it shall also be defined as any firm, copartnership, corporation or association which drills or abandons, or contracts to drill or abandon any well for hire or otherwise in this state.

(4) A driller's license shall be obtained by filing with the director an application in writing on a form provided by the director accompanied by a two hundred dollar (\$200) application fee.

(5) The director shall require that an applicant for a driller's license successfully pass a written or oral examination, and be required to submit references and other detailed information describing past drilling experience to allow the director to determine if the applicant is qualified to drill wells in the state.

(6) The water resource board shall adopt rules for licensing and renewal of licenses of well drillers in compliance with chapter 52, title 67, Idaho Code. The board is authorized to adopt rules on professional responsibility and continuing education requirements, not to exceed twenty (20) hours during each licensing period. Notwithstanding other provisions of this chapter, the director may refuse to issue or renew a driller's license permanently or for a designated period of time if the driller has previously constructed wells improperly or constructed a well without a valid driller's license. The rules may also allow for the director to issue a license with limitations on the type, size or depth of wells the applicant is authorized to construct. A copy of the proposed rules for licensing of well drillers shall be furnished to each well driller holding a current license at the time such proposed rules are promulgated or modified. The rules shall provide for the consideration of such factors as the applicant's:

- (a) Knowledge of Idaho water laws and the rules of the water resource board in connection with the drilling of wells including proper well construction standards and procedures;
- (b) Knowledge of the various types of drilling tools and their use;
- (c) General knowledge of underground geology and ground water hydrology and their relation to well construction;
- (d) Ownership or access to equipment capable of adequately constructing a well;
- (e) Knowledge of types of well casing and their use;
- (f) Knowledge of special well drilling problems and their solution, including additional requirements for licensing for drillers who construct wells in areas of drilling concern or for the production of low temperature geothermal resources as defined in section 42-233, Idaho Code, and for the production of geothermal resources as provided in chapter 40, title 42, Idaho Code;
- (g) Previous drilling experience; and
- (h) History of compliance with well drilling laws and rules.

(7) If it is determined that the applicant for a driller's license is not qualified, the director shall deny the application. If it is determined that the applicant is qualified, a license shall be issued upon the filing with the director of a surety bond or cash bond in the penal sum of not less than five thousand dollars (\$5,000), or more than twenty thousand dollars (\$20,000) as determined by the director based on the applicant's history of compliance

with well drilling laws and rules, the size and depth of the wells the applicant proposes to drill, the complexity of the wells, the resource to be recovered, the area of operation of the applicant, and other relevant factors the director determines are in the public interest. The surety or cash bond shall be conditioned upon the proper compliance with the provisions of this chapter, chapter 40, title 42, Idaho Code, and rules promulgated pursuant thereto. Such bond shall be made payable to the director.

(8) Employees of drilling firms, copartnerships, corporations or associations are authorized to operate drilling equipment for the driller after obtaining an operator's permit from the director. Such employees shall be designated as operators.

(a) A driller is responsible for adequate supervision of the operators during the construction of each well. A driller shall be responsible for the work of the operators employed by the driller.

(b) An operator shall only operate drilling equipment for the driller listed on the operator's permit.

(c) An operator's permit shall be obtained by filing with the director an application in writing on a form provided by the director accompanied by a twenty-five dollar (\$25.00) application fee.

(d) The applicant for an operator's permit shall successfully complete a written or oral examination.

(e) The water resource board shall adopt rules for the issuance, revocation and renewal of an operator's permit in accordance with chapter 52, title 67, Idaho Code. The board is also authorized to adopt rules on professional responsibility and continuing education requirements not to exceed twenty (20) hours during each permitting period. The rules shall consider such factors as:

(i) Knowledge of Idaho water laws and the rules of the water resource board in connection with the drilling of wells;

(ii) Demonstrated previous compliance with well drilling laws and rules including well construction standards; and

(iii) General understanding of well drilling equipment, well construction techniques, basic geology and map reading.

(9) Driller's licenses and operator's permits issued under this section shall expire on March 31 in the second year after issuance or upon revocation of the license by the director as provided for in this act. The driller's license can be renewed effective April 1 of every other year upon written application on forms provided by the director and the filing of a one hundred dollar (\$100) renewal fee plus a fifteen dollar (\$15.00) renewal fee for each operator employed by the licensed driller. Drillers renewing licenses in 1997 shall be assessed a licensing fee prorated monthly based upon the annual fee schedule. Thereafter, driller licenses and operator permits will be renewed upon expiration for a two (2) year period. Documents demonstrating compliance with the continuing education requirements of the rules shall be submitted to the director along with other license and permit renewal documents. The renewal request must be accompanied by a new bond or evidence that the previous bond is still in effect. The renewal may then be granted by the director if he determines that the driller or operator

has complied with the rules promulgated pursuant to this act. The fees collected for the licensing of well drillers and permitting of operators are nonrefundable and shall be deposited in the water administration fund with the state treasurer with other fees collected by the director.

(10) The licensed driller and permitted operators shall have a card on hand, provided by the director to indicate that the driller or operator is presently licensed or permitted at all times when he is operating the drilling equipment. The director may also require other identification to be posted on the drilling equipment as he deems helpful in the administration of this act.

(11) Well driller's report. In order to enable a comprehensive survey of the extent and occurrence of the state's ground water resource, every well driller is hereby required to keep available for inspection at the well site a daily well log and pertinent data concerning each well, and its construction or abandonment, that is constructed or abandoned under the driller's direction in Idaho, including wells excepted under sections 42-227 and 42-228, Idaho Code, and complete a report on forms furnished by the director. These reports shall be properly prepared and signed by the driller and deposited with the director within thirty (30) days following the completion of the well. When the driller signs the report, the driller shall attest that all information on the report is accurate to the best of the driller's knowledge and that the driller has met all minimum well construction standards, low temperature geothermal resource well construction standards, geothermal resource well construction standards and area of drilling concern standards as adopted by the water resource board. The reports shall become a permanent record in the office of the director for hydrologic and geologic analysis and research, and shall be available for public use. The report shall include such data as the director deems necessary to provide the information that will be valuable for future reference and study.

(12) Well construction standards. The water resource board shall adopt minimum standards for new well construction, modification and abandonment of existing wells, low temperature geothermal resource well construction and geothermal well construction in this state under the provisions of chapter 52, title 67, Idaho Code. Such standards shall require each well to be so constructed as to protect the ground water of the state from waste and contamination and may include additional requirements for wells drilled in "areas of drilling concern" as designated in accordance with subsection (15) of this section. Every licensed well driller will be furnished a copy of the adopted standards by the director, and will be required to construct or abandon each well in compliance with the adopted standards.

(13) Penalties for violation. Drilling of a well without first obtaining a license as required in this section shall be a criminal misdemeanor, and the employees of the department of water resources are hereby empowered to issue Idaho uniform citations, as provided by the rules of the court for magistrate's division of the district court, to any person who drills a well without first obtaining the required license. When the director of the department of water resources determines that any person is in substantial violation of any provision of this section or any rule, permit, condition of

approval or order issued or promulgated pursuant to this section, the director may commence an administrative enforcement action by issuing a written notice of violation in accordance with the provisions of section 42-1701B, Idaho Code. Failure of the driller to comply with the provisions of section 42-238(11), Idaho Code, will allow the director to proceed to collect the necessary data on the well or wells in any manner available to him, and the cost of this data collection may be charged against the driller's bond in the amount of the expenses incurred up to the total amount of the bond.

(a) Failure of the driller to comply with the provisions of section 42-238(11), Idaho Code, is also cause for the director to revoke an active license, or refuse to renew a license, until such time as the well driller's report or reports are properly completed and on file in the office of the director. If it is found that a driller has intentionally submitted inaccurate or false information in the signed well driller's report as provided in subsection (11) of this section, or has failed to file a report within the time frame required, the driller shall be liable for a civil penalty as provided in section 42-1701B, Idaho Code. In addition, this shall be cause for the director to suspend an active license for a period not in excess of one (1) year or to not renew a license.

(b) Failure of the driller to comply with the provisions of section 42-238(12), Idaho Code, will allow the director to proceed to repair, reconstruct or abandon a well so that it complies with the adopted minimum standards of well construction and abandonment, and the costs of this work may be charged against the driller's bond in the amount of the expenses incurred up to the total amount of the bond.

(c) Failure of the driller to comply with the provisions of section 42-238(12), Idaho Code, is also cause for the director to revoke an active license or refuse to renew a license until such time as the well driller has repaired or reconstructed the well or wells so that they meet the adopted minimum standards. Any driller, well owner or well pump installer causing a well to be altered or modified so as to not meet the construction standards provided for under this section, shall be deemed to have violated the provisions of this section and shall be subject to the enforcement provisions of section 42-1701B, Idaho Code. The director may also require that the well driller present evidence to show that he and his equipment are now capable of constructing a well in a proper manner, before the license is renewed.

(14) Appeals. Refusal to issue, refusal to renew, or revocation of a well driller's license or operator's permit by the director shall be cause for the well driller to seek a public hearing before the water resource board. No formal petition shall be required from the affected driller or operator, but a simple statement, in writing, requesting a hearing shall be sufficient. The board shall notify the driller or operator, and the director, of the date set for the hearing, which shall be at least fifteen (15) days after the notice is sent by certified mail to the well driller or operator at his address of record with the department. A certified transcript of the proceedings and the evidence received at such hearing shall be maintained by the board. The board shall affirm, modify or reject the director's decision, and make its decision in the

form of an order to the director. The hearing shall be conducted in accordance with chapter 52, title 67, Idaho Code, and rules of practice and procedure adopted by the water resource board. Any party to the hearing may seek judicial review of any final order of the water resource board pursuant to chapter 52, title 67, Idaho Code.

(15) Drilling in a designated “area of drilling concern.” The director of the department of water resources may designate as he determines necessary, “areas of drilling concern” on an aquifer by aquifer basis within which drillers must comply with the additional requirements of this section. The director shall designate “areas of drilling concern” to protect public health and to prevent waste or contamination of ground or surface water because of factors such as aquifer pressure, vertical depth of the aquifer, warm or hot ground water, or contaminated ground or surface waters. It is unlawful for any person not meeting the requirements of this subsection to drill a well for any purpose in a designated “area of drilling concern.” Any person drilling a new well or deepening or modifying an existing well for any purpose in an “area of drilling concern” as designated by the director as herein provided shall comply with the following additional requirements:

- (a) Additional bonding requirements, as determined by the director, to insure that the well is constructed or abandoned in compliance with the adopted standards for well construction.
- (b) Additional experience and knowledge in drilling wells encountering warm water or pressurized aquifers as required by rules adopted by the water resource board.
- (c) Document that specialized equipment needed to drill wells in “areas of drilling concern,” as determined by the director, is or will be available to the driller.
- (d) Provide a notice of intent to drill, deepen or modify a well, submit plans and specifications for the well and a description of the drilling methods that will be used, as required by the director, and receive the written approval of the director before commencing to drill, deepen, or modify any well in a designated “area of drilling concern.”

Prior to designating an “area of drilling concern,” the director shall conduct a public hearing in or near the area to determine the public interest concerning the designation. Notice of the hearing shall be published in two (2) consecutive weekly issues of a newspaper of general circulation in the area prior to the date set for hearing.

In the event an area has been designated as an “area of drilling concern” and the director of the department of water resources desires to remove such designation or modify the boundaries thereof, he shall likewise conduct a public hearing following similar publication of notice prior to taking such action. [I.C., § 42-238, as reen. by 1967, ch. 339, § 1, p. 977; am. 1970, ch. 187, § 4, p. 541; am. 1971, ch. 149, § 2, p. 730; am. 1974, ch. 20, § 1, p. 533; am. 1980, ch. 238, § 9, p. 526; am. 1987, ch. 347, § 8, p. 741; am. 1990, ch. 366, § 1, p. 999; am. 1993, ch. 216, § 33, p. 587; am. 1997, ch. 361, § 1, p. 1062; am. 1998, ch. 173, § 2, p. 595.]

Compiler's notes. S.L. 1967, ch. 339 repealed and reenacted I.C., § 42-238 which prior thereto comprised S.L. 1951, ch. 200, § 13(22), p. 423; 1953, ch. 182, § 9, p. 277.

Section 8 of S.L. 1980, ch. 238 is compiled as § 42-237e, § 10 of S.L. 1980, ch. 238 was repealed, and § 11 of S.L. 1980, ch. 238 is compiled as § 42-304.

Section 9 of S.L. 1987, ch. 347 is compiled as § 42-238b (now repealed).

Sections 32 and 34 of S.L. 1993, ch. 216 are compiled as §§ 42-203D and 42-1605, respectively.

Section 2 of S.L. 1997, ch. 361 is compiled as § 42-238b (now repealed).

Section 1 of S.L. 1998, ch. 173 is compiled as § 42-235 and § 3 contained a repeal.

Section 3 of S.L. 1971, ch. 149 declared an emergency. Approved March 20, 1971.

Sec. to sec. ref. This section is referred to in §§ 42-227, 42-228, 42-1607, 42-3902, 42-3912 and 42-3913.

Cited in: Jones v. State Bd. of Medicine, 97 Idaho 859, 555 P.2d 399 (1976); Parker v. Wallentine, 103 Idaho 506, 650 P.2d 648 (1982).

Construction Standards.

Subsection (4) mandating the establishment of minimum well construction standards, when read in pari materia with such standards, manifests an intention to prevent contamination of ground water from an unsealed well and thereby creates a mandatory duty upon a driller to cap and seal a finished well. Craig H. Hisaw, Inc. v. Bishop, 95 Idaho 145, 504 P.2d 818 (1972).

42-238a. Water administration account. — There is hereby created in the state treasury a special account known as the water administration account. All fees and other moneys collected by the director of the department of water resources pursuant to sections 42-221, 42-237g, 42-238, 42-1713, 42-3905, 42-4003, and 42-4011, Idaho Code, shall be deposited in the water administration account. All moneys deposited in the water administration account are hereby appropriated to the director for the purpose of the administration of the provisions of title 42, Idaho Code, and no moneys received in the account shall be disbursed by the state treasurer unless the voucher for such disbursement contains the certificate of the director that such voucher is for an expense incurred in the administration of the provisions of title 42, Idaho Code. [1951, ch. 200, § 23, as added by 1953, ch. 182, § 10, p. 277; am. 1968 (2nd E. S.), ch. 25, § 2, p. 47; am. 1974, ch. 20, § 2, p. 533; am. 1987, ch. 158, § 3, p. 308.]

Compiler's notes. Section 3 of S.L. 1968 (2nd E.S.), ch. 25 provided for the transfer of remaining moneys to the water administration fund.

Section 4 of S.L. 1968 (2nd E.S.), ch. 25 provided for the transfer of the appropriation to the state reclamation engineer (director of the department of water resources).

Section 1 of S.L. 1968 (2nd E.S.), ch. 25 is compiled herein as § 42-221.

Section 3 of S.L. 1974, ch. 20 was repealed,

§ 4 of S.L. 1974, ch. 20 is compiled as § 42-1701.

Section 2 of S.L. 1987, ch. 158 is compiled as § 42-1417.

Section 5 of S.L. 1968 (2nd E.S.), ch. 25 declared an emergency and provided that this act shall be in effect upon its passage retroactively to July 1, 1967.

Sec. to sec. ref. This section is referred to in §§ 42-701, 42-1713, 42-3905, 42-4003, and 42-4011.

42-238b. Enforcement procedure. [Repealed.]

Compiler's notes. This section, which comprised I.C., § 42-238b, as added by 1987, ch. 347, § 9, p. 741; am. 1996, ch. 267, § 2, p.

868; am. 1997, ch. 361, § 2, p. 1062, was repealed by S.L. 1998, ch. 173, § 3, effective July 1, 1998.

42-239. Interpretation. — The executive and judicial departments of the state shall construe the provisions of this act, wherever possible in harmony with the provisions of title 42, Idaho Code, as amended; and

nothing herein shall be construed contrary to or in conflict with the provisions of article 15 of the Constitution; and except where otherwise provided in this act, the provisions of said title 42, Idaho Code, as amended, shall continue to govern ground water rights in this state. [1951, ch. 200, § 15(25), p. 423; am. 1953, ch. 182, § 11, p. 277.]

Compiler's notes. Section 27 of S.L. 1951, ch. 200, as added by 1953, ch. 182, § 12 read: "All proceedings commenced prior to the effective date of this act for the acquisition of rights to the use of ground water may be so commenced and such rights may be acquired and perfected under chapter 2 of title 42, Idaho Code, unaffected by this act or by chapter 200, Laws of 1951."

As amended by S.L. 1953, ch. 182, § 11, this section, originally numbered 15, was amended to become § 25 of S.L. 1951, ch. 200.

Section 16 (amended by S.L. 1953, ch. 182

to become § 26) of S.L. 1951, ch. 200, read: "If any part or parts of this act shall be adjudged by the courts to be unconstitutional or invalid, the same shall not affect the validity of any part or parts thereof which can be given effect without the part or parts adjudged to be unconstitutional or invalid. The legislature hereby declares that it would have passed the remaining parts of this act if it had been known that such other part or parts thereof would be declared unconstitutional or invalid."

42-240. Application for right to exchange water — Filing fee — Notice — Protest — Hearing — Approval or denial — Appeal. —

(1) Any person holding a right for the use of surface water may make application to the director of the department of water resources to exchange water authorized to be diverted under the right with the same or a different source, or with water authorized to be diverted under one (1) or more other rights from the same source or another surface water source. If the application proposes an exchange with water under another water right, the application shall be accompanied by an agreement in writing subscribed by the person proposing the exchange and each person or organization owning rights to water with whom the exchange is proposed to be made.

(2) The application shall be upon forms furnished by the department and shall contain such information as shall enable the director to determine the nature of the proposed exchange, and shall be accompanied by the statutory filing fee provided under section 42-221, Idaho Code, for an application to change a vested water right.

(3) Upon receipt of the application, it shall be the duty of the director to examine the same and, if otherwise proper, to cause notice of the proposed exchange to be published in the same manner as applications under section 42-203A, Idaho Code. The notice shall fully describe the nature of the proposed exchange of water and shall advise that anyone who wishes to protest shall file notice of protest in accordance with the provisions of section 42-203A, Idaho Code.

(4) Upon the receipt of any protest it shall be the duty of the director to investigate the same and to conduct a hearing thereon. The director shall also advise the watermaster of the district in which the exchange is proposed, if a district exists, and the watermaster shall notify the director of the watermaster's recommendations on the application. The director shall not take final action on the application or exchange until the director has received the recommendations of the watermaster, including recommended conditions necessary for the exchange of water to be properly administered and regulated.

(5) The director shall examine all the evidence and available information and shall approve the exchange in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the exchange does not constitute an enlargement in use of the original right or rights, the exchange is consistent with the conservation of water resources within the state of Idaho, the exchange is in the local public interest as defined in section 42-202B, Idaho Code, and the exchange will not adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates. Unless otherwise provided in a written agreement between the applicant and other right holders, the director shall condition approval of an exchange so that the exchange will not be operative during times when water is not available to satisfy the exchange, and that during these times the right to use water automatically reverts to the place of use authorized under the water rights. A copy of the approved application for exchange shall be provided to the applicant and the watermaster, and the applicant shall be authorized upon receipt thereof to make the exchange in accordance with the conditions set forth by the director. Should an approved exchange thereafter be discontinued, the applicant or the applicant's successor in interest must so notify the director and the district watermaster.

(6) In the absence of a contrary agreement by the parties to an exchange, when the director has approved a right to exchange storage water for the natural flow of a stream or other water supply, the storage water shall be delivered in preference to any exchange rights subsequently approved using the same storage water right.

(7) Any person or persons feeling themselves aggrieved by a final order or final action of the director under this section may, if a protest was filed and hearing held thereon, seek judicial review pursuant to section 42-1701A(4), Idaho Code. If no protest was filed and no hearing held, the applicant may request a hearing pursuant to section 42-1701A(3), Idaho Code, for the purpose of contesting the action of the director and may seek judicial review of the final order of the director following the hearing pursuant to section 42-1701A(4), Idaho Code. [I.C., § 42-240, as added by 1998, ch. 424, § 2, p. 1339; am. 2003, ch. 298, § 4, p. 806.]

Compiler's notes. Former section 42-240, which comprised I.C., § 42-240, as added by 1969, ch. 300, § 2, p. 900; am. 1974, ch. 20, § 3, p. 533; am. 1980, ch. 238, § 10, p. 526, was repealed by S.L. 1986, ch. 313, § 6.

Section 1 of S.L. 1998, ch. 424 is compiled as § 42-105.

Sections 3 and 5 of S.L. 2003, ch. 298, are compiled as § 42-222 and 42-1763, respectively.

Sec. to sec. ref. This section is referred to in § 42-105 and 42-222A.

42-241. Purpose. — The future growth and development of the state is dependent upon effective management and efficient use of the state's water resources. The purpose of this act is to provide adequate records of water right claims for efficient administration and to aid in the proper planning for the future use of the state's water resources. [I.C., § 42-241, as added by 1978, ch. 345, § 4, p. 884.]

Compiler's notes. The words "this act" refer to S.L. 1978, ch. 345 compiled herein as §§ 42-241 — 42-247, 42-1501 — 42-1505, 42-1736B, 42-1756. Section 3 of S.L. 1978, ch. 345 contained a repeal and § 2 is compiled as § 42-1736B.

42-242. Definitions. — Whenever used in this act, the terms:

(1) "Person" shall mean an individual, partnership, association, public or private corporation, city or other municipality, county, state agency, or the state of Idaho, and the United States of America when claiming water rights established under the laws of the state of Idaho.

(2) "Notice in writing" means a notice substantially in the following form:

WATER RIGHTS NOTICE

Every person, including but not limited to an individual, partnership, association, public or private corporation, city or other municipality, county, state agency or the state of Idaho, and the United States of America, when claiming water rights established under the laws of the state of Idaho, is hereby notified that all water rights or claimed water rights relating to the withdrawal or diversion of public surface or ground waters of the state for uses other than domestic purposes, except those water rights based upon authority of permit or license issued by the department of water resources or one of its predecessors or water rights which have previously been adjudicated by a court having jurisdiction of such matters, must be registered with the department of water resources, Boise, Idaho, not later than June 30, 1983. FAILURE TO REGISTER AS REQUIRED BY LAW WILL BE GROUNDS FOR INSTITUTING AN ACTION FOR FORFEITURE OF THE CLAIMED WATER RIGHT. For further information contact the Department of Water Resources, Boise, Idaho, for a copy of the act and an explanation thereof:

[I.C., § 42-242, as added by 1978, ch. 345, § 5, p. 884; am. 1990, ch. 319, § 4, p. 870.]

Compiler's notes. For words "this act" see compiler's notes, § 42-241. **Sec. to sec. ref.** This section is referred to in §§ 42-111, 42-247.

Section 3 of S.L. 1990, ch. 319 is compiled as § 42-230.

42-243. Filing of claims of rights established by diversion and use — Form and content of claim. — In order to allow for the recording of historic uses of the waters of this state, any person using or claiming rights to the use of water for uses other than domestic purposes, which have heretofore been established by diversion and application to a beneficial use shall file a claim of such right with the department of water resources not later than June 30, 1983, or if mailed, shall be postmarked not later than June 30, 1983. Such claim shall be in affidavit form on forms furnished by the department of water resources and shall set forth:

- a. The name and post-office address of the claimant.
- b. The quantity of water claimed to have been used.
- c. The source of the water supply.
- d. The location of the point or points of diversion.

e. The nature of the use and the period during each year when the water is used for such purposes.

f. The priority of the right claimed which shall be determined by the date when the water was first applied to a beneficial use provided there has been no period of abandonment or nonuse or forfeiture of the water right since that date.

g. If water is claimed for irrigation, the legal description of the lands irrigated.

h. Such other information as shall be required by the blank form furnished by the department.

Such claim may be accompanied by maps showing the place of use, affidavits of witnesses familiar with the uses claimed, measurements of the water diverted and used, and such other information as the claimant may wish to submit.

If the claim is filed with the department of water resources later than June 30, 1983, or if it is mailed to the department of water resources and the postmark is later than June 30, 1983, the claim shall be classified as follows:

a. If the only use identified on the claim is domestic purposes, then the claim will be considered to be filed in a timely manner.

b. If the use(s) identified on the claim includes other than domestic purposes, then the claim shall be considered to be a late claim, with a unique filing fee as set forth in section 42-221, Idaho Code.

This section shall not apply to any water rights which are based on the authority of a permit or license issued by the department of water resources or one of its predecessors or water rights which have previously been adjudicated by a court having jurisdiction of such matters. [I.C., § 42-225a, as added by 1967, ch. 338, § 2, p. 974; I.C., § 42-243, as changed and amended by 1978, ch. 345, § 6, p. 884; am. 1983, ch. 61, § 1, p. 141; am. 1985, ch. 226, § 2, p. 540; am. 1990, ch. 319, § 5, p. 870; am. 1998, ch. 79, § 2, p. 282.]

Compiler's notes. This section was formerly compiled as § 42-225a and was redesignated as § 42-243 by § 6 of S.L. 1978, ch. 345.

Section 2 of S.L. 1983, ch. 61 is compiled as § 42-221.

Section 1 of S.L. 1985, ch. 226 is compiled as § 42-221.

Section 6 of S.L. 1990, ch. 319 is compiled as § 42-1401A.

Section 1 of S.L. 1998, ch. 79 is compiled as § 42-221.

Sec. to sec. ref. This section is referred to in §§ 42-111, 42-113, 42-221, 42-245, 42-246 and 42-247.

Cited in: Fremont-Madison Irrigation Dist. & Mitigation Group v. Idaho Ground Water Appropriators, Inc., 129 Idaho 454, 926 P.2d 1301 (1996).

42-244. Recording of claims by department — Corrections. —

Upon receipt of any claim submitted under this chapter, together with the statutory filing fee as set forth in section 42-221, Idaho Code, it shall be the duty of the department of water resources to file and to maintain a record of such claim, which shall be available for public inspection during all normal office hours. The department shall also cause a notice to be published once a week for two (2) consecutive weeks in a newspaper published and of general circulation in the county where the water is claimed to be diverted, if there is such a newspaper, otherwise in a newspaper of general circulation

in the county, which said notice shall set forth such information as shall apprise the public of the nature of the claim which has been filed. At any time after the filing of a claim under the previous section, any person who disagrees that a right has been established as set forth in said claim may file an exception thereto in duplicate, in affidavit form, accompanied by such proof as said person deems appropriate. An exception filed shall be made a part of the file of the claim in the department of water resources and shall be considered the same as other evidence in said file. A copy of an exception filed shall be forwarded to the claimant by the department of water resources. Such claims may be corrected by the claimant only by filing of an amended claim in the same form as the original, which shall be recorded and numbered by the department the same as the original, and for which no additional filing fees shall be required. [I.C., § 42-225b, as added by 1967, ch. 338, § 3, p. 974; I.C., § 42-244, as changed and amended by 1978, ch. 345, § 7, p. 884.]

Compiler's notes. This section was formerly compiled as § 42-225b and was redesignated as § 42-244 by § 6 of S.L. 1978, ch. 345.

42-245. Failure to file claim waives and relinquishes right. — Any person claiming the right to divert or withdraw and use waters of the state who fails to file a claim as provided in section 42-243, Idaho Code, shall be conclusively deemed to have waived and relinquished any right, title or interest in said right.

The provisions of this section shall not apply if a claim to the right is filed in a general water rights adjudication proceeding commenced prior to June 30, 1988, under the provisions of chapter 14, title 42, Idaho Code. [I.C., § 42-245, as added by 1978, ch. 345, § 8, p. 884; am. 1988, ch. 152, § 1, p. 272; am. 1994, ch. 63, § 1, p. 121.]

Cited in: Fremont-Madison Irrigation Water Appropriators, Inc., 129 Idaho 454, 926 Dist. & Mitigation Group v. Idaho Ground P2d 1301 (1996).

42-246. Filing of claim not deemed adjudication of right — Evidence. — The filing of a claim does not constitute an adjudication of any claim to the right to use of waters as between the water use claimant and the state, or as between one (1) or more water use claimants and another or others. A statement of claim filed pursuant to section 42-243, Idaho Code, shall be admissible in a general adjudication of water rights as evidence of the times of use and the quantity of water the claimant was withdrawing or diverting as of the year of the filing, if, but only if, the quantities of water in use and the time of use when a controversy is mooted are substantially in accord with the times of use and quantity of water claimed in the claim. A claim shall not otherwise be evidence of the priority of the claimed water right. [I.C., § 42-246, as added by 1978, ch. 345, § 9, p. 884.]

42-247. Notice of chapter provisions — How given — Requirements. — To ensure that all persons referred to in sections 42-242 and 42-243, Idaho Code, are notified of the provisions of this chapter, the

department of water resources is directed to give notice of the provisions of this chapter as follows:

(1) It shall cause a notice in writing to be placed in a prominent and conspicuous place in at least one (1) newspaper published and of general circulation in each county of the state, if there is such newspaper, otherwise in a newspaper of general circulation in the county, at least once each year for five (5) consecutive years.

(2) It shall cause a notice substantially the same as a notice in writing to be broadcast by each commercial television station operating in the state, and by at least one (1) commercial radio station operating from each county of the state having such a station, regularly, at six (6) month intervals for five (5) consecutive years.

(3) It shall cause a notice in writing to be placed in a prominent and conspicuous location in each county courthouse in the state.

(4) The county treasurer of each county shall enclose with each mailing of one (1) or more statements of taxes due issued in 1981 a copy of a notice in writing and a declaration that it shall be the duty of the recipient of the statement of taxes due to forward the notice to the beneficial owner of the property. A sufficient number of copies of the notice and declaration shall be supplied to each county treasurer by the director of the Department of Water Resources before the fifteenth day of January, 1981.

The director of the department may also in his discretion give notice in any other manner which will carry out the purposes of this section. [I.C., § 42-247, as added by 1978, ch. 345, § 10, p. 884; am. 1980, ch. 276, § 1, p. 720.]

Compiler's notes. Section 11 of S.L. 1978, ch. 345 is compiled as §§ 42-1501 — 42-1505.

Section 13 of S.L. 1978, ch. 345 read: "The provisions of this act are hereby declared to be severable and if any provision of this act or

the application of such provision to any person or circumstance is declared invalid or unconstitutional for any reason, such declaration shall not affect the validity of remaining portions of this act."

42-248. Notification of change in ownership of a water right or change of address of a water right owner — Notice of action affecting a water right. — (1) All persons owning or claiming ownership of a right to use the water of this state, whether the right is represented by decree of the court, by claim to a water right filed with the department of water resources or by permit or license issued by the director of the department of water resources, shall provide notice to the department of water resources of any change in ownership of any part of the water right or of any change in the owner's mailing address, either of which occurs after June 30, 2000. Notice shall be provided within one hundred twenty (120) days of any change using forms acceptable to the director. Any notice received by the department of water resources more than one hundred twenty (120) days after the change in ownership or mailing address has occurred shall be accompanied by a late filing fee. The late filing fee shall be one hundred dollars (\$100). The director may waive the late filing fee or a portion thereof for good cause.

(2) All persons owning or claiming ownership of a right to use the water of this state that is evidenced by a water right recorded with the department

of water resources prior to June 30, 2000, and for which a claim to water right, with current ownership and mailing address, is not on file with the department of water resources in the Snake River Basin Adjudication, Twin Falls Civil Case No. 39576, shall verify with the department that the ownership and mailing address information in the department's records is correct. Any incorrect ownership or mailing address shall be corrected by the owner or claimant of the water right by July 1, 2002, using forms acceptable to the director. Any mailing address or ownership corrections required by this subsection received by the department of water resources after July 1, 2002, shall be subject to the late filing fee described in subsection (1) of this section. The director may waive the late filing fee or a portion thereof for good cause.

(3) The director of the department of water resources will be deemed to have provided notice concerning any action by the director affecting a water right or claim if a notice of the action is mailed to the address and owner of the water right shown in the records of the department of water resources at the time of mailing the notice.

(4) Compliance with section 42-1409(6), Idaho Code, shall be deemed to be compliance with this section. The filing of an application to change a water right under the provisions of section 42-211 or section 42-222, Idaho Code, showing a change in address of the owner of the right, and accompanied by evidence documenting any change in ownership of the water right, shall be deemed compliance with this section.

(5) A filing fee of twenty-five dollars (\$25.00) per right shall accompany a notice of change of ownership of a water right, provided that the fee shall be one hundred dollars (\$100) per right if a request is made to change the department's records to reflect a division in the ownership of the water right resulting from a division in the ownership of the place of use under the water right. A notice of change of ownership of all or part of a water right shall be accompanied by evidence showing the basis for the change in ownership, and how the right is divided if the change divides the right among multiple owners.

(6) Any person having a security interest in a water right and desiring to be notified by the department regarding the filing of a change in ownership of that water right or of any proposed or final action to amend, transfer or otherwise modify that water right shall make the request upon a form provided by the department accompanied by a fee of twenty-five dollars (\$25.00) per right. The request shall be accompanied by evidence of the security interest including the expiration date of the security interest or other date defining the end of the period for which notification is requested. The request for notification shall expire at the end of the requested notification period unless renewed on a form provided by the department and accompanied by a renewal fee of twenty-five dollars (\$25.00) per right. The holder of a security interest requesting notification under this subsection shall provide notice to the department within sixty (60) days if the security interest is terminated prior to the end of the requested notification period. [I.C., § 42-248, as added by 1996, ch. 149, § 1, p. 487; am. 2000, ch. 313, § 1, p. 1052.]

42-250. Water conservation. — (1) The legislature finds that voluntary water conservation practices and projects can advance the policy of the state of Idaho to promote and encourage the conservation, development, augmentation and utilization of the water resources of this state. The legislature deems it appropriate, therefore, to encourage and support voluntary water conservation practices and projects.

(2) For purposes of this section, “water conservation practice” means any practice, improvement, project or management program, that results in the diversion of less than the authorized quantity of water while maintaining the full beneficial use(s) authorized by the water right. Water conservation practices include, but are not limited to, practices that result in reductions in consumptive use as defined in section 42-202B, Idaho Code, reductions in conveyance losses, and reductions in surface and seepage losses occurring at the place of use.

(3) For the purposes of this section, “conserved water” means the quantity of water that is no longer diverted as a result of a water conservation practice. Conserved water shall not include quantities of water not diverted due to decreases in beneficial use. [I.C., § 42-250, as added by 2003, ch. 166, § 2, p. 470.]

Compiler’s notes. Section 1 of S.L. 2003, ch. 166, is compiled as § 42-223.

Section 3 of S.L. 2003, ch. 166 declared an

emergency. Approved March 27, 2003.

Sec. to sec. ref. This section is referred to in § 42-223.

CHAPTER 3

APPROPRIATION OF WATER—CANCELLATION OF PERMITS

SECTION.

42-301. Permits contestable — When and by whom.

42-302. Petition for cancellation.

42-303. Notice of contest.

42-304. Hearing.

42-305 — 42-309. [Repealed.]

42-310. Record of cancellation.

42-311. Cancellation of permit — Grounds — Hearing — Permittee defined.

SECTION.

42-312 — 42-349. [Reserved.]

42-350. Revocation of license — Grounds — Hearing — Licensee defined.

42-351. Illegal diversion or use of water — Enforcement procedure — Injunctive relief.

42-352. [Repealed.]

42-301. Permits contestable — When and by whom. — If the holder of a permit to appropriate the public waters shall fail to comply with the requirements of his permit as to the commencing of work or the filing of bond thereunder, or the completion of one fifth ($\frac{1}{5}$) of the construction work within one half ($\frac{1}{2}$) the time allowed for the entire completion of such construction work, or shall fail to complete the entire construction work within the time specified in his permit, said permit may be canceled and voided by the department of water resources as hereinafter provided at the instance of any person or persons holding any permit for the diversion of water from the same stream, such permit postdating the permit which is sought to be canceled. [1909, p. 299, § 1; reen. C.L., § 3265a; C.S., § 5584; I.C.A., § 41-301.]

Compiler's notes. The name of the department of water administration (formerly the department of reclamation) has been changed to the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

The act forming the basis of this chapter repealed a prior law, 1903, p. 223, § 3, am. 1907, p. 532, § 1, reen. R.C., § 3256; C.S., § 5584.

Sec. to sec. ref. This chapter is referred to in §§ 42-1415 and 42-1421.

Cited in: *Shokal v. Dunn*, 109 Idaho 330, 707 P.2d 441 (1985).

ANALYSIS

Constitutionality.

Subsequent permit holders.

Time limits.

Constitutionality.

The act, of which this is the first section, does not vest in state engineer (department of

water resources) judicial power and is not in conflict with Const., Art. 2, § 1 or Art. 5, § 2. *Speer v. Stephenson*, 16 Idaho 707, 102 P. 365 (1909).

Subsequent Permit Holders.

Holders of subsequent permits, on a proper showing, were entitled to judgment in action at law canceling prior permits, when department of reclamation (department of water resources) refused to cancel such permits in a proceeding instituted before it. *Clark v. Hansen*, 35 Idaho 449, 206 P. 808 (1922).

Time Limits.

If work was not commenced within time specified in permit issued by state engineer (department of water resources), or if one fifth of the work was not completed within time therein limited, failure could not be cured by extending time for making proof of the beneficial use of water attempted to be appropriated. *Washington State Sugar Co. v. Goodrich*, 27 Idaho 26, 147 P. 1073 (1915).

42-302. Petition for cancellation. — Any person as above specified desiring the cancellation of a permit shall file with the department of water resources a petition clearly setting forth the facts upon which he bases his prayer for cancellation, plainly stating wherein the holder of the permit, which is sought to be canceled, has failed to comply with the law and with the requirements of his permit. [1909, p. 299, part of § 2; reen. C.L., § 3265b; C.S., § 5585; I.C.A., § 41-302.]

Compiler's notes. The name of the department of water administration (formerly the department of reclamation) has been changed to the department of water resources

on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

Sec. to sec. ref. This section is referred to in § 42-1737.

42-303. Notice of contest. — Upon receipt of such petition, the department of water resources shall issue a notice, naming the petitioner as contestant and all persons, shown by the records of the department of water resources to have any claim of title or interest in the permit sought to be canceled as contestees, and requiring all contestees to appear at the office of the department on a day to be specified therein, which day shall be not less than sixty (60) nor more than ninety (90) days from the date of the notice, and show cause, by affidavit, if any there be, why said permit should not be canceled. Such notice shall be sent by registered mail, addressed to every person named therein at his last known post-office address. [1909, p. 299, part of § 2; reen. C.L., § 3265c; C.S., § 5586; I.C.A., § 41-303.]

Compiler's notes. The name of the department of water administration (formerly the department of reclamation) has been changed to the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

Due Process.

This provision that permits shall be recorded in the office of the state engineer (department of water resources) and requiring notice of contest must be sent by registered mail to last known post-office address of

all persons shown by the records to have an interest is sufficient notice and due process. *Speer v. Stephenson*, 16 Idaho 707, 102 P. 365 (1909).

42-304. Hearing. — On the day set for the hearing the contestant and such contestees as have filed the affidavit hereinbefore required of them, shall file such affidavits in support of their respective allegations as they may desire, and the department of water resources may require such additional evidence and may make or cause to be made by an engineer whom the department may designate, such personal examination of the work done under the permit in question, as the department may deem necessary to enable it to render a fair decision: provided, that before making or causing such examination to be made the department shall estimate the cost of such examination and shall require the contestant to deposit a sum equal to such estimate and if after the making of such examination it is found that the amount so deposited is in excess of the cost of such examination the department shall return such excess to the contestant. For the purpose of producing additional testimony in making investigations, the department may continue the hearing to such time, not exceeding [exceeding] thirty (30) days, as would seem to it advisable. The hearing shall be conducted in accordance with section 42-1701A(1) and (2), Idaho Code, and the contestant or contestee may seek judicial review pursuant to section 42-1701A(4), Idaho Code, of the final order of the director. [1909, p. 299, part of § 2; reen. C. L., § 3265d; C. S., § 5587; I. C. A., § 41-304; am. 1980, ch. 238, § 11, p. 526.]

Compiler's notes. The bracketed word "exceeding" was inserted by the compiler.

Section 10 of S.L. 1980, ch. 238 was compiled as the now repealed § 42-240, § 9 of

S.L. 1980, ch. 238 is compiled as § 42-238, § 12 of S.L. 1980, ch. 238 was compiled as former § 42-311, and § 13 of S.L. 1980, ch. 238 is compiled as § 42-407.

42-305 — 42-309. Notice, appeal of decision on permit — Suit to quiet title. [Repealed.]

Compiler's notes. These sections, which comprised 1909, p. 299, §§ 2-5; reen. C.L., §§ 3265e — 3265i; C.S., §§ 5588 — 5592;

I.C.A., §§ 41-305 — 41-309, were repealed by S.L. 1980, ch. 238, § 24.

42-310. Record of cancellation. — In case the decision of the department of water resources shall be adverse to the contestee and in case no appeal has been taken and no action commenced in the district court within ninety (90) days from said notice of decision, as hereinbefore provided for, said department shall cause to be spread upon the record copy of the permit in question an order of cancellation, which order shall be final and shall determine said permit to be canceled and voided, by reason of the facts established on the hearing of the contest. [1909, p. 299, § 6; compiled and reen. C.L., § 3265j; C.S., § 5593; I.C.A., § 41-310.]

Compiler's notes. "Contestant" changed to "contestee" in second line of this section on authority of *Speer v. Stephenson* (1909), 16 Idaho 707, 102 P. 365.

The name of the department of water ad-

ministration (formerly the department of reclamation) has been changed to the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

42-311. Cancellation of permit — Grounds — Hearing — Permittee defined. — (1) If the director of the department of water resources finds, on the basis of available information at any time after a permit is issued but prior to license, that the permittee has refused or failed to comply with any of the conditions in the permit, or has refused or failed to comply with the provisions of the law governing the permit, then the director of the department of water resources may issue (a) an order to show cause before the director of the department or the director's designee on or before a date therein set, which shall be not less than thirty (30) days from the date of service, why the director of the department should not cancel said permit; or (b) an order directing the permittee to cease and desist the activity or activities alleged to be in violation of the conditions of the permit or in violation of provisions of the law governing the permit. A cease and desist order may direct compliance with the permit forthwith or may provide for a time schedule to bring the permittee into compliance with the conditions of the permit.

(2) Any order to show cause or order to cease and desist shall contain a statement of findings of fact and of conclusions of law that provide a factual and legal basis for the order of the director of the department of water resources.

(3) The director of the department of water resources shall serve a copy of any such order on the permittee by personal service or by certified mail. If reasonable efforts to personally serve the order fail, or if the certified mail is returned unclaimed, the department may serve the order by publication by publishing a summary of the order once a week for two (2) consecutive weeks in a newspaper of general circulation in the county in which the point of diversion is located. Service by certified mail shall be complete upon receipt of the certified mail. Personal service may be completed by department personnel or a person authorized to serve process under the Idaho rules of civil procedure. Service by publication shall be complete upon the date of the last publication.

(4) The permittee shall have a right to an administrative hearing before the department if requested in writing within twenty-one (21) days from the date of service of the order, and to judicial review, all as provided in section 42-1701A, Idaho Code.

(5) The term "permittee," as used in this chapter, includes the heirs, successors, or assigns of the person to whom the department issued a water right permit. [I.C., § 42-311, as added by 1986, ch. 313, § 7, p. 763; am. 1988, ch. 83, § 1, p. 143.]

Compiler's notes. Former § 42-311, which comprised 1909, p. 299, § 7; am. 1915, ch. 34, § 2, p. 103; am. 1917, ch. 9, § 1, p. 11; compiled and reen. C.L. § 3265k; C.S., § 5594; I.C.A. § 41-311; am. 1967, ch. 188, § 1, p. 618; am. 1980, ch. 238, § 12, p. 526

was repealed by S.L. 1986, ch. 313, § 6.

Section 5 of S.L. 1986, ch. 313 is compiled as § 42-222, and § 8 is compiled as §§ 42-350 — 42-352 (now repealed).

Section 2 of S.L. 1988, ch. 83 is compiled as § 42-350.

42-312 — 42-349. [Reserved.]

42-350. Revocation of license — Grounds — Hearing — Licensee defined. — (1) If the director of the department of water resources finds, on the basis of available information at any time after a license is issued, that the licensee has ceased to put the water to a beneficial use for a period of five (5) continuous years or that the licensee has wilfully or intentionally failed to comply with any of the conditions in the license, or has wilfully or intentionally failed to comply with provisions of the law governing the license, then the director of the department of water resources may issue (a) an order to show cause before the director of the department or the director's designee on or before a date therein set, which shall be not less than thirty (30) days from the date of service, why the director of the department should not revoke said license; or (b) an order directing the licensee to cease and desist the activity or activities alleged to be in violation of the conditions of the license or in violation of provisions of the law governing the license. A cease and desist order may direct compliance with the license forthwith or may provide for a time schedule to bring the licensee into compliance with the conditions of the license.

(2) Any order to show cause or order to cease and desist shall contain a statement of findings of fact and of conclusions of law that provide a factual and legal basis for the order of the director of the department of water resources.

(3) The director of the department of water resources shall serve a copy of any such order on the licensee by personal service or by certified mail. If reasonable efforts to personally serve the order fail, or if the certified mail is returned unclaimed, the department may serve the order by publication by publishing a summary of the order once a week for two (2) consecutive weeks in a newspaper of general circulation in the county in which the point of diversion is located. Service by certified mail shall be complete upon receipt of the certified mail. Personal service may be completed by department personnel or a person authorized to serve process under the Idaho rules of civil procedure. Service by publication shall be complete upon the date of the last publication.

(4) The licensee shall have a right to an administrative hearing before the department, if requested in writing within twenty-one (21) days from the date of service of the order, and to judicial review, all as provided in section 42-1701A, Idaho Code.

(5) If the director of the department of water resources has issued an order to show cause why the director should not revoke a license, the licensee may, within twenty-one (21) days from the date of service of the order, notify the director in writing of the intent of the licensee to waive the right to an administrative hearing before the department and to file a complaint in the district court for a determination of the validity of the license. The complaint shall name the director of the department of water resources as a defendant and shall be filed either in the county where the point of diversion or the place of use under the license is located, or in the county where the director issued the order to show cause. The complaint

shall be filed within forty-two (42) days of the date of service of the order to show cause by the director.

(6) The term “licensee,” as used in this chapter, includes the heirs, successors, or assigns of the person to whom the department issued a water right license. [I.C., § 42-350, as added by 1986, ch. 313, § 8, p. 763; am. 1988, ch. 83, § 2, p. 143.]

Compiler’s notes. Section 7 of S.L. 1986, ch. 313 is compiled as § 42-311.

42-351. Illegal diversion or use of water — Enforcement procedure — Injunctive relief. — (1) It is unlawful for any person to divert or use water from a natural watercourse or from a ground water source without having obtained a valid water right to do so, or to divert or use water not in conformance with a valid water right.

(2) It is unlawful for any person to divert or use water in substantial violation of any provision of this title, or any rule, permit, condition of approval or order issued or promulgated pursuant to this title that is related to the diversion or use of water.

(3) Upon investigation of available information, the director of the department of water resources shall have the discretion to issue a written notice of violation to the person in accordance with the provisions of section 42-1701B, Idaho Code, for the illegal diversion or use of water.

(4) Notwithstanding the issuance of a notice of violation, the director may also file an action seeking injunctive relief directing the person to cease and desist the activity or activities alleged to be in violation of applicable law or any existing water right. [I.C., § 42-351, as added by 1986, ch. 313, § 8, p. 763; am. 1988, ch. 83, § 3, p. 143; am. 1994, ch. 450, § 5, p. 1434; am. 1998, ch. 173, § 4, p. 595; am. 2003, ch. 165, § 1, p. 467.]

Compiler’s notes. Section 4 of S.L. 1994, ch. 450 is compiled as § 42-237g.

Section 6 of S.L. 1994, ch. 450 declared an emergency and provided that this act shall apply to all calls for distribution of water pending at the time of passage and approval.

Approved April 11, 1994.
Section 2 of S.L. 2003, ch. 165, is compiled as § 42-1701B.
Sec. to sec. ref. This section is referred to in § 42-5244.

42-352. Civil penalties. [Repealed.]

Compiler’s notes. This section, which comprised I.C., § 42-352, as added by 1986, ch. 313, § 8, p. 763; am. 1988, ch. 83, § 4, p.

143., was repealed by S.L. 1998, ch. 173, § 5, effective July 1. 1998.

CHAPTER 4

APPROPRIATIONS FOR USE OUTSIDE STATE

- SECTION.
42-401. Applications for use of public waters outside the state.
42-402. Application and permit.
42-403. Proof of completion of works.
42-404. License.

- SECTION.
42-405. Idaho laws controlling.
42-406. Rules and regulations.
42-407. Appeal from department’s decision.
42-408 — 42-411. [Repealed.]

42-401. Applications for use of public waters outside the state. —

(1) The state of Idaho is dedicated to the conservation of its public waters and the necessity to maintain adequate water supplies for the state's water requirements. The state of Idaho also recognizes that under appropriate conditions the out-of-state transportation and use of its public waters is not in conflict with the public welfare of its citizens or the conservation of its waters.

(2) Any person, firm or corporation or any other entity intending to withdraw water from any surface or underground water source in the state of Idaho and transport it for use outside the state or to change the place or purpose of use of a water right from a place in Idaho to a place outside the state shall file with the department of water resources an application for a permit to do so, subject to the requirements of chapter 2, title 42, Idaho Code.

(3) In order to approve an application under this chapter, the director must find that the applicant's use of water outside the state is consistent with the provisions of section 42-203A(5), Idaho Code. In addition, the director shall consider the following factors:

- (a) The supply of water available to the state of Idaho;
- (b) The current and reasonably anticipated water demands of the state of Idaho;
- (c) Whether there are current or reasonably anticipated water shortages within the state of Idaho;
- (d) Whether the water that is the subject of the application could feasibly be used to alleviate current or reasonably anticipated water shortages within the state of Idaho;
- (e) The supply and sources of water available to the applicant in the state where the applicant intends to use the water; and
- (f) The demands placed on the applicant's supply in the state where the applicant intends to use the water.

(5) By filing an application to use waters outside the state, the applicant shall submit to and comply with the laws of the state of Idaho governing the appropriation and use of water and any future changes to the water right.

(6) The director is empowered to condition the permit to insure that the use of water in another state is subject to the same regulations and restrictions that may be imposed upon water use in the state of Idaho.

(7) Upon submittal of the application, the applicant shall designate an agent in the state of Idaho for reception of service of process and other legal notices.

(8) The director may, as a condition to the approval of an application under this chapter, require that the applicant shall file a certificate from the proper officer or official of the state where the water shall be used, showing to the satisfaction of the director that the intended use would be beneficial, and that the intended appropriation is feasible. [I.C., § 42-401, as added by 1990, ch. 141, § 3, p. 316.]

Legislative Intent. Section 1 of S.L. 1990, ch. 141 read: "It is the intent of the legislature that passage of this act shall not affect exist-

ing appropriations of water that are used outside the state of Idaho nor affect the provisions of any interstate compact."

Compiler's notes. Former § 42-401, which comprised 1915, ch. 111, § 1, p. 254; reen. C.L., § 3265n; C.S., § 5595; I.C.A., § 41-401; am. 1951, ch. 80, § 1, p. 149, was repealed by S.L. 1990, ch. 141, § 2.

Section 2 of S.L. 1990, ch. 141 contains repeals, and § 4 of S.L. 1990, ch. 141 is compiled as § 42-203A.

Section 6 of S.L. 1990, ch. 141 read: "The

provisions of this act are hereby declared to be severable and if any provision of this act or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of remaining portions of this act."

Sec. to sec. ref. This section is referred to in § 42-1763.

DECISIONS UNDER PRIOR LAW

ANALYSIS

Interstate adjudication.

Priority.

Interstate Adjudication.

Rights, as between states, to share in the waters of interstate stream, were a matter for adjustment between states, and individual users could not raise question about the use of such water in another state out of the territorial jurisdiction of court. *Vineyard Land & Stock Co. v. Twin Falls Salmon River Land &*

Water Co., 245 F. 9 (9th Cir. 1917).

Priority.

Right obtained by appropriation of water from stream in one state for use on lands in another state was superior to later appropriation in former state for use in former state. *Weiland v. Pioneer Irrigation Co.*, 259 U.S. 498, 42 S. Ct. 568, 66 L. Ed. 1027 (1922).

Collateral References. 78 Am. Jur. 2d, Waters, § 361.

Cooperation or compacts between states as to water rights. 134 A.L.R. 1412.

42-402. Application and permit. — The application for permit and the permit issued thereon as provided in section 42-401, shall be in accordance with the laws of the state of Idaho, relative to the filing of application for permit and the obtaining of permit to appropriate the public waters of the state of Idaho. [1915, ch. 111, § 2, p. 254; reen. C.L., § 3265o; C.S., § 5596; I.C.A., § 41-402.]

Cross ref. Application, hearing, proof of completion and issuance of license, §§ 42-202, 42-203A, and 42-219.

42-403. Proof of completion of works. — Proof of completion of works under such permit shall be made in accordance with the laws of the state of Idaho relative to proof of completion under a permit to appropriate the public waters of the state of Idaho, as to all works of diversion under such permit: provided, that the department of water resources may as a condition to the issuance of a certificate of completion under such proof require from the officer or official mentioned in section 42-401 a certificate to the effect that the proper public records of such sister state show the works to have been completed under said permit, said certificate to show in second feet the capacities of the various conduits constructed and to show in acre feet the capacities of reservoir, if any there be, constructed in such sister state under said permit. [1915, ch. 111, § 3, p. 254; reen. C.L., § 3265p; C.S., § 5597; I.C.A., § 41-403; am. 1951, ch. 80, § 2, p. 149.]

Compiler's notes. Section 1 of S.L. 1951, ch. 80, was repealed.

The name of the department of water administration (formerly the department of rec-

lamation) has been changed to the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

42-404. License. — The department of water resources shall issue a license in accordance with the laws of the state of Idaho relative to the issuance of license under a permit, upon receipt of such proof as will satisfy the department as to application of the waters to beneficial use, and may as a condition of granting any such license require a certificate from the officer or official mentioned in section 42-401, to the effect that the proper public records of such sister state show that beneficial use has been made of the waters sought to be appropriated under said permit, said certificate to show the extent of such use in second feet. If such use is for irrigation, such certificate shall give a description by legal subdivisions of the land which is irrigated by such water. If such use is for power purposes such certificate shall describe the location of the point of use. [1915, ch. 111, § 4, p. 254; reen. C.L., § 3265q; C.S., § 5598; I.C.A., § 41-404; am. 1951, ch. 80, § 3, p. 149.]

Compiler's notes. The name of the department of water administration (formerly the department of reclamation) has been changed to the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

42-405. Idaho laws controlling. — Appropriations of water made under the provisions of this chapter shall be subject to the laws of the state of Idaho relative to administration, control and distribution of public waters, so long as said waters appropriated in accordance herewith shall remain within the state of Idaho: provided further, that such rights in their entirety shall be subject to all laws of the state of Idaho which have been or may be passed from time to time relative to the appropriation and control of public waters, to the end that such rights may be upon a parity with water rights within the state of Idaho. [1915, ch. 111, § 5, p. 254; reen. C.L., § 3265r; C.S., § 5599; I.C.A., § 41-405.]

Compiler's notes. The words "this chapter" refer to S.L. 1915, ch. 111, compiled herein as §§ 42-402 — 42-407. **Collateral References.** 93 C.J.S., Waters, §§ 343-409.

42-406. Rules and regulations. — The department of water resources is empowered to make such rules and regulations as may be necessary to the proper administration of the provisions of this chapter. [1915, ch. 111, § 6, p. 254; compiled and reen. C.L., § 3265s; C.S., § 5600; I.C.A., § 41-406.]

Compiler's notes. For sections in which "this chapter" is compiled see compiler's note to § 42-405. **Cited in:** Hart v. Stewart, 95 Idaho 781, 519 P.2d 1171 (1974).

42-407. Appeal from department's decision. — Whenever any person or persons feel themselves aggrieved by the determination or decision of the department of water resources relative to the granting of permit, the issuance of certification of proof of completion or the issuance of license, as hereinbefore provided for, such person or persons may request a hearing pursuant to section 42-1701A(3), Idaho Code, if a hearing on the matter has not been held, or, if a hearing has been held, may seek judicial review pursuant to section 42-1701A(4), Idaho Code. [1915, ch. 111, § 7, p. 254;

reen. C.L., § 3265t; C.S., § 5601; I.C.A., § 41-407; am. 1980, ch. 238, § 13, p. 526.]

Compiler's notes. Section 12 of S.L. 1980, ch. 238 contained a repeal and section 14 of S.L. 1980, ch. 238 is compiled as § 42-1503.
Section 25 of S.L. 1980, ch. 238 read: "The provisions of this act are hereby declared to be severable and if any provision of this act or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of remaining portions of this act."

42-408 — 42-411. Appropriation subject to reciprocal legislation — Certain waters excluded — Appropriation of water for use in other states. [Repealed.]

Compiler's notes. These sections, which comprised 1915, ch. 111, § 8, p. 254; reen. C.L., § 3265u; 1919, ch. 118, § 1, p. 404; C.S., §§ 5602, 5603; am. 1925, ch. 3, § 1, p. 7; I.C.A., §§ 41-408, 41-409; 1949, ch. 24, § 1, p. 41; I.C., § 42-411, as added by 1970, ch. 89, § 1, p. 217, were repealed by S.L. 1990, ch. 141, § 2.

CHAPTER 5
APPROPRIATIONS BY BUREAU OF LAND MANAGEMENT OF UNITED STATES
DEPARTMENT OF INTERIOR

SECTION.	SECTION.
42-501. Appropriation by United States bureau of land management, department of interior — Fee — Conditions of permit — Flow.	42-503. Right to file application under general laws.
42-502. Revocation of permit.	42-504. Separability.
	42-505. Provisions controlling over other acts.

42-501. Appropriation by United States bureau of land management, department of interior — Fee — Conditions of permit — Flow. — The bureau of land management of the department of interior of the United States may appropriate for the purpose of watering livestock any water not otherwise appropriated, on the public domain. The department of water resources shall, upon application in such form and of such content as it shall by rule prescribe issue permit and license and certificate of water right within a reasonable time in such form as it shall prescribe for such appropriation. With each such application there shall be paid to the department of water resources a fee of ten dollars (\$10.00) and there shall be no further fee required for the issuance of the permit or license and certificate of water right, nor for any other proceedings in connection with such application. Such permit, license and certificate of water right shall be conditioned that the water appropriated shall never be utilized thereunder for any purpose other than the watering of livestock without charge therefor on the public domain. The maximum flow for which permit, license and certificate of water right may issue hereunder shall be five (5) miner's inches, and the maximum storage for which permit, license and certificate of water right may issue hereunder shall be fifteen (15) acre feet in any one storage reservoir. [1939, ch. 205, § 1, p. 412; am. 1971, ch. 152, § 1, p. 752.]

Compiler's notes. The name of the department of water administration (formerly the department of reclamation) has been changed to the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

Opinions of Attorney General. It is unlikely that a court will find that the legislature intended a repeal of this section by enactment of § 42-114. OAG 88-6.

42-502. Revocation of permit. — Such permit, license and certificate of water right may be revoked by the director of the department of water resources in his discretion for the purpose of issuing permit for the construction of any reservoir to have a storage capacity of at least five hundred (500) acre feet of water for irrigation purposes. [1939, ch. 205, § 2, p. 412.]

Compiler's notes. The name of the director of the department of water administration (formerly the state reclamation engineer and before that the commission of reclamation) has been changed to the director of the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 31 (§ 42-1804).

42-503. Right to file application under general laws. — Nothing herein shall be construed to deprive the department of water resources of the United States from filing application for waters nor from obtaining permit, license and certificate of water right under the general laws of the state having to do with the appropriation of waters of the state. [1939, ch. 205, § 3, p. 412.]

42-504. Separability. — Notwithstanding any other evidence of legislative intent, it is hereby declared to be the controlling legislative intent that if any provision of this act, or the application thereof to any person or circumstances, is held invalid, the remainder of the act and the application of such provision to persons and circumstances other than those as to which it is held invalid, shall not be affected thereby. [1939, ch. 205, § 4, p. 412.]

Compiler's notes. The words "this act" refer to S.L. 1939, ch. 205, §§ 1-5, compiled as §§ 42-501 — 42-505.

42-505. Provisions controlling over other acts. — Insofar as the provisions of this act are inconsistent with the provisions of any other law, the provisions of this act shall be controlling. [1939, ch. 205, § 5, p. 412.]

Compiler's notes. The words "this act" refer to S.L. 1939, ch. 205, §§ 1-5, compiled as §§ 42-501 — 42-505.

CHAPTER 6

DISTRIBUTION OF WATER AMONG APPROPRIATORS

SECTION.

42-601. [Repealed.]

42-602. Director of the department of water resources to supervise water distribution within water districts.

42-602A. [Repealed.]

42-603. Supervision of water distribution — Rules and regulations.

SECTION.

42-604. Creation of water districts.

42-605. District meetings — Watermaster and assistants — Election — Removal — Oath and bond — Advisory committee.

42-605A. Nonconsumptive water rights — Assessments — Voting.

42-606. Reports of watermasters.

SECTION.

- 42-607. Distribution of water.
 42-608. Watermaster's term of service.
 42-609. Watermaster's assistants — Employment in emergency — Oath and compensation.
 42-610. Compensation of watermasters — Allotment and charge against land — Charge against canal.
 42-611. [Repealed.]
 42-612. Budget of water district — Adoption and contents — Debt of water user.
 42-613. Budget — Collection — Payment of district expenses.
 42-613A. Proceeds from the lease of stored water — District retention —

SECTION.

- Control and use by advisory committee.
 42-614. [Repealed.]
 42-615. Proposed budget for succeeding year.
 42-616. Budget — Action to collect charges — Attorney's fees.
 42-617. Time for collection of budget — Water not delivered until charges paid — Filing of resolutions and copies — Collection at time fixed.
 42-618. Alternate plan of collecting expenses in water districts.
 42-619. Alternate plan for payment of district expenses.

42-601. Water divisions — Establishment and boundaries. [Repealed.]

Compiler's notes. This section, which comprised 1903, p. 223, §§ 13, 16; reen. R.C.

& C.L., § 3268; C.S., § 5605; I.C.A., § 41-501, was repealed by S.L. 1992, ch. 339, § 1.

42-602. Director of the department of water resources to supervise water distribution within water districts. — The director of the department of water resources shall have direction and control of the distribution of water from all natural water sources within a water district to the canals, ditches, pumps and other facilities diverting therefrom. Distribution of water within water districts created pursuant to section 42-604, Idaho Code, shall be accomplished by watermasters as provided in this chapter and supervised by the director.

The director of the department of water resources shall distribute water in water districts in accordance with the prior appropriation doctrine. The provisions of chapter 6, title 42, Idaho Code, shall apply only to distribution of water within a water district. [First paragraph: 1915, ch. 34, § 4, p. 103; second paragraph: 1903, p. 223, § 32; reen. R.C., § 3283; am. 1915, ch. 34, § 17, p. 112; reen. C.L., § 3270; C.S., § 5606; I.C.A., § 41-502; am. 1992, ch. 339, § 2, p. 1014; am. 1994, ch. 450, § 1, p. 1434.]

Compiler's notes. The name of the department of water administration (formerly the department of reclamation) has been changed to the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

Section 2 of S.L. 1994, ch. 450 is compiled as § 42-1701A.

Section 6 of S.L. 1994, ch. 450 declared an emergency and provided that this act shall apply to all calls for distribution of water pending at the time of passage and approval. Approved April 11, 1994.

Sec. to sec. ref. This chapter is referred to in §§ 34-106, 34-1401, 42-801, 42-1417 and 42-1505.

Cited in: Public Utils. Comm'n v. Natatorium Co., 36 Idaho 287, 211 P. 533 (1922);

Almo Water Co. v. Darrington, 95 Idaho 16, 501 P.2d 700 (1972).

ANALYSIS

Determination of time for use.
 Doctrine of prior appropriation.
 Immunity.
 Review.
 Subterranean waters.

Determination of Time for Use.

Decree making water user judge of time when water could be used was too broad, as this matter should be determined by department of reclamation (department of water resources) which has immediate direction and control of water distribution. Arkoosh v. Big

Wood Canal Co., 48 Idaho 383, 283 P. 522 (1929).

Doctrine of Prior Appropriation.

The trial court properly issued a writ of mandate ordering the director of the Idaho department of water resources immediately to comply with this section and distribute water in accordance with the doctrine of prior appropriation. *Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994).

Immunity.

In a suit brought by owners of flooded farmland, the state was immune from liability for any decision of the director of the Department of Water Resources in taking measures to protect against failure of a dike; this immunity extended to the flood control district and the chairman, and also to the water district and its watermaster and chairman since there was no evidence they owned, controlled, operated or maintained or man-

aged the dike. *Marty v. State*, 117 Idaho 133, 786 P.2d 524 (1989).

Review.

Action of commissioner in determining when water may be first beneficially used and in delivering or refusing to deliver water may be reviewed and controlled in such manner, as facts may require, by appropriate action on part of any person deeming himself aggrieved. *Arkoosh v. Big Wood Canal Co.*, 48 Idaho 383, 283 P. 522 (1929).

Subterranean Waters.

Court may retain jurisdiction of cause involving rights to subterranean waters for two years and decree administrative provisions concerning such rights, although this section does not expressly relate to subterranean waters not in a defined stream. *Silkey v. Tiegs*, 51 Idaho 344, 5 P.2d 1049 (1931).

Collateral References. 93 C.J.S., Waters, §§ 376-390.

42-602A. Emergency provision. [Repealed.]

Compiler's notes. This section, which comprised I.C., § 42-602A, as added by 1977, ch. 246, § 1, p. 723, was repealed by S.L. 1992, ch. 339, § 3.

42-603. Supervision of water distribution — Rules and regulations. — The director of the department of water resources is authorized to adopt rules and regulations for the distribution of water from the streams, rivers, lakes, ground water and other natural water sources as shall be necessary to carry out the laws in accordance with the priorities of the rights of the users thereof. Promulgation of rules and regulations shall be in accordance with the procedures of chapter 52, title 67, Idaho Code. [1915, ch. 34, § 8, p. 103; reen. C.L., § 3273; C.S., § 5607; I.C.A., § 41-503; am. 1992, ch. 339, § 4, p. 1014.]

Compiler's notes. The name of the department of water administration (formerly the department of reclamation) has been changed to the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

42-604. Creation of water districts. — The director of the department of water resources shall divide the state into water districts in such manner that each public stream and tributaries, or independent source of water supply, shall constitute a water district: provided, that any stream or water supply, when the distance between the extreme points of diversion thereon is more than forty (40) miles, may be divided into two (2) or more water districts: provided, that any stream tributary to another stream may be constituted into a separate water district when the use of the water therefrom does not affect or conflict with the rights to the use of the water of the main stream: provided, that any stream may be divided into two (2) or more water districts, irrespective of the distance between the extreme points of diversion, where the use of the waters of such stream by appropriators in one district does not affect or conflict with the use of the

waters of such stream by appropriators outside such district: provided, that this section shall not apply to streams or water supplies whose priorities of appropriation have not been adjudicated by the courts having jurisdiction thereof.

The director may create, revise the boundaries of, or abolish a water district or combine two (2) or more water districts by entry of an order if such action is required in order to properly administer uses of the water resource. Copies of the order shall be sent by regular mail to all holders of rights to the waters affected by the order. The director's order is subject to judicial review as provided in section 42-1701A, Idaho Code.

Before entering an order creating, modifying, or abolishing a district, the director shall, by regular mail, send notice of the proposed action to each water user in the district or proposed district. The notice shall describe the proposed action to be taken, the reasons therefore, the time and place of a hearing to be held concerning the proposed action, and provide a time period within which written comment on the action will be accepted. The hearing shall not be held sooner than ten (10) days after the mailing of the notice, and the written comment period shall not close sooner than ten (10) days after the hearing. Instead of mailing notice, the director may publish notice describing the proposed action, the time and place for the hearing, and the deadline for receiving written comment. The notice shall be published once a week for two (2) weeks in a newspaper or newspapers having general circulation within the district or proposed district, with the second publication appearing at least ten (10) days before the date set for the hearing. The hearing shall be held within the district or proposed district, or at some nearby location convenient to the affected water users.

Each water district created hereunder shall be considered an instrumentality of the state of Idaho for the purpose of performing the essential governmental function of distribution of water among appropriators under the laws of the state of Idaho. [1903, p. 223, § 23; am. 1907, p. 532, § 2; reen. R.C., § 3274; am. 1909, p. 326, § 1; am. 1915, ch. 34, § 9, p. 103; reen. C.L., § 3274; C.S., § 5608; am. 1927, ch. 63, § 1, p. 78; I.C.A., § 41-504; am. 1986, ch. 78, § 1, p. 236; am. 1992, ch. 339, § 5, p. 1014.]

Compiler's notes. Section 2 of S.L. 1986, ch. 78 is compiled as § 42-1765.

Sec. to sec. ref. This section is referred to in §§ 42-237a, 42-602, 42-613A.

Cited in: *DeRousse v. Higginson*, 95 Idaho 173, 505 P.2d 321 (1973).

ANALYSIS

Application of section.
Combining districts.
Conflicting uses.
Estoppel to deny validity.
Immunity.
Validity of district.
Waters in Boise River.

Application of Section.

On streams "whose priorities of appropriation and use have not been adjudicated by the

courts having jurisdiction thereof" there could be no legal organization of water district, and no persons claiming to be officers of such district have any authority to determine priorities and amounts or to interfere with the irrigation works of any user. *Marsters v. United States*, 236 F. 663 (9th Cir. 1916).

Combining Districts.

Where the department of water resources wishes to combine two water districts on the same creek into one and the number of uncontested water rights along the creek is unknown, it must first hold a public hearing to hear the relevant claims; if the department decides there are insufficient uncontested rights to develop a workable plan for water distribution, it should proceed to an adjudication pursuant to § 42-1406 before combining the two districts. *Nettleton v. Higginson*, 98

Idaho 87, 558 P.2d 1048 (1977).

Conflicting Uses.

The mere fact that in 1977 there is a conflict between the use of water in one district and the use of water in another, both districts being on the same stream, is not sufficient to show that there was a conflict when the original district was split into two in 1916. *Nettleton v. Higginson*, 98 Idaho 87, 558 P.2d 1048 (1977).

Estoppel to Deny Validity.

In action for contribution for expense of watermaster, defendant who had participated in meetings of water district and received benefits for eleven years could not deny liability, although this section had not been complied with in the formation of such water district. *Owen v. Nampa & Meridian Irrigation Dist.*, 48 Idaho 680, 285 P. 464 (1930).

Immunity.

In a suit brought by owners of flooded farmland, the state was immune from liability for any decision of the director of the Department of Water Resources in taking measures to protect against failure of a dike; this immunity extended to the flood control district and the chairman, and also to the water district and its watermaster and chairman since there was no evidence they owned, controlled, operated or maintained or managed the dike. *Marty v. State*, 117 Idaho 133, 786 P.2d 524 (1989).

Validity of District.

No particular steps are specified or form prescribed to be taken or followed by department of reclamation (department of water resources) in creating or designating water

district. *Owen v. Nampa & Meridian Irrigation Dist.*, 48 Idaho 680, 285 P. 464 (1930).

Since §§ 42-607 and 42-1405 assume the existence of unadjudicated rights within a water district, this section must be construed to mean that a water district may be validly created even though not all the users within the district have had their rights adjudicated. *Nettleton v. Higginson*, 98 Idaho 87, 558 P.2d 1048 (1977).

The validity of the creation of a water district depends upon the number of unadjudicated constitutional use rights at the time of creation, not at the present. *Nettleton v. Higginson*, 98 Idaho 87, 558 P.2d 1048 (1977).

Waters in Boise River.

Decision in case of Farmers Cooperative Ditch Co. v. Riverside Irrigation Dist., 16 Idaho 525, 102 P. 481, together with decree and orders of trial court in that case, though not res judicata, constituted an adjudication of the waters in Boise River for the purpose of distribution. *Owen v. Nampa & Meridian Irrigation Dist.*, 48 Idaho 680, 285 P. 464 (1930).

Opinions of Attorney General. State water districts are instrumentalities of the state that exist for the purpose of assisting the Idaho Department of Water Resources in carrying out its duty under this section to provide for the distribution of the public waters of the state in accordance with rights of prior appropriation. OAG 91-7.

The term of existence of Water District 1 as an administrative and geographic unit is continuous from its date of creation until dissolved by order of the director, and it is active year-round. OAG 91-7.

42-605. District meetings — Watermaster and assistants — Election — Removal — Oath and bond — Advisory committee. —

(1) There shall be held on the first Monday in March in each year, and, except as provided in subsection (2) of this section, commencing at two o'clock P.M., a meeting of all persons owning or having the use of a water right, in the waters of the stream or water supply comprising such district, which right has been adjudicated or decreed by the court or is represented by valid permit or license issued by the department of water resources.

(2) Such meeting shall be held at some place within the water district, or at some nearby location convenient to a majority of those entitled to vote thereat, which place shall be designated by the director of the department of water resources. The director shall, between January first and February first of each year, notify by regular mail all persons, companies or corporations known by the director to hold rights to the use of the waters of such district, which right has been adjudicated or decreed by the court or is represented by valid permit or license issued by the department of water resources, of the time, date, location and purpose of the annual meeting. At any annual meeting the water users may vote to waive the requirement for

notice by mail and provide for notice to be given for future meetings by publication of the time, date, location and purpose of the meeting in a newspaper or newspapers in general circulation in the district. Published notice shall be made once per week for two (2) consecutive weeks with the second notice appearing at least thirty (30) and not more than sixty (60) days prior to the meeting. In water districts whose area includes land in more than four (4) counties the annual meeting shall commence at ten o'clock A.M. instead of two o'clock P.M.: provided, that the water users of any water district may, by resolution adopted at an annual meeting or at a special meeting properly called for that purpose, change the time of day when the meeting shall commence or change the date for annual meetings in subsequent years to any day except Saturday and Sunday between the second Monday of January and the third Monday in March or change both the time and the date, in which case the director of the department of water resources shall send notification at least thirty (30) days prior to said meeting date. At an annual meeting the water users may adopt resolutions to assure or improve the distribution of the waters of the district within state law, and may provide that such resolutions shall continue from year to year.

(3) At the meeting of the water users of a district there shall be elected a watermaster for such water district, who may be authorized to employ such other regular assistants as the water users shall deem necessary, and who, upon appointment by the director of the department of water resources, shall be responsible for distribution of water within said water district, and the water users shall, prior to the election of such watermaster and approval of the employment of assistants, fix the compensation to be paid them during the time actually engaged in the performance of their duties.

(4) Voting shall be by majority vote of the water users present at the meeting unless one (1) or more water users requests voting using the procedure which follows in this subsection. In such case the meeting chairman shall appoint a credentials committee to determine the number of votes each water user present is authorized to cast. If requested, each person present, owning or having the use for the ensuing season of any water right in the stream or water supply comprising such water district, which right has been adjudicated or decreed by the court or is represented by valid permit or license issued by the department of water resources, shall be entitled to a number of votes equal to the average annual dollar amount and any fraction thereof assessed for that person's qualifying water right for the previous five (5) years, or such lesser number of years as the right has been assessed. If a right has not previously been assessed, a person present, owning or having the use of the right for the ensuing season shall be entitled to a number of votes equal to the dollar amount and any fraction thereof which the right would have been assessed had it existed and been reasonably used when water was available under the priority of the right during the previous season.

(5) At such meeting the water users shall choose a meeting chairman and meeting secretary and shall determine the manner and method of electing the watermaster. The water users shall, at the annual meeting, provide for

the water district treasurer functions in accordance with section 42-619, Idaho Code. Within five (5) days after such meeting the meeting chairman and meeting secretary shall forward a certified copy of the minutes of such meeting to the department of water resources. The meeting chairman, or the meeting secretary, if the meeting chairman is not present, from the immediately preceding annual meeting shall call the meeting to order and preside over the election of officers for the meeting.

(6) At such meeting the water users may choose an advisory committee to be composed of members selected as may be determined at the meeting, which committee shall serve as advisors to the director and the watermaster in matters pertaining to the distribution of water within the district. The advisory committee may be authorized to carry out policies as set forth in resolutions duly adopted by the water users at the annual meeting or at a special meeting. The advisory committee may also serve as the local committee to facilitate the rental of stored water if appointed by the water resource board for such purpose under the provisions of section 42-1765, Idaho Code.

(7) A corporation or a water delivery organization, including, but not limited to a corporation, a water company, an irrigation district, an irrigation company or a canal company, shall be considered a person for the purpose of this section and shall cast its vote by someone to be designated by the corporation.

(8) Should said meeting not be held, or should said watermaster not be elected or the watermaster's compensation not be fixed as above provided, then the director of the department of water resources is authorized to appoint a watermaster and fix the watermaster's compensation.

(9) The director of the department of water resources may remove any watermaster whenever such watermaster fails to perform the watermaster's duty, upon complaint in that respect being made to the director in writing, by one (1) person owning or having the right to the use of a water right in such district, which right has been adjudicated or decreed by the court or is represented by valid permit or license issued by the department of water resources provided, that upon investigation the director, after a hearing with the other water users of said district, which shall be held in the district or at some location convenient to the water users of the district, finds such charge to be true, and the director may appoint a successor for the unexpired term.

(10) Before entering upon the duties of the watermaster's office, said watermaster shall take and subscribe an oath before some officer authorized by the laws of the state to administer oaths, to faithfully perform the duties of the watermaster's office, as provided in section 42-607, Idaho Code, and shall file that oath with the department of water resources. Upon appointment by the director of the department of water resources, the actions taken by a watermaster in fulfillment of the duties of his office are covered by the state group surety bond as provided by sections 59-801 through 59-804, Idaho Code.

(11) The director shall call a special meeting of the water users of a district upon receipt of a written request for such meeting from a majority

of the members of the advisory committee for a district, a written request from water users representing thirty per cent (30%) or more of the votes cast at the last regular annual meeting, a written request from the watermaster or on the director's own motion if the director determines a meeting is necessary to address matters that cannot be delayed until the next regular annual meeting. Notice of the time, place and purpose of the special meeting shall be given by the director in the manner provided in section 42-605(2), Idaho Code.

(12) The water users may, by resolution, authorize the watermaster to acquire, hold and dispose of such real and personal property, equipment and facilities in the name of the water district as necessary for the proper distribution of water and shall provide that all such real and personal property shall remain in the custody of the watermaster and the watermaster's successor. [1903, § 24, p. 223; reen. R.C., § 3275; am. 1909, § 1, p. 326; am. 1915, ch. 34, § 10, p. 103; C.L., § 3275; C.S., § 5609; am. 1925, ch. 60, § 1, p. 86; am. 1931, ch. 94, § 1, p. 160; I.C.A., § 41-505; am. 1947, ch. 9, § 1, p. 9; am. 1969, ch. 305, § 1, p. 913; am. 1973, ch. 262, § 1, p. 534; am. 1982, ch. 14, § 1, p. 18; am. 1984, ch. 175, § 1, p. 420; am. 1987, ch. 112, § 1, p. 225; am. 1988, ch. 31, § 1, p. 38; am. 1991, ch. 101, § 1, p. 225; am. 1992, ch. 339, § 6, p. 1014.]

Compiler's notes. Section 2 of S.L. 1969, ch. 305 is compiled herein as § 42-607.

Section 2 of S.L. 1973, ch. 262 is compiled as § 42-607.

Section 2 of S.L. 1982, ch. 14 declared an emergency. Approved February 26, 1982.

Cross ref. Appointment of watermaster by owner of ditch, canal, or lateral, § 42-901.

Compensation: Allotment and charge against land and canals; § 42-610; Budget of water district, and district expenses, §§ 42-612 — 42-619.

Sec. to sec. ref. This section is referred to in §§ 42-608, 42-613A, 42-1765.

Cited in: *Marsters v. United States*, 236 F. 663 (9th Cir. 1916).

ANALYSIS

Immunity.

Jurisdiction of watermaster.

Liability for watermaster's acts.

Nature of office.

Power of commissioner.

Suit against watermaster.

Voting rights.

Immunity.

In a suit brought by owners of flooded farmland, the state was immune from liability for any decision of the director of the Department of Water Resources in taking measures to protect against failure of a dike; this immunity extended to the flood control district and the chairman, and also to the water district and its watermaster and chairman since there was no evidence they owned,

controlled, operated or maintained or managed the dike. *Marty v. State*, 117 Idaho 133, 786 P.2d 524 (1989).

Jurisdiction of Watermaster.

The 1969 amendment to this section defining a water right as "any water right which has been adjudicated by the court or is represented by valid permit or license issued by the department of reclamation" (department of water resources) delineates the jurisdiction and control of the watermaster of a water district. *DeRousse v. Higginson*, 95 Idaho 173, 505 P.2d 321 (1973). (Decision prior to 1973 amendment.).

Liability for Watermaster's Acts.

Water company was no more responsible for acts of watermaster than any water user of system, so long as it did not aid, abet or ratify his acts. *Bailey v. Idaho Irrigation Co.*, 39 Idaho 354, 227 P. 1055 (1924).

Nature of Office.

Watermaster is not an agent of water company or water user, but is a ministerial officer. *Bailey v. Idaho Irrigation Co.*, 39 Idaho 354, 227 P. 1055 (1924).

Watermaster is a public administrative officer, and holds office until his successor is elected or appointed and qualified. *Big Wood Canal Co. v. Chapman*, 45 Idaho 380, 263 P. 45 (1927).

Power of Commissioner.

Commissioner of reclamation (director of the department of water resources) had no

power to determine legality of election of watermaster and appoint another in his place. *Whitten v. Chapman*, 45 Idaho 653, 264 P. 871 (1928).

Suit against Watermaster.

In suit against watermaster to adjudicate the rights of water users of certain wells, proceedings were not binding on users not made parties thereto. *Owsley Canal Co. v. Henninger*, 66 Idaho 485, 162 P.2d 389 (1945).

Voting Rights.

Each person or corporation with right equal to ten inches of water was entitled to one vote for every ten inches thus possessed and not to one vote only for his entire holdings. *Whitten v. Chapman*, 45 Idaho 653, 264 P. 871 (1928).

Corporation is person and may properly designate someone to cast its vote, based on whole number of inches of water to which it is entitled. *Whitten v. Chapman*, 45 Idaho 653, 264 P. 871 (1928).

Opinions of Attorney General. Idaho law provides four alternative methods for the collection and disbursement of water district funds: (1) the county auditor and treasurer may collect and disburse the assessments; (2) the county auditor and treasurer may collect

the assessments, and the water district treasurer may hold and disburse the water district funds; (3) the watermaster may collect the assessments, and the county treasurer may hold and disburse the assessments; (4) the watermaster may collect the funds, and the water district treasurer may hold and disburse the assessments; Idaho law does not permit the watermaster to act as treasurer for a water district, thus, Water District 1's present practice of allowing the watermaster to also serve as treasurer is not permissible. OAG 91-7.

The current officers of Water District 1 are the chairman and secretary whose primary duties are (1) presiding over the annual meeting of the district, (2) transmitting a certified copy of the budget to the Idaho Department of Water Resources (IDWR) and the county auditor in some circumstances, and (3) preparing, maintaining and transmitting the minutes of the meeting to the IDWR; the daily business activities of the district are transacted by a watermaster elected by the water users and appointed by the director and the watermaster of Water District 1 presently serves as treasurer. OAG 91-7.

42-605A. Nonconsumptive water rights — Assessments — Voting.

— (1) Notwithstanding other provisions of this chapter, the setting of annual water district assessments and the voting of permitted, licensed and decreed water rights administered by the watermaster solely for nonconsumptive purposes shall be determined in accordance with the provisions of this section. For purposes of this chapter, a water right is nonconsumptive if so designated by provisions of the permit or license issued by the department of water resources, or otherwise so designated by the director, or by decree of the court allowing use of the right to continue when the diversion of earlier priority water rights from the same source has been reduced or stopped by action of the watermaster.

(2) A nonconsumptive water right is subject to the provisions of this section if water is taken into man-made facilities for beneficial use whether or not the water leaves the river or stream channel. Instream flow water rights held in the name of governmental entities or agencies for the protection of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation and navigation values, and water quality shall be exempt from the payment of assessments and the rights shall not be voted. The procedure for collection and payment of the assessments shall be the same as used for consumptive water rights under this chapter.

(3) In preparing the next year's budget, the watermaster shall determine an assessment for the ensuing year for each water right used solely for nonconsumptive purposes. The assessment shall be sufficient to pay the additional costs and expenses for watermaster services for data collection, water measurement, delivery of water, and record keeping directly attributable to delivery of the water right.

(4) The assessment shall not become final until adopted as part of the water district budget at the annual meeting of water users in accordance with section 42-612, Idaho Code. The assessment shall not exceed an amount necessary to pay for watermaster services associated with the nonconsumptive right. Nothing in this section shall affect the right, under section 42-612, Idaho Code, of the water users at the annual meeting to provide by resolution for a minimum charge for watermaster services, except as to those instream flow rights exempt from the payment of assessments under this section.

(5) The holder of a water right assessed under the provisions of this section who desires to contest the amount of an assessment for a nonconsumptive water right shall file a written petition with the director of the department of water resources stating the grounds for contesting the assessment and requesting a hearing. The petition must be filed with the director within thirty (30) days after the billing is mailed to the holder of the water right as provided in section 42-613 or 42-618, Idaho Code. The hearing before the director and any judicial review thereof shall be in accordance with the provisions of section 42-1701A, Idaho Code. The filing of a petition under this section shall not relieve the holder of a nonconsumptive water right from the obligation to pay the assessment when due and payable. The amount of any excessive or deficient assessment determined by a final order of the director shall be credited or collected in the succeeding year in the manner provided under section 42-606, Idaho Code.

(6) At water district meetings, each person present holding a water right used solely for nonconsumptive purposes shall be entitled to a number of votes equal to the average dollar amount and any fraction thereof assessed in accordance with subsection (3) of this section for that person's qualifying nonconsumptive water right for the previous five (5) years, or such lesser number of years as the right has been assessed in accordance with subsection (3) of this section. If a nonconsumptive right has not been assessed in previous years using subsection (3) of this section, a person present owning or having the use of the right for the ensuing season shall be entitled to a number of votes equal to the dollar amount and any fraction thereof which the right is assessed under subsection (3) of this section for the ensuing season. [I.C., § 42-605A, as added by 1991, ch. 101, § 2, p. 225; am. 1992, ch. 339, § 7, p. 1014.]

Compiler's notes. Section 3 of S.L. 1991, ch. 101 is compiled as § 42-608.

Sec. to sec. ref. This section is referred to in § 42-608.

42-606. Reports of watermasters. — All watermasters shall make an annual report to the department of water resources prior to the expiration of the watermaster's appointment for the current year. This report shall show the total amount of water delivered by the watermaster during the preceding year, the amount delivered to each water user, the total expense of delivery and the apportionment of expenses among users and all debits and credits to be carried over to the following year. Such report shall also include records of stream flow the watermaster used or made in the process of distributing water supplies. The director may ask for other information

deemed necessary in assuring proper distribution of water supplies within the district. The reports of watermasters to the department of water resources shall be filed and kept in the office of the department. [1903, p. 223, § 25; reen. R.C., § 3276; am. 1915, ch. 34, § 11, p. 103; reen. C.L., § 3276; C.S., § 5610; I.C.A., § 41-506; am. 1992, ch. 339, § 8, p. 1014.]

Compiler's notes. The name of the department of water administration (formerly the department of reclamation) has been

changed to the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

42-607. Distribution of water. — It shall be the duty of said watermaster to distribute the waters of the public stream, streams or water supply, comprising a water district, among the several ditches taking water therefrom according to the prior rights of each respectively, in whole or in part, and to shut and fasten, or cause to be shut or fastened, under the direction of the department of water resources, the headgates of the ditches or other facilities for diversion of water from such stream, streams or water supply, when in times of scarcity of water it is necessary so to do in order to supply the prior rights of others in such stream or water supply; provided, that any person or corporation claiming the right to the use of the waters of the stream or water supply comprising a water district, but not owning or having the use of an adjudicated or decreed right therein, or right therein evidenced by permit or license issued by the department of water resources, shall, for the purposes of distribution during the scarcity of water, be held to have a right subsequent to any adjudicated, decreed, permit, or licensed right in such stream or water supply, and the watermaster shall close all headgates of ditches or other diversions having no adjudicated, decreed, permit or licensed right if necessary to supply adjudicated, decreed, permit or licensed right in such stream or water supply. So long as a duly elected watermaster is charged with the administration of the waters within a water district, no water user within such district can adversely possess the right of any other water user. [1903, § 26; p. 223; reen. R.C., § 3277; am. 1909, § 1, p. 326; am. 1915, ch. 34, § 12, p. 103; C.L., § 3277; C.S., § 5611; am. 1927, ch. 63, § 2, p. 78; I.C.A., § 41-507; am. 1969, ch. 305, § 2, p. 913; am. 1973, ch. 262, § 2, p. 534; am. 1992, ch. 339, § 9, p. 1014.]

Compiler's notes. The name of the department of water administration (formerly the department of reclamation) has been changed to the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

Sections 1, 3 of S.L. 1969, ch. 305 are compiled herein as §§ 42-605, 42-618, respectively.

Section 3 of S.L. 1973, ch. 262 declared an emergency. Approved March 16, 1973.

Sec. to sec. ref. This section is referred to in § 42-605.

Cited in: *Marsters v. United States*, 236 F. 663 (9th Cir. 1916); *Sears v. Berryman*, 101 Idaho 843, 623 P.2d 455 (1981); *Boise-Kuna Irrigation Dist. v. Gross*, 118 Idaho 940, 801 P.2d 1291 (Ct. App. 1990).

ANALYSIS

Abandonment of priority.
Constitutionality.
Constitutional use water right.
Construction.
Decree governs watermaster.
Landowners outside district.
Loss of right by estoppel.
Loss of rights through forfeiture.
Preference during scarcity.
Preferential use not adverse.
Status of watermaster.
Unadjudicated water rights.
Watermaster's duties.

Abandonment of Priority.

The right of priority to water in time of shortage, given under this section, may be

abandoned. *Graham v. Leek*, 65 Idaho 279, 144 P.2d 475 (1944).

Constitutionality.

Although this section does not provide for notice and hearing prior to the shutting off of unadjudicated water rights, it is not in violation of procedural due process, since the need to restrict the use of water in times of shortage constitutes an extraordinary circumstance where valid governmental interest justifies the postponement of notice and hearing. *Nettleton v. Higginson*, 98 Idaho 87, 558 P.2d 1048 (1977).

Since private water rights cannot be adequately protected unless the watermaster has specific record of the users' priority dates, use and points of diversion through adjudication of licensing, the preference granted to users with adjudicated or licensed rights by this section does not constitute an unconstitutional denial of equal protection to users with unadjudicated "constitutional use" water rights. *Nettleton v. Higginson*, 98 Idaho 87, 558 P.2d 1048 (1977).

Constitutional Use Water Right.

One in possession of an unadjudicated constitutional use water right may have this right adjudicated at any time pursuant to § 42-1405 and thereby acquire the protection of this section. *Nettleton v. Higginson*, 98 Idaho 87, 558 P.2d 1048 (1977).

Construction.

This section is intended to make the watermaster's authority more certain, duties less difficult, and decisions less controversial; however, this section does not apply outside its own language to subordinate constitutional water rights for all purposes, it does not authorize one water user unilaterally to interfere with another's superior rights, and it is not applicable to private disputes. *R.T. Nahas Co. v. Hulet*, 114 Idaho 23, 752 P.2d 625 (Ct. App. 1988).

Decree Governs Watermaster.

Watermaster could not be required to go beyond provisions of decree to ascertain whether or not the same was supported by findings or whether there was a conflict between the findings and decree, but he could look only to the decree for his instructions as to the amount of water to be distributed to each claimant. *Stethem v. Skinner*, 11 Idaho 374, 82 P. 451 (1905).

Landowners Outside District.

Only method by which owners of land lying outside the boundaries of an irrigation district could be entitled to use the waters or to acquire an interest in the district's water was by annexation to the district itself. *Jones v. Big Lost River Irrigation Dist.*, 93 Idaho 227, 459 P.2d 1009 (1969).

Loss of Right by Estoppel.

Holders of water rights are entitled to presume that a watermaster, who is authorized to distribute water only in compliance with applicable decrees, is delivering water to them in compliance with the priorities expressed in the governing decree, and unless holder of water right was aware that he was not receiving water from the watermaster in accordance with his decreed right, that right could not be lost through estoppel, the element of knowing acquiescence being lacking. *Almo Water Co. v. Darrington*, 95 Idaho 16, 501 P.2d 700 (1972).

Loss of Rights Through Forfeiture.

This section applies only to loss of water rights through adverse possession and does not affect the potential loss of water rights through forfeiture or abandonment. *Olson v. Bedke*, 97 Idaho 825, 555 P.2d 156 (1976).

Preference During Scarcity.

Where water rights of parties have been adjudicated, it is duty of watermaster during scarcity of water to treat unadjudicated rights as inferior and subordinate to decreed rights. *Big Wood Canal Co. v. Chapman*, 45 Idaho 380, 263 P. 45 (1927); *State v. Hall*, 90 Idaho 478, 413 P.2d 685 (1966).

Since the right of appropriation does not carry with it an unconditional guarantee of water regardless of the supply of water available, the fact that the diversion belonging to a holder of an appropriated constitutional use water right must be shut off to allow those with priority to receive water does not justify a contention that private property has been taken for public use without just compensation contrary to Const., Art. I, § 14. *Nettleton v. Higginson*, 98 Idaho 87, 558 P.2d 1048 (1977).

Preferential Use Not Adverse.

Distribution of water to decreed rights in time of scarcity was not adverse but permissive use based upon watermaster's statutory duty to give preference. *Big Wood Canal Co. v. Chapman*, 45 Idaho 380, 263 P. 45 (1927).

Status of Watermaster.

A watermaster is an administrative officer and has no interest in the subject of litigation involving the water under his control. *Nampa & Meridian Irrigation Dist. v. Barclay*, 56 Idaho 13, 47 P.2d 916 (1935).

The watermaster is not the agent of the water company or water user, but is a ministerial officer. *Jones v. Big Lost River Irrigation Dist.*, 93 Idaho 227, 459 P.2d 1009 (1969).

Unadjudicated Water Rights.

The 1969 amendment to this section deleting the preference of adjudicated water rights over unadjudicated water rights in times of water scarcity divested the watermaster of

control and jurisdiction over adjudicated water rights, and state reclamation engineer (now the director of department of water resources) and watermaster were properly enjoined from interfering with water diversion by plaintiff who claimed water right by constitutional appropriation. *DeRousse v. Higginson*, 95 Idaho 173, 505 P.2d 321 (1973) (Decision prior to 1973 amendment.).

Watermaster's Duties.

His only duty is to distribute the waters of his district in accordance with the respective rights of appropriators, adjudicated rights having preference over unadjudicated rights. *Nampa & Meridian Irrigation Dist. v. Barclay*,

56 Idaho 13, 47 P.2d 916 (1935).

The watermaster's duties are to determine decrees, regulate flow of streams and to transfer the water of decreed rights to the appropriate diversion points. *Jones v. Big Lost River Irrigation Dist.*, 93 Idaho 227, 459 P.2d 1009 (1969).

This section does not alter the doctrine of prior appropriation as applied to private water right disputes; rather, it governs the duties of the watermaster. *R.T. Nahas Co. v. Hulet*, 114 Idaho 23, 752 P.2d 625 (Ct. App. 1988).

Collateral References. 93 C.J.S., *Waters*, §§ 239-242.

94 C.J.S., *Waters*, §§ 874-902.

42-608. Watermaster's term of service. — (1) A watermaster shall not begin work until called upon by one (1) or more owners or managers of ditches or persons controlling ditches or other diversion facilities, in the district, by application in writing to the department of water resources, stating that there is a necessity for the use and control of the waters of such district.

(2) In the absence of application or in water districts in which there are five (5) or fewer adjudicated water rights, the watermaster may be called upon to assume the watermaster's duties at any time the department of water resources finds that there is a necessity for the use and control of the waters of the district.

(3) The watermaster shall not continue performing services after the necessity therefor shall cease, which shall be determined by the department of water resources, and which shall not be after the first of November of each year, unless determined necessary by the director of the department of water resources or is otherwise provided by a resolution adopted at the annual water users' meeting for said water district.

(4) At any annual meeting the water users may, by resolution, provide that the watermaster shall serve throughout the year. The department of water resources, upon receipt of a certified copy of the minutes of said meeting containing such resolution and upon the receipt of the oath of said watermaster, as provided for in section 42-605, Idaho Code, shall immediately issue a certificate of appointment ordering said watermaster to assume the watermaster's duties at once and continue the same throughout the year as provided for in said resolution.

(5) The director of the department of water resources, upon receipt of a petition requesting an extension of the watermaster's term of service in any year from the holder of a water right authorizing the diversion or storage of water during the time period for which the extension is sought and upon a determination of necessity therefor shall extend the watermaster's term of service for the period of time determined necessary by the director in any year. Payment for watermaster services during the extended term of service ordered by the director shall be the responsibility of the holders of water rights delivered by the watermaster during the extended term of service. For the purpose of determining voting rights at a water district meeting,

amounts paid for watermaster services pursuant to this subsection shall be included in the calculation of annual assessment amounts and assessment rates under sections 42-605 and 42-605A, Idaho Code. [1903, p. 223, § 27; reen. R.C., § 3278; am. 1909, p. 326, § 1; am. 1915, ch. 34, § 13, p. 103; reen. C.L., § 3278; C.S., § 5612; am. 1927, ch. 63, § 3, p. 78; I.C.A., § 41-508; am. 1939, ch. 199, § 1, p. 378; am. 1991, ch. 101, § 3, p. 225; am. 1992, ch. 339, § 10, p. 1014.]

Compiler's notes. The name of the department of water administration (formerly the department of reclamation) has been changed to the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and 1974, ch. 20, § 28 (§ 42-1801a).

Section 2 of S.L. 1939, ch. 199 was repealed, and § 3 contained an emergency clause.

Section 2 of S.L. 1991, ch. 101 is compiled as § 42-605A.

Section 4 of S.L. 1991, ch. 101 declared an emergency. Approved March 27, 1991.

Cross ref. See notes, § 42-602, (1929).

ANALYSIS

Construction.
Term of office.

Construction.

This provision is mandatory and watermaster could not recover for services as such watermaster unless services were rendered after written application had been presented to him. *Walker v. Elmore County*, 16 Idaho 696, 102 P. 389 (1909).

Watermaster is paid per diem compensation. *Big Wood Canal Co. v. Chapman*, 45 Idaho 380, 263 P. 45 (1927).

Term of Office.

This section does not expressly fix term of office of watermaster but he holds office until his successor is elected or appointed and has qualified. *Big Wood Canal Co. v. Chapman*, 45 Idaho 380, 263 P. 45 (1927).

42-609. Watermaster's assistants — Employment in emergency — Oath and compensation. — A watermaster shall have power, in case of emergency, with the approval of the director of the department of water resources, to employ suitable assistants in addition to those who may have been approved at the annual meeting of the water users of the district to aid the watermaster in the discharge of the watermaster's duties, who shall take the same oath* as the watermaster, and shall obey the watermaster's instructions, and shall be entitled to a salary as set by the water users in their adopted budget and approved by the director of the department of water resources, or if no budget is adopted, then as set by the director of the department of water resources, to be paid in the same manner as provided for the payment of watermasters. [1903, p. 223, § 28; reen. R.C., § 3279; am. 1915, ch. 34, § 14, p. 103; reen. C.L., § 3279; C.S., § 5613; am. 1927, ch. 63, § 4, p. 78; I.C.A., § 41-509; am. 1980, ch. 277, § 1, p. 721; am. 1992, ch. 339, § 11, p. 1014.]

Compiler's notes. Section 2 of S.L. 1980, ch. 277 is compiled as § 42-801.

Section 5 of S.L. 1927, ch. 63 declared an emergency.

42-610. Compensation of watermasters — Allotment and charge against land — Charge against canal. — Watermasters herein provided for shall make up a sworn statement which shall be approved by the department of water resources, and shall show the number of days said watermaster has devoted to the distribution of such water, and the number of days the watermaster's assistant or assistants have devoted to the same purpose, and such statement shall also show the volume of water, stated in cubic feet per second, the watermaster has by virtue of the allotment of said

waters delivered to each user each day. The pay for the services of said watermaster and the watermaster's assistants shall be a charge against the land of the users to which said water was so delivered, the expense for said services being first divided between all classes as to priority of allotment or decree, in the proportion which the number of days such water is received by all users in the same class of priority of allotment or decree bears to the whole number of days said watermaster is engaged in distributing said water; the amount charged to each user in the same class of priority of allotment or decree bearing the same proportion to the amount charged to all users in the same class of priority of allotment or decree as the volume of water delivered to each user bears to the whole amount delivered to all of like class of priority of allotment or decree, by the said watermaster and the watermaster's assistants. This statement, which shall show the proper distribution of the said expenses among the various users, shall be filed with the auditor and recorder of the county or counties in which the said water was delivered, unless such county or counties have elected to not provide county services for the collection of assessments and payment of district expenses as provided in section 42-619, Idaho Code: provided, that in counties which have not so elected to decline providing the services, when any portion of the allotted waters is distributed by said watermaster to the canal of any duly organized canal company, the amount of the expense chargeable for such services shall be a charge against such canal and the account of such charge to be paid by the county in the manner herein provided shall be charged as a tax against such canal, which tax shall be collected in the manner provided by law for the collection of other taxes, and no canal in this state shall be exempt from the payment of such tax, whether the water right be decreed or undecreed, or whether the water so distributed to said canal be the natural flow of the stream, or stored water, or whatever may be its source, nature or description. [1903, p. 223, § 29; am. 1907, p. 482, § 1; reen. R.C., § 3280; am. 1915, ch. 34, § 15, p. 110; reen. C.L., § 3280; C.S., § 5614; am. 1925, ch. 60, § 2, p. 86; am. 1927, ch. 81, § 1, p. 99; I.C.A., § 41-510; am. 1992, ch. 339, § 12, p. 1014.]

Compiler's notes. The name of the department of water administration (formerly the department of reclamation) has been changed to the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

Section 13 of S.L. 1992, ch. 339 is compiled as § 42-612.

Cross ref. Compensation fixed by election at district meeting or by department of water resources, § 42-605.

Compensation of watermaster appointed by court, § 42-901.

Cited in: Bailey v. Idaho Irrigation Co., 39

Idaho 354, 227 P. 1055 (1924).

Assessment of Compensation.

Portion of judgment which required direct assessment of costs of watermaster against defendant in order to discourage future interference with plaintiff's water rights was premature and inappropriate; while plaintiff might have an action against defendant for those costs, the costs must first be assessed against plaintiff. *R.T. Nahas Co. v. Hulet*, 106 Idaho 37, 674 P.2d 1036 (Ct. App. 1983). See also, 114 Idaho 23, 752 P.2d 625 (1988).

42-611. Compensation of watermaster and assistants — Payment and collection from water users. [Repealed.]

Compiler's notes. This section, which § 3281; C.S., § 5615; I.C.A., § 41-511, was comprised 1903, p. 223, § 30; am. R.C. & C.L., repealed by S.L. 1989, ch. 286, § 1.

42-612. Budget of water district — Adoption and contents — Debt of water user. — (1) At any annual meeting the water users must adopt a budget covering the estimated expenses of delivering the water of the district for the ensuing year, and by resolution determine that the budget shall be collected. The compensation of the watermaster and the watermaster's assistants and any other expenses of delivering the water of the district to the users thereof, including the costs of the advisory committee in implementing resolutions adopted by the water users of the district for activities other than the payment of the salary and operating expenses of the watermaster and assistants, shall be paid in the manner hereinafter, in this section, provided.

(2) To the extent possible, funding for advisory committee expenses associated with implementing resolutions adopted by the water users for other than the payment of the salary and operating expenses of the watermaster and assistants shall come from funds available pursuant to section 42-613A, Idaho Code.

(3) The budget shall show the aggregate amount to be collected from all the water users in the district, and the amount to be paid by each ditch, canal company, irrigation district or other water user. For the purpose of computing the respective amounts, to be paid by each water user, the water delivered to the various ditches, canal companies, irrigation districts or other users during the past season or seasons, not exceeding five (5) seasons, shall be used as a basis.

(4) Upon the adoption of the budget the amount payable by each ditch, canal company, irrigation district or other water user, as shown by the budget, shall become the debt of each respectively and shall become due and payable as hereinafter provided. Other provisions of chapter 6, title 42, Idaho Code, notwithstanding, water users may at the annual meeting by resolution provide for an annual minimum charge not to exceed fifty dollars (\$50.00) per water user for watermaster services. The minimum charge is applicable whenever the prorated charge against any ditch, canal company, irrigation district or other water user is less than the minimum charge.

(5) Other provisions of chapter 6, title 42, Idaho Code, notwithstanding, water users at the annual meeting may provide, by resolution, that the respective amounts owed by each water user as shown in the adopted budget shall constitute a final determination of the amount due for that year without the need to carry forward any water user debits or credits to the following year. [C.S., § 5615-A, 1st par., as added by 1927, ch. 39, § 1, p. 51; I.C.A., § 41-512; am. 1933, ch. 217, § 1, p. 462; am. 1980, ch. 139, § 1, p. 305; am. 1992, ch. 339, § 13, p. 1014; am. 1998, ch. 179, § 1, p. 665; am. 2000, ch. 83, § 1, p. 173.]

Compiler's notes. Section 12 of S.L. 1992, ch. 339 is compiled as § 42-610.

Sec. to sec. ref. This section is referred to in §§ 42-605A, 42-617, 42-618.

42-613. Budget — Collection — Payment of district expenses. —

Said budget when approved shall be filed with the secretary of said meeting and thereupon the watermaster shall immediately prepare and file a certified copy thereof with the director of the department of water resources and a certified copy with the county auditor of such county or counties designated at said water users' meeting. If more than one (1) county is designated then said budget shall show the amount to be collected in each county and the water users from which each county shall make collection. Each auditor of the county or counties so designated, shall immediately make up a roll showing the amount of said budget to be collected by the county and the ditch, canal company, irrigation district or other water user from whom the same shall be collected and the respective amounts from each. When said roll is completed, the county auditor shall deliver the same to the county treasurer for collection. Said county treasurer shall thereupon mail a notice to each ditch, canal company, irrigation district or other water user of the amount payable by each such water user, for the distribution of water and other expenses of said district for the ensuing year, which amount shall be due and payable on the date so fixed by resolution of said year and if not so paid, shall bear a penalty not to exceed ten percent (10%) of the amount owed and interest of one percent (1%) per month, which both shall be fixed by resolution, from said date until paid. It is hereby declared the duty of the respective county auditors and treasurers to perform the services herein required.

The county treasurer, upon receipt of said roll, shall open a special account to be known as "Water District Funds" and shall credit to said account all moneys received from the water users of said district. The compensation of the watermaster and his assistants and any other charges against said water district shall be paid from the funds of said account in the same manner as bills against the county are paid. [C.S., § 5615-A, 2d & 3d par., as added by 1927, ch. 39, § 1, p. 51; I.C.A., § 41-513; am. 1992, ch. 339, § 14, p. 1014; am. 2000, ch. 83, § 2, p. 173.]

Compiler's notes. The name of the commissioner of reclamation has been changed to the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 31 (§ 42-1804).

Section 3 of S.L. 2000, ch. 83, is compiled as § 42-617.

Cross ref. Change in time for collection of budget, § 42-617.

Claims against counties, § 31-1501 et seq.

Sec. to sec. ref. This section is referred to in §§ 42-605A, 42-617, 42-618.

Opinions of Attorney General. Idaho law provides four alternative methods for the collection and disbursement of water district funds: (1) the county auditor and treasurer

may collect and disburse the assessments; (2) the county auditor and treasurer may collect the assessments, and the water district treasurer may hold and disburse the water district funds; (3) the watermaster may collect the assessments, and the county treasurer may hold and disburse the assessments; (4) the watermaster may collect the funds, and the water district treasurer may hold and disburse the assessments; Idaho law does not permit the watermaster to act as treasurer for a water district, thus, Water District 1's present practice of allowing the watermaster to also serve as treasurer is not permissible. OAG 91-7.

42-613A. Proceeds from the lease of stored water — District retention — Control and use by advisory committee. — The advisory committee of a water district created pursuant to section 42-604, Idaho Code, and chosen pursuant to section 42-605(6), Idaho Code, when appointed by the water resource board to facilitate the rental of stored water in the district pursuant to section 42-1765, Idaho Code, shall be authorized to manage and retain in a special account the proceeds accruing within the district from the rental of storage water leased under the provisions of section 42-1765, Idaho Code. Notwithstanding the supervisory responsibilities of the director of the department of water resources over the activity of watermasters delivering water within water districts, the account shall be under the exclusive control of the advisory committee of the water district when such committee has been appointed by the water resource board to facilitate the rental of stored water in the district within which the leased water is stored.

All proceeds from the lease of stored water which are retained by the advisory committee of any district under this section shall be used in accordance with the resolutions duly adopted by the water users of the district solely for one or more of the following public purposes:

- (1) Expenses of the district.
- (2) Improvements to the district's facilities, including a reasonable reserve for future improvements.
- (3) Educational projects designed to increase public awareness in the area of water distribution, water rights and water conservation.
- (4) Other public projects designed to assist in the adjudication, conservation or more efficient distribution of water.

All funds retained by an advisory committee pursuant to this section shall be deposited by the water district treasurer pursuant to the public depository law. [I.C., § 42-613A, as added by 1986, ch. 78, § 3, p. 236; am. 1992, ch. 339, § 15, p. 1014.]

Compiler's notes. Section 2 of S.L. 1986, ch. 78 is compiled as § 42-1765.

Sec. to sec. ref. This section is referred to in §§ 42-612, 42-619, 42-1765.

Opinions of Attorney General. This sec-

tion does not vest in the local committee of a water district any responsibilities regarding the collection, investment, or disbursement of water bank funds; the water district retains authority over water bank funds. OAG 91-7.

42-614. Report of water delivered — Basis for apportionment of expenses — Excessive or deficient payments — Filing of report. [Repealed.]

Compiler's notes. This section, which comprised C.S., § 5615-A, 4th par., as added by 1927, ch. 39, § 1, p. 51; I.C.A., § 41-514;

am. 1937, ch. 24, § 1, p. 33; am. 1939, ch. 199, § 2, p. 378, was repealed by S.L. 1992, ch. 339, § 16.

42-615. Proposed budget for succeeding year. — Each watermaster shall, at least thirty (30) days prior to the annual meeting of the water users of the water district, also prepare and file with the department of water resources a proposed budget for the succeeding year, together with a distribution of the amount of said budget to the respective water users,

using the actual deliveries for the past irrigation season or seasons, as the basis for said distribution as hereinabove provided, which said proposed budget and distribution shall be submitted to the water users for consideration and approval at the next annual water meeting. [C.S., § 5615-A, 5th par., as added by 1927, ch. 39, § 1, p. 51; I.C.A., § 41-515; am. 1992, ch. 339, § 17, p. 1014.]

Sec. to sec. ref. This section is referred to in § 42-618.

42-616. Budget — Action to collect charges — Attorney's fees. —

The county treasurer or water district treasurer of a water district shall have the right to collect any charges due and unpaid, by civil action, said action to be brought in any court of competent jurisdiction, in the name of the county treasurer or water district treasurer to whom such charges are payable, and in addition to the amount found due, together with interest and costs, may also recover such sum as the court may adjudge reasonable as attorney's fees in said action. [C.S., § 5615-A, 6th par., as added by 1927, ch. 39, § 1, p. 51; I.C.A., § 41-516; am. 1992, ch. 339, § 18, p. 1014.]

Compiler's notes. Section 2 of S.L. 1927, ch. 39 declared an emergency.

Cited in: Owen v. Nampa & Meridian Irrigation Dist., 48 Idaho 680, 285 P. 464 (1930).

Sec. to sec. ref. This section is referred to in § 42-618.

42-617. Time for collection of budget — Water not delivered until charges paid — Filing of resolutions and copies — Collection at time fixed. — At any annual meeting of the water users at which a budget has been adopted, covering the estimated expenses of said district for the ensuing year, as provided in section 42-612, Idaho Code, said water users may by resolution fix a date different than that fixed by said section 42-613, Idaho Code, upon which the amount payable by each ditch, canal company, irrigation district or other water user shall become due and payable, and said amount shall become due and payable from each such user on the date so fixed by said resolution, and if not paid when due shall bear a penalty from said date until paid not to exceed ten percent (10%) of the amount owed and interest of one percent (1%) per month, which both shall be fixed by resolution. Said water users at said meeting may also by resolution provide that no ditch, canal company, irrigation district or other water user shall have the right to demand and receive or to continue to receive any water and the watermaster shall not deliver water to any such user until the amount due and payable from such user, as shown by the budget adopted at said meeting, has been paid.

All resolutions adopted under the provisions of this section shall be filed with the secretary of said meeting and thereupon he shall immediately prepare and file a certified copy thereof with the director of the department of water resources and a certified copy with the county auditor of such county or counties as designated at said water users' meeting.

At the same time the county auditor delivers the roll to the county treasurer for collection, as provided in said section 42-613, Idaho Code, he

shall also deliver to said treasurer a copy of any resolutions filed in his office, under the provisions of this section. The county treasurer shall collect said roll in the manner provided in said section 42-613, Idaho Code, or the watermaster may collect the assessment as provided in section 42-618, Idaho Code: provided, that if said water users at their annual meeting have by resolution provided for a time of payment of the amount due from each user, as shown in said budget, other than the time fixed in said section 42-613, Idaho Code, the said county treasurer or said watermaster shall collect the same at the time fixed in said resolution: and, provided further, that if said water users have by resolution provided that no water shall be delivered to any water user until the amount due from such user has been paid, the notice, to be mailed by said county treasurer or watermaster, shall also state the substance of said resolution. [C.S., § 5615-B, as added by 1929, ch. 87, § 1, p. 140; I.C.A., § 41-517; am. 1992, ch. 339, § 19, p. 1014; am. 2000, ch. 83, § 3, p. 173.]

Compiler’s notes. The name of commissioner of reclamation has been changed to director of the department of water resources on authority of S.L. 1974, ch. 20, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

Section 2 of S.L. 2000, ch. 83, is compiled as § 42-613.

Section 2 of S.L. 1929, ch. 87 declared an emergency.

42-618. Alternate plan of collecting expenses in water districts.
— In water districts the water users, instead of following the provisions of sections 42-612, 42-613, 42-615, 42-616, and 42-617, Idaho Code, may, at any annual meeting, authorize the watermaster to collect his compensation and that of his assistants, and other expenses of delivering the water of said district to the users thereof, directly from the water users, canal companies, and irrigation districts. When so authorized the watermaster shall collect such compensation and expenses directly from the water users and shall turn the collected funds over to the water district treasurer for deposit and disbursement in accordance with section 42-619, Idaho Code. The water users in such water districts may also, at any annual meeting, authorize the watermaster to withhold water deliveries or suspend water deliveries in the event delivery has commenced, from those users who have not paid their pro rata share of the cost of operating the district as levied until such time as said pro rata share of the cost is paid. Said water district shall have the right to collect any charges due and unpaid, by civil action, said action to be brought in any court of competent jurisdiction, in the name of the watermaster to whom such charges are payable, and in addition to the amount found due, together with interest and costs, may also recover such sum as the court may adjudge reasonable as attorney’s fees in said action. [1947, ch. 11, § 1, p. 51; am. 1969, ch. 305, § 3, p. 913; am. 1992, ch. 339, § 20, p. 1014.]

Compiler’s notes. Section 2 of S.L. 1969, ch. 305 is compiled herein as § 42-607.

Sec. to sec. ref. This section is referred to in § 42-605A.

Opinions of Attorney General. Idaho law provides four alternative methods for the

collection and disbursement of water district funds: (1) the county auditor and treasurer may collect and disburse the assessments; (2) the county auditor and treasurer may collect the assessments, and the water district treasurer may hold and disburse the water dis-

trict funds; (3) the watermaster may collect the assessments, and the county treasurer may hold and disburse the assessments; (4) the watermaster may collect the funds, and the water district treasurer may hold and disburse the assessments; Idaho law does not permit the watermaster to act as treasurer for a water district, thus, Water District 1's present practice of allowing the watermaster to also serve as treasurer is not permissible. OAG 91-7.

This section merely replaced the procedures for collection of monies stated in other sections with the alternative collection procedures provided by this section and the other sections otherwise remained in effect; thus, if a water district only elects to proceed under this section, the county treasurer retains the authority to hold and disburse the funds of the water district and not the watermaster. OAG 91-7.

42-619. Alternate plan for payment of district expenses. —

(1) The county commissioners of any county having determined that providing the service of payment of water district expenses by the county treasurer from water district funds pursuant to section 42-613, Idaho Code, is an undue burden upon the county and shall no longer be provided, shall notify the director of the department of water resources of this action by December 1 in the year preceding the year for which the action shall first be effective by providing to the director a certified copy of the resolution of the commissioners taking such action.

(2) Notice of the action of the county commissioners shall be given to the water users of the district by the department of water resources together with the notice of the annual meeting given pursuant to section 42-605, Idaho Code.

(3) At each annual meeting of a district for which the county commissioners have taken the action provided for in subsection (1) of this section, the water users shall provide for the election or appointment of a water district treasurer. If a water district treasurer is not elected at the annual meeting, and one is found to be necessary, the director of the department of water resources shall appoint a water district treasurer. The water district treasurer shall keep a complete, accurate and permanent record of all moneys received by and disbursed for and on behalf of the district. The water district treasurer shall deposit all moneys of the district in a designated depository approved at the annual meeting, and shall comply with the public depository law as contained in chapter 1, title 57, Idaho Code.

(4) Before undertaking the duties of the office, the water district treasurer shall take and subscribe to an oath before an officer authorized by the laws of the state to administer oaths, to faithfully perform the duties of the office, and shall file the oath with the director of the department of water resources. Upon issuance by the director of a certificate confirming the election or appointment of a water district treasurer, the actions taken by the water district treasurer in fulfillment of the duties of the office are covered by the state group surety bond as provided in sections 59-801 through 59-804, Idaho Code.

(5) The water district treasurer shall serve until a successor is elected or appointed, and qualified. A water district treasurer may be removed from office by the director for failure to perform the duties of the office in the manner provided for removal of a watermaster.

(6) Compensation for the services of the water district treasurer shall be set at the annual meeting and may be established on a fixed-sum, per diem, or voluntary basis. If a water district treasurer is appointed by the director in the absence of being elected at the annual meeting, the director shall fix the compensation to be paid, if any.

(7) With respect to any district for which the county commissioners have taken the action provided for in subsection (1) of this section, or for which the water users have taken the action provided for in subsection (10) of this section and have notified the county thereof, the county auditor shall in the time and manner provided by section 63-1202, Idaho Code, transmit to the water district treasurer of the water district a settlement of all moneys belonging to such district paid into the county treasury and apportioned to such water district on or after the second Monday of the preceding month; provided, however, that in the months of July and January the money may be transmitted no later than the 25th of the month. The treasurer of the water district shall immediately deposit the funds in the designated depository for the district.

(8) The treasurer of the water district shall only disburse moneys from the water district account upon submission of a written voucher approved by the watermaster for expenses incurred for water district purposes related to the delivery of water or by a voucher approved by the chairman of the advisory committee for activities pursuant to resolutions adopted by the water users from district funds or funds retained pursuant to section 42-613A, Idaho Code.

(9) It shall be the duty of the water district treasurer to prepare a statement of the financial affairs of the district at the end of each fiscal year and to file the statement with the director of the department of water resources. An audit of the financial affairs of the district shall be made as required in section 67-450B, Idaho Code. A certified copy of the audit shall be filed with the director of the department of water resources following the audit.

(10) In any water district for which the county commissioners have not taken the action provided for in subsection (1) of this section, the water users may at the annual meeting of the district approve a resolution authorizing the election or appointment of a water district treasurer who shall exercise all duties and responsibilities of a treasurer provided for in this section.

(11) In water districts with an annual budget of three thousand dollars (\$3,000) or less, the water users may by resolution adopted at the annual meeting authorize the watermaster to serve as water district treasurer. Watermasters in water districts with annual budgets in excess of three thousand dollars (\$3,000) shall not be authorized to act as water district treasurer. [I.C., § 42-619, as added by 1989, ch. 286, § 2, p. 710; am. 1992, ch. 339, § 21, p. 1014; am. 1993, ch. 387, § 11, p. 1417; am. 1996, ch. 322, § 36, p. 1029.]

Compiler's notes. Sections 35 and 37 of S.L. 1996, ch. 322 are compiled as §§ 39-1334 and 42-3215, respectively.

Section 1 of S.L. 1989, ch. 286 contained a repeal.

Section 22 of S.L. 1992, ch. 339 is compiled as § 42-1765.

Sections 10 and 12 of S.L. 1993, ch. 387 are compiled as §§ 40-1317 and 42-3115, respectively.

Sec. to sec. ref. This section is referred to in § 42-610.

Opinions of Attorney General. Idaho law provides four alternative methods for the collection and disbursement of water district funds: (1) the county auditor and treasurer may collect and disburse the assessments; (2) the county auditor and treasurer may collect the assessments, and the water district treasurer may hold and disburse the water district funds; (3) the watermaster may collect the assessments, and the county treasurer

may hold and disburse the assessments; (4) the watermaster may collect the funds, and the water district treasurer may hold and disburse the assessments; Idaho law does not permit the watermaster to act as treasurer for a water district, thus, Water District 1's present practice of allowing the watermaster to also serve as treasurer is not permissible. OAG 91-7.

The watermaster of Water District 1 should not have custody of the funds of Water District 1 and assuming Water District 1 has elected to follow this section, a district treasurer should be elected to have custody of Water District 1 funds and to make disbursements from these funds; the district treasurer is prohibited by the provisions of the Public Depository Law from investing any district funds in common stocks, corporate bonds, mutual funds and other types of equity securities. OAG 91-7.

CHAPTER 7

HEADGATES AND MEASURING DEVICES

SECTION.

- 42-701. Installation and maintenance of controlling works and measuring devices by water appropriators — Procedure upon failure to install and maintain — Measuring and reporting of diversions — Penalty for failure to comply — Enforcement procedure — Report filing fee.
- 42-702. Measuring devices above reservoirs.
- 42-703. Measuring devices along streams.
- 42-704. [Repealed.]
- 42-705. Director of the department of water resources authorized to create and supervise water measurement districts.
- 42-706. Creation of water measurement districts.
- 42-707. District meetings — District hydrographer and assistants

SECTION.

- Election — Removal — Oath and bond — Advisory committee — District treasurer.
- 42-708. Reports of district hydrographers.
- 42-709. Measurement of water.
- 42-710. District hydrographer's term of service.
- 42-711. Expenses of the district — Approval — Allotment and charge against water user.
- 42-712. Proposed budget for succeeding year.
- 42-713. Budget of water measurement district — Adoption and contents — Debt of appropriator or water user.
- 42-714. Budget — Collection method — Enforcement.
- 42-715. Duties of the water measurement district treasurer.

42-701. Installation and maintenance of controlling works and measuring devices by water appropriators — Procedure upon failure to install and maintain — Measuring and reporting of diversions — Penalty for failure to comply — Enforcement procedure — Report filing fee. — (1) The appropriators or users of any public waters of the state of Idaho shall maintain to the satisfaction of the director of the department of water resources suitable headgates and controlling works at the point where the water is diverted. Each device shall be of such construction that it can be locked and kept closed by the watermaster or other officer in charge, and shall also be of such construction as to regulate the flow of water at the diversion point. Each such appropriator shall

construct and maintain, when required by the director of the department of water resources, a rating flume or other measuring device at such point as is most practical in such canal, ditch, wellhead or pipeline for the purpose of assisting the watermaster or department in determining the amount of water that may be diverted into said canal, ditch, wellhead or pipeline from the stream, well or other source of public water. Plans for such headgates, rating flumes or other measuring devices shall be approved by the department of water resources.

(2) If an appropriator determines that installation and maintenance of a measuring device required by the director would be burdensome for his diversion, the appropriator may, upon approval of the director, execute an agreement with the director and submit to the director such information and technical data concerning the diversion and pumping facilities as the director determines necessary to establish the relationship of power usage to water withdrawal by any pump used to divert public water.

(3) Any appropriator or user of the public waters of the state of Idaho that neglects or refuses to construct or maintain such headgates, controlling works, or measuring devices, or has not executed an agreement in lieu of a measuring device as provided in subsection (2) of this section, upon receiving ten (10) days' notice from the director of the department of water resources within which to begin and diligently pursue to completion the construction or installation of the required device or devices or to begin and diligently pursue to completion a remedy to such defects as exist in accordance with said notice, then the director of the department of water resources may order the duly qualified and acting watermaster of the water district to shut off and refuse to deliver at the point of diversion, the water owned by such appropriator or user until the user does construct and maintain such headgates, controlling works or measuring devices or remedy the defects which exist or the director may take action pursuant to section 42-1701B, Idaho Code, to enforce the requirement to construct, install or maintain such devices.

(4) The appropriators or users of the public waters of the state of Idaho shall be given a reasonable time within which to complete construction of such headgates, controlling works or measuring devices, depending upon the size and extent thereof, when due diligence has been used in the prosecution of such work.

(5) All appropriators of the public waters of the state of Idaho who are given thirty (30) days' written notice by the director prior to the beginning of the irrigation season but no later than March 15 of any year, shall measure their water diversions and report said diversions annually thereafter on a form approved by the director of the department of water resources. Such report shall include: a legal description of the point of diversion, the number assigned to each water right diverting from the public waters of the state, the maximum authorized rate of diversion, the maximum rate at which diversions have been made during the reporting period, the total volume diverted during the reporting period, and a description of the physical changes to the diversion works that have been made during the reporting period. The appropriator shall furnish each year the depth to

water in any well prior to commencement of pumping, the depth to water during the pumping period, and the pressure in the pipe distribution system during diversion if the well is not free flowing. When the director of the department of water resources determines that any person is in substantial violation of any provision of this section or any rule, permit, condition of approval or order issued or promulgated pursuant to this section, the director may commence an administrative enforcement action by issuing a written notice of violation in accordance with the provisions of section 42-1701B, Idaho Code. Subsections (5) and (6) of this section shall not apply to:

- (a) any appropriator or water user with respect to a water right included in an active water district created pursuant to chapter 6, title 42, Idaho Code, the annual report of which meets the reporting requirements of section 42-708, Idaho Code;
- (b) any irrigation district or ground water district having shown to the satisfaction of the director that they are currently making and recording sufficient measurements of their diversions with measuring methods acceptable to the director and upon their agreement to provide an annual report of their diversions to the director in substantially the same form as required in section 42-708, Idaho Code; and
- (c) any water right included in an active water measurement district created pursuant to this chapter.

(6) The director of the department of water resources shall collect a report processing fee of twenty-five dollars (\$25.00) per diversion required to be reported, including those diversions covered by an agreement in lieu of a measuring device as provided in subsection (2) of this section. Such fee shall be submitted with the annual report of diversions and well data. All such fees received by the department shall be deposited in the water administration account created pursuant to section 42-238a, Idaho Code, for use by the department to collect, analyze and report water use information and to regulate water withdrawal and use.

(7) All domestic uses, as defined in section 42-111, Idaho Code, and all stock watering uses, as defined in section 42-1401A, Idaho Code, shall be exempt from the measuring device installation and maintenance, measuring and reporting requirements of this section. [1899, p. 223, § 31; reen. R.C., § 3282; am. 1913, ch. 68, p. 305; am. 1915, ch. 34, § 16, p. 111; am. 1917, ch. 53, part of § 1, p. 122; reen. C.L., § 3282; C.S., § 5616; am. 1927, ch. 69, § 2, p. 85; I.C.A., § 41-601; am. 1994, ch. 430, § 1, p. 1388; am. 1995, ch. 291, § 1, p. 1013; am. 1996, ch. 298, § 2, p. 977; am. 1997, ch. 374, § 1, p. 1192; am. 1998, ch. 173, § 6, p. 595.]

Compiler's notes. The name of the department of water administration (formerly the department of reclamation), was changed to the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

C.S., §§ 5617-5619 were repealed by S.L. 1927, ch. 69, § 1.

Section 2 of S.L. 1994, ch. 430 is compiled as § 42-237a.

Sections 1 and 3 of S.L. 1996, ch. 298 are compiled as §§ 34-1401 and 42-706, respectively.

Section 2 of S.L. 1995, ch. 291 contained a repeal and § 3 is compiled as §§ 42-705 — 42-715.

Section 2 of S.L. 1997, ch. 374 is compiled as § 42-1401A.

Section 5 of S.L. 1998, ch. 173 repealed § 42-352.

Section 7 of S.L. 1998, ch. 173 is compiled as § 42-1605.

Section 3 of 1994, ch. 430, declared an emergency. Approved April 7, 1994.

Section 8 of S.L. 1997, ch. 374 declared an emergency. Approved March 24, 1997.

Cross ref. Distributor of water under fixed annual charge, water companies to furnish headgates and measuring devices, § 42-903.

Sec. to sec. ref. This section is referred to in § 42-237a.

Sections 42-701 — 42-703 are referred to in § 42-709.

Requirement as Permit Condition.

The Director of the Idaho Department of Water Resources was authorized to require that a permittee maintain a measuring device as a condition for granting an amendment to a water permit. *Hardy v. Higginson*, 123 Idaho 485, 849 P.2d 946 (1993).

42-702. Measuring devices above reservoirs. — Any person, firm or corporation using the channel of any stream or streams or any tributary of such stream or streams in this state as an impounding reservoir shall place therein at a point above and as near as practicable to the backwater of such reservoir such system or device as the department of water resources may require for measuring the flow of water at such point and in accordance with plans and specifications which shall be furnished by the department. [1917, ch. 53, part of § 3, p. 124; reen. C.L., § 3282d; C.S., § 5620; I.C.A., § 41-602.]

Compiler's notes. The name of the department of water administration (formerly the department of reclamation) was changed

to the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

42-703. Measuring devices along streams. — It shall also be the duty of those using water in any district to place in the streams from which said water is diverted and at such places and intervals on said streams as the department of water resources may require suitable systems or devices for measuring the flow of water. [1917, ch. 53, part of § 3, p. 124; reen. C.L., § 3282e; C.S., § 5621; I.C.A., § 41-603.]

Compiler's notes. The name of the department of water administration (formerly the department of reclamation) was changed to the department of water resources on the

authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

C.S., § 5622 was repealed by S.L. 1927, ch. 69, § 1.

42-704. Act of 1927 not retroactive. [Repealed.]

Compiler's notes. This section, which comprised 1927, ch. 69, § 3, p. 85; I.C.A.,

§ 41-604, was repealed by S.L. 1995, ch. 291, § 2, effective March 21, 1995.

42-705. Director of the department of water resources authorized to create and supervise water measurement districts. — The director of the department of water resources is authorized to create water measurement districts to carry out the water measuring requirements of this chapter and shall have direction and control of the measurement of water existing therein or diverted from all public water sources, including ground water sources, within a water measurement district. Measurement of water within water measurement districts created pursuant to section 42-706, Idaho Code, shall be accomplished by district hydrographers as provided in this chapter and supervised by the director. Administration of

water rights within water measurement districts shall be pursuant to the authority of the director of the department of water resources found elsewhere in title 42, Idaho Code, except such curtailment of diversion as is specifically authorized in section 42-714, Idaho Code. [I.C., § 42-705, as added by 1995, ch. 291, § 3, p. 1013.]

Sec. to sec. ref. This section is referred to in § 63-36220.

42-706. Creation of water measurement districts. — (1) The director of the department of water resources is authorized to divide the state into water measurement districts in such manner that each public water source or sources or part thereof shall constitute a water measurement district; provided, that any appropriation or use included in a water district created pursuant to chapter 6, title 42, Idaho Code, shall not be included in a water measurement district. Appropriators or users of water for hydropower, instream flow, aquaculture purposes and irrigation districts duly organized under title 43, Idaho Code, holding water rights for distribution to landowners within the irrigation district, and ground water districts duly organized under chapter 52, title 42, Idaho Code, may petition to be excluded from the water measurement district at the time the water measurement district is created or modified, or at a later time, upon a showing to the satisfaction of the director that they are currently making and recording sufficient measurements of their diversions with measuring methods acceptable to the director and upon their agreement to provide an annual report of their diversions to the director in substantially the same form as required in section 42-708, Idaho Code. The director may create, revise the boundaries of, or abolish a water measurement district or combine two (2) or more water measurement districts by entry of an order if such action is required in order to properly administer uses of the water resource. Copies of the order and notice of the first meeting of the water measurement district shall be sent by regular mail to all holders of rights to the waters affected by the order.

(2) Before entering an order creating, modifying, or abolishing a district, the director shall, by regular mail, send notice of the proposed action to each appropriator and water user in the district or proposed district. The notice shall describe the proposed action to be taken, the reasons therefor, the time and place of a hearing to be held concerning the proposed action, and provide a time period within which written comment on the action will be accepted. The hearing shall not be held sooner than ten (10) days after the mailing of the notice, and the written comment period shall not close sooner than ten (10) days after the hearing. Instead of mailing notice, the director may publish notice describing the proposed action, the time and place for the hearing, and the deadline for receiving written comment. The notice shall be published once a week for two (2) weeks in a newspaper or newspapers having general circulation within the district or proposed district, with the second publication appearing at least ten (10) days before the date set for the hearing. The hearing shall be held within the district or proposed

district, or at some nearby location convenient to the affected appropriators or water users.

(3) Each water measurement district created hereunder shall be considered an instrumentality of the state of Idaho for the purpose of performing the essential governmental function of measurement of water within the district.

(4) Any order of the director issued pursuant to this section is subject to judicial review as provided in section 42-1701A, Idaho Code. [I.C., § 42-706, as added by 1995, ch. 291, § 3, p. 1013; am. 1996, ch. 298, § 3, p. 977.]

Compiler's notes. Sections 2 and 4 of S.L. 1996, ch. 298 are compiled as §§ 42-701 and 42-5210, respectively.

Section 10 of S.L. 1996, ch. 298 declared an

emergency. Approved March 18, 1996.

Sec. to sec. ref. This section is referred in § 63-36220.

42-707. District meetings — District hydrographer and assistants — Election — Removal — Oath and bond — Advisory committee — District treasurer. — (1) There shall be held, except as provided in subsection (2) of this section, on the first Monday in November in each year commencing at two o'clock P.M., a meeting of all persons owning or having the use of a water right in the waters of the stream or water supply comprising such district. For purposes of this chapter, a water right is a right which has been adjudicated by the court, is represented by valid permit or license issued by the department of water resources, or is based upon diversion and beneficial use and is recorded by a claim to water right on file with the department of water resources.

(2) Such meeting shall be held at some place within the water measurement district, or at some nearby location convenient to a majority of those entitled to vote thereat, which place shall be designated by the director of the department of water resources. The director shall provide notice of district meetings by publication of the time, date, location and purpose of the meeting in a newspaper or newspapers in general circulation in the district. Published notice shall be made once per week for two (2) consecutive weeks with the second notice appearing at least thirty (30) and not more than sixty (60) days prior to the meeting. The appropriators or water users of any water measurement district may, by resolution adopted at an annual meeting or at a special meeting properly called for that purpose, change the time of day when the meeting shall commence or change the date for annual meetings in subsequent years to any day, except Saturday or Sunday, between the first Monday of November and the fourth Monday in February or change both the time and the date. At an annual meeting the appropriators or water users may adopt resolutions to assure or improve the measurement of the waters of the district within state law, and may provide that such resolutions shall continue from year to year.

(3) At the meeting of the appropriators or water users of a district there shall be elected a qualified district hydrographer for such water measurement district, who may be authorized to employ such other qualified regular assistants as the appropriators or water users shall deem necessary, and who, upon qualification and appointment by the director of the department

of water resources, shall be responsible for measurement of water as in this chapter required within the water measurement district, and the appropriators or water users shall, prior to the election of such district hydrographer and approval of the employment of assistants, fix the compensation to be paid them during the time actually engaged in the performance of their duties. Qualifications for the district hydrographer and hydrographer's assistants include:

(a) Any combination of education or experience that demonstrates to the satisfaction of the director of the department of water resources the applicant's ability to conduct water measurements, to perform mathematical computations associated with water measurements, to keep complete and accurate records of water measurements, to be familiar with common terminology associated with water rights and water diversion and use, and to be able to read public land legal descriptions, translate written public land legal descriptions to map locations and find those locations on the land; and

(b) In addition, the district hydrographer's qualifications shall include any combination of education or experience that demonstrates to the satisfaction of the director of the department of water resources the applicant's ability to keep financial records as those records pertain to the expenses of the district, prepare a budget, and prepare assessments and billings for the appropriators or water users in the district.

(4) The appropriators or water users may, by resolution, authorize the district hydrographer to utilize, through a memorandum of understanding, water delivery organizations as hydrographer's assistants.

(5) Voting shall be by majority vote of the appropriators or water users present at the meeting unless one (1) or more appropriators or water users requests voting using the procedure which follows in this subsection. In such case the meeting chairman shall appoint a credentials committee to determine the number of votes each appropriator or water user present is authorized to cast. If requested, each person present, owning or having the use for the ensuing season of any water right in the stream or water supply comprising such water measurement district shall be entitled to a number of votes equal to the average annual dollar amount and any fraction thereof assessed for that person's qualifying water right for the previous five (5) years, or such lesser number of years as the right has been assessed. If a right has not previously been assessed, a person present, owning or having the use of the right for the ensuing season shall be entitled to a number of votes equal to the dollar amount and any fraction thereof which the right would have been assessed had it existed and been used during the previous year.

(6) At such meeting the appropriators or water users shall choose a meeting chairman and meeting secretary and shall determine the manner and method of electing the district hydrographer. Within five (5) days after such meeting the meeting chairman and meeting secretary shall forward a certified copy of the minutes of such meeting to the department of water resources. The meeting chairman, or the meeting secretary if the meeting chairman from the immediately preceding annual meeting is not present,

shall call the meeting to order and preside over the election of officers for the meeting.

(7) At such meeting the appropriators or water users may choose an advisory committee to be composed of members selected as may be determined at the meeting, which committee shall serve as advisors to the director and the district hydrographer in matters pertaining to the measurement of water within the district. The advisory committee may be authorized to carry out policies pertaining to the measurement of water within the district as set forth in resolutions duly adopted by the appropriators or water users at the annual meeting or at a special meeting.

(8) A corporation or a water delivery organization including, but not limited to a corporation, a water company, an irrigation district, an irrigation company or a canal company, shall be considered a person for the purpose of this section and shall cast its vote by someone to be designated by the corporation or water delivery organization.

(9) Should the meeting not be held, or should the district hydrographer not be elected or the district hydrographer's compensation not be fixed as above provided, then the director of the department of water resources is authorized to appoint a district hydrographer and fix the district hydrographer's compensation.

(10) The director of the department of water resources may remove any district hydrographer whenever such district hydrographer fails to perform the district hydrographer's duty, upon the director's own motion or upon complaint in that respect being made to the director in writing, by one (1) person owning or having the right to the use of a water right in such district provided, that upon investigation the director, after a hearing with the other appropriators or water users of the district, which shall be held in the district or at some location convenient to the appropriators or water users of the district, finds such charge to be true. If at any time a vacancy occurs, for whatever reason, in the position of district hydrographer, the director may appoint a successor for the unexpired term.

(11) Before entering upon the duties of the district hydrographer's office, the district hydrographer shall take and subscribe an oath before some officer authorized by the laws of the state to administer oaths, to faithfully perform the duties of the district hydrographer's office, as provided in section 42-709, Idaho Code, and shall file that oath with the department of water resources. Upon qualification and appointment by the director of the department of water resources, the actions taken by a district hydrographer in fulfillment of the duties of his office are covered by the state group surety bond as provided in sections 59-801 through 59-804, Idaho Code.

(12) The director shall call a special meeting of the appropriators or water users of a district upon receipt of a written request for such meeting from a majority of the members of the advisory committee for a district, a written request from appropriators or water users representing thirty percent (30%) or more of the votes cast at the last regular annual meeting, a written request from the district hydrographer or on the director's own motion if the director determines a meeting is necessary to address matters that cannot be delayed until the next regular annual meeting. Notice of the time, place

and purpose of the special meeting shall be given by the director in the manner provided in subsection (2) of this section or by regular mail to all holders of rights to the use of the waters of such district known to the director.

(13) The appropriators or water users may, by resolution, authorize the district hydrographer to acquire, hold and dispose of such real and personal property, equipment and facilities in the name of the water measurement district as necessary for the proper measurement of water and shall provide that all such real and personal property shall remain in the custody of the district hydrographer and the district hydrographer's successor.

(14) At such meeting the appropriators or water users shall choose a district treasurer to be selected as may be determined at the meeting. The district treasurer shall assume the duties specified in section 42-715, Idaho Code. If a water measurement district treasurer is not selected at the annual meeting, and one is found to be necessary, the director of the department of water resources shall appoint a water measurement district treasurer. [I.C., § 42-707, as added by 1995, ch. 291, § 3, p. 1013; am. 1998, ch. 44, § 1, p. 189.]

Compiler's notes. Section 2 of S.L. 1998, ch. 44 is compiled as § 42-710.

Sec. to sec. ref. This section is referred to in § 42-711.

42-708. Reports of district hydrographers. — All district hydrographers shall make and certify annually a report to the department of water resources, in a form and containing the information required by the director of the department of water resources, prior to the expiration of the district hydrographer's appointment for the current year. This report shall show the amount of water diverted at each diversion as measured or determined by the district hydrographer during the preceding period from November 1 through October 31, the total expense of the district and the apportionment of expenses among users and all debits and credits to be carried over to the following year. Such report shall also include records of stream flow, depth to ground water measurements, current names and addresses of appropriators or water users within the district and such other information as the district hydrographer collected or caused to be collected in the course of completing the duties of the district as instructed by the director. The director may also ask for other information deemed necessary in assuring proper administration of water within the district. The reports of district hydrographers to the department of water resources shall be filed and kept in the office of the department. [I.C., § 42-708, as added by 1995, ch. 291, § 3, p. 1013.]

Sec. to sec. ref. This section is referred to in § 42-701.

42-709. Measurement of water. — (1) It shall be the duty of the district hydrographer to:

(a) Measure the diversion from the water supply within the district by each appropriator or water user, or as the director of the department of

water resources may otherwise require, and report the results as provided in section 42-708, Idaho Code.

(b) Take and record measurements from devices within the district required in sections 42-702 and 42-703, Idaho Code, and report the results as provided in section 42-708, Idaho Code.

(c) Monitor the ground water levels at ground water diversions, as required by the director of the department of water resources, before the pumping period begins and during the pumping period and report the results as provided in section 42-708, Idaho Code.

(d) Maintain current records of names and addresses of ground and surface appropriators or water users within the district and report the names and addresses as provided in section 42-708, Idaho Code.

(e) Maintain and report, as provided in section 42-708, Idaho Code, any change in the diversion facilities of any appropriator or water user in the district.

(f) Immediately report to the director of the department of water resources the diversion of any water appearing to be diverted without a water right or in violation of a water right.

(2) Data collected pursuant to the provisions of subsection (1) of this section during the period November 1 through December 31 shall be reported in the report required in section 42-708, Idaho Code, submitted the following year.

(3) The district hydrographer and his assistants may make reasonable entry upon any lands in the state for the purpose of making water measurements or in direct support of making water measurements.

(4) Appropriators or water users may be required by the director, pursuant to subsections (1) through (4) of section 42-701, Idaho Code, or section 42-702 or 42-703, Idaho Code, to install measuring devices to facilitate the measurement of water required in this section. [I.C., § 42-709, as added by 1995, ch. 291, § 3, p. 1013.]

Sec. to sec. ref. This section is referred to in § 42-707.

42-710. District hydrographer's term of service. — A district hydrographer shall serve throughout the year from January 1 through December 31. The appropriators or water users of any water measurement district may, by resolution adopted at an annual meeting or at a special meeting properly called for that purpose, change the hydrographer's term of service to correspond with consecutive annual meeting dates or other annual dates as determined by the appropriators or water users. Assistants to the district hydrographer shall serve when necessary to make the water measurements required of the district or for such period of time as specified by resolution at any annual meeting of the appropriators or water users, provided, the period of time set by resolution is sufficient for the assistants to make all needed water measurements in the district. [I.C., § 42-710, as added by 1995, ch. 291, § 3, p. 1013; am. 1998, ch. 44, § 2, p. 189.]

Compiler's notes. Section 1 of S.L. 1998, ch. 44 is compiled as § 42-707.

42-711. Expenses of the district — Approval — Allotment and charge against water user. — (1) District hydrographers shall prepare an accounting of all expenses of the district for the year. The accounting shall show:

- (a) The time charged to the district by each employee of the district, the function performed by each employee for the time charged and the cost to the district for the time charged.
- (b) The cost to the district for each activity of the advisory committee and for each activity a breakdown of the cost by per diem for committee members, travel costs, goods and services, and other costs with a description of the substance of the other costs.
- (c) The cost to the district for travel and services, except as already included in paragraph (b) of this subsection, and a description of the activity performed for the district for each cost.
- (d) The cost to the district for all real or personal property, equipment or facilities acquired, and a description and the cost of each.

The accounting shall be certified by the district hydrographer and the chairman of the advisory committee.

(2) The accounting shall be submitted to the director of the department of water resources for approval.

(3) The expenses of the district shall be a charge against the water users in the district. The expenses of the district shall be apportioned among all water users included within the district in the following manner:

- (a) A charge of twenty-five dollars (\$25.00) per year for each diversion measured, provided the charge may be up to fifty dollars (\$50.00) per year if adopted by resolution approved by vote of the water users at a meeting conducted in accordance with section 42-707, Idaho Code; and
- (b) A pro rata share of the total expense of the district, minus the total amount charged for all diversions in the district from paragraph (a) of this subsection determined by the fraction the recorded diversion rate for each water right is to the total recorded diversion rate of all water rights being measured by the district.
- (c) Except, if the total charge for all diversions measured in the district from paragraph (a) of this subsection is more than the total expense of the district, the individual charge for each diversion will be the total expense of the district divided by the number of diversions in the district and the pro rata share from paragraph (b) of this subsection will be zero (0).

(4) An allocation of the district expenses among the various users shall be prepared by the district hydrographer and filed with the director of the department of water resources and with the water measurement district treasurer. [I.C., § 42-711, as added by 1995, ch. 291, § 3, p. 1013; am. 2001, ch. 169, § 1, p. 581.]

42-712. Proposed budget for succeeding year. — Each district hydrographer shall, at least thirty (30) days prior to the annual meeting of

the appropriators or water users of the water measurement district, also prepare and file with the department of water resources a proposed budget for the succeeding year, together with an allocation of the amount of the budget to the respective appropriators or water users, using the actual amounts for the past year or years as the basis for the allocation, which proposed budget and allocation shall be submitted to the appropriators or water users for consideration and approval at the next annual district meeting. [I.C., § 42-712, as added by 1995, ch. 291, § 3, p. 1013.]

42-713. Budget of water measurement district — Adoption and contents — Debt of appropriator or water user. — At any annual meeting the appropriators or water users must adopt a budget covering the estimated expenses of water measurements and data collection, as required in section 42-709, Idaho Code, of the district for the ensuing year, and by resolution determine that the budget shall be collected, and the compensation of the district hydrographer and the district hydrographer's assistants and any other expenses of the district, including the costs of the advisory committee in implementing resolutions adopted by the appropriators or water users of the district for activities in addition to the payment of the salary and operating expenses of the district hydrographer and assistants, shall be paid in the manner provided in this section. The budget shall show the aggregate amount to be collected from all the appropriators or water users in the district, and the amount to be paid by each ditch, canal company, irrigation district or other appropriator or water user, and for the purpose of computing the respective amounts, the cost of measuring the various diversions and other measurements during the past year or years not exceeding five (5) years, shall be used as a basis. Upon the adoption of the budget the amount payable by each ditch, canal company, irrigation district or other appropriator or water user, as shown by the budget, shall become the debt of each respectively and shall become due and payable as in this chapter provided. [I.C., § 42-713, as added by 1995, ch. 291, § 3, p. 1013.]

42-714. Budget — Collection method — Enforcement. — (1) The budget, when approved, shall be filed with the secretary of the meeting and the district treasurer and thereupon the district hydrographer shall immediately prepare and file a certified copy thereof with the director of the department of water resources. The budget so approved shall be due and payable on the first day of April of each year unless a different due date is specified by resolution of the appropriators or water users at the annual meeting. Any assessments not paid by the due date shall bear interest from the due date until paid at the rate of eight percent (8%) per annum.

(2) The district hydrographer is authorized to collect his compensation and that of his assistants, and other expenses of the district, directly from the appropriators or water users, canal companies, and irrigation districts. The district hydrographer shall collect such compensation and expenses directly from the appropriators or water users and shall turn the collected funds over to the water measurement district treasurer for deposit and disbursement in accordance with section 42-715, Idaho Code.

(3) The district hydrographer is authorized to cause the delivery of water to be withheld or to cause diversions of water to cease by those users who have not paid their pro rata share of the cost of operating the district as levied until such time as the pro rata share of the cost is paid.

(4) The water measurement district shall have the right to collect any charges due and unpaid, by civil action, the action to be brought in any court of competent jurisdiction, in the name of the district hydrographer to whom such charges are payable, and in addition to the amount found due, together with interest and costs, may also recover such sum as the court may adjudge reasonable as attorney's fees in the action.

(5) The appropriators or water users may by resolution request the department of water resources to prepare and mail the billings for the collections authorized in this section. The resolution will agree to reimburse to the department the actual cost incurred by the department in preparing and mailing the billings. [I.C., § 42-714, as added by 1995, ch. 291, § 3, p. 1013.]

Sec. to sec. ref. This section is referred to in § 42-705.

42-715. Duties of the water measurement district treasurer. —

(1) The water measurement district treasurer shall keep a complete, accurate and permanent record of all moneys received by and disbursed for and on behalf of the district. The water measurement district treasurer shall deposit all moneys of the district in a designated depository approved at the annual meeting, and shall comply with the public depository law as contained in chapter 1, title 57, Idaho Code.

(2) Before undertaking the duties of the office, the water measurement district treasurer shall take and subscribe to an oath before an officer authorized by the laws of the state to administer oaths, to faithfully perform the duties of the office, and shall file the oath with the director of the department of water resources. Upon issuance by the director of a certificate confirming the selection of a water measurement district treasurer, the actions taken by the water measurement district treasurer in fulfillment of the duties of the office are covered by the state group surety bond as provided in sections 59-801 through 59-804, Idaho Code.

(3) The water measurement district treasurer shall serve until a successor is elected or appointed, and qualified. A water measurement district treasurer may be removed from office by the director for failure to perform the duties of the office in the manner provided for removal of a district hydrographer.

(4) Compensation for the services of the water measurement district treasurer shall be set at the annual meeting and may be established on a fixed sum, per diem, or voluntary basis. If a water measurement district treasurer is appointed by the director in the absence of being elected at the annual meeting, the director shall fix the compensation to be paid, if any.

(5) The treasurer of the water measurement district shall only disburse moneys from the water measurement district account upon submission of a written voucher approved by the district hydrographer for expenses in-

curred for water measurement district purposes related to the district or by a voucher approved by the chairman of the advisory committee for activities pursuant to resolutions adopted by the appropriators or water users from district funds.

(6) It shall be the duty of the water measurement district treasurer to prepare a statement of the financial affairs of the district at the end of each fiscal year and to file the statement with the director of the department of water resources. An audit of the financial affairs of the district shall be made as required in section 67-450B, Idaho Code. A certified copy of the audit shall be filed with the director of the department of water resources following the audit.

(7) In water measurement districts with an annual budget of three thousand dollars (\$3,000) or less, the appropriators or water users may, by resolution adopted at the annual meeting, authorize the district hydrographer to serve as water measurement district treasurer. District hydrographers in water measurement districts with annual budgets in excess of three thousand dollars (\$3,000) shall not be authorized to act as water measurement district treasurer. [I.C., § 42-715, as added by 1995, ch. 291, § 3, p. 1013.]

Legislative Intent. Section 4 of S.L. 1995, ch. 291 read: "STATEMENT OF LEGISLATIVE INTENT. It is the intent of the legislature of the State of Idaho that the Director of the Department of Water Resources exercise the authority provided under Chapter 7, Title 42, Idaho Code, to create water measurement districts within the Eastern Snake River Plain Aquifer area in a timely manner to assure that water diverted from public water sources is measured and reported to the De-

partment of Water Resources in accordance with the provisions of the chapter to be used in the management of water resources of the State."

Compiler's notes. Section 5 of S.L. 1995, ch. 291 declared an emergency. Approved March 21, 1995.

Sec. to sec. ref. This section is referred to in § 42-707.

CHAPTER 8

DISTRIBUTION OF STORED WATER

SECTION.
42-801. Conveyance of stored water through natural channel — Appointment of special deputy and assistants.

SECTION.
42-802. Conveyance of stored water — Penalty for interference — Duty of special deputy.

42-801. Conveyance of stored water through natural channel — Appointment of special deputy and assistants. — Whenever the owner of a reservoir shall desire to use the bed of a stream, or a natural water course, for the purpose of carrying stored water, he shall in writing notify the department of water resources, giving the date when it is proposed to discharge the water, its volume in acre feet, and in cubic feet per second at the point of discharge, and the persons and ditches entitled to its use. The department shall then appoint a special deputy, unless a state watermaster has already been appointed to deliver the waters from said stream, in which event the appointed watermaster and his assistants may be instructed to make the delivery of the stored water without further appointment, whose

duty it shall be to adjust the headgates of all ditches not entitled to the stored water, and in such manner that those having the right to the use of such water shall secure the volume to which they are entitled. For the purpose of delivering such stored water the deputy appointed by the department of water resources may employ such number of assistants as, with the approval of the department, he may deem necessary. The owner of any reservoir proceeding under the provisions of this section shall pay to the special deputy and to each assistant a salary as determined by the director of the department of water resources, or a salary and expenses as negotiated with the owner of the said stored water and approved by the director of the department of water resources, or pay to the water district, if there is one, a sum based upon the cost of delivering a unit of water. Said charge by the water district will be determined and collected in the same manner as prescribed in chapter 6, title 42, Idaho Code, for compensating the watermaster for delivery of natural flow water. [1909, p. 150, § 1; reen. C.L., § 3282h; C.S., § 5624; I.C.A., § 41-701; am. 1980, ch. 277, § 2, p. 721.]

Compiler's notes. Section 1 of S.L. 1980, ch. 277 is compiled as § 42-609.

ANALYSIS

Constitutional right.

Dams.

Fluctuating flow of river.

Right to use channel.

Constitutional Right.

Constitution, Art. 15, § 3, providing that right to appropriate unappropriated waters of a natural stream to a beneficial use shall never be denied, applies to right to use of such stream as highway to carry storage water from a reservoir. *Twin Falls Canal Co. v. American Falls Reservoir Dist. No. 2*, 49 F.2d 632 (D. Idaho 1931), *aff'd*, 59 F.2d 19 (9th Cir. 1932), *cert. denied*, 287 U.S. 638, 53 S. Ct. 87, 77 L. Ed. 552 (1932).

Dams.

Where plaintiff constructed a dam which resulted in the backing up of water to height which others could utilize, he could not compel reservoir district, diverting storage water from such stream, to contribute to the initial cost of constructing dam. *Twin Falls Canal Co. v. American Falls Reservoir Dist. No. 2*, 49 F.2d 632 (D. Idaho 1931), *aff'd*, 59 F.2d 19 (9th Cir. 1932), *cert. denied*, 287 U.S. 638, 53 S. Ct. 87, 77 L. Ed. 552 (1932).

Fluctuating Flow of River.

An easement which granted a power company the right to fluctuate the flow of a river

would be construed as granting something in addition to the right of the power company to fill completely the natural channel of the river, since the power company had the latter right without the aid of an easement. *Griffeth v. Utah Power & Light Co.*, 226 F.2d 661 (9th Cir. 1955).

Right to Use Channel.

Where defendant built a series of dams that increased the flow of a river to such extent that plaintiff's access to his farm land was obstructed and plaintiff sought to recover damages on the theory that the dams constituted a nuisance, court held that, by statute, defendant and other appropriators of water for lawful purposes had right to use channel of natural streams for carrying stored water or water diverted from other streams. *Johnson v. Utah Power & Light Co.*, 215 F.2d 814 (9th Cir. 1954).

The current of a river cannot be appropriated by a riparian proprietor in Idaho, even assuming the possible persistence in that state of the doctrine of riparian rights, in view of statutes declaring the right of appropriators of water for irrigation or other lawful purpose to use the channel of natural streams for carrying stored water or water diverted from other streams. *Johnson v. Utah Power & Light Co.*, 215 F.2d 814 (9th Cir. 1954).

42-802. Conveyance of stored water — Penalty for interference — Duty of special deputy. — After the special deputy and his assistants shall have adjusted the headgates of all ditches, the owners of which are not entitled to the use of such stored water as provided in the preceding section

and before such stored water shall have passed the headgates so adjusted, any person who shall raise or tamper with any such headgate in such manner as to misappropriate any portion of such water to his own use and benefit whether he be the owner of such headgate or not, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than \$100 together with imprisonment in the county jail for ten (10) days; and not more than \$2000 or by imprisonment in the county jail not to exceed six (6) months, or by both such fine and imprisonment.

Whenever the special deputy or any assistant shall discover any person in the act of committing a misdemeanor declared in this section, he shall arrest such person and turn him over to the sheriff of the county in which the misdemeanor was committed and he shall also file with the county attorney of such county an affidavit setting out the facts with reference to the commission of such misdemeanor. [1909, p. 150, § 2; reen. C.L., § 3282i; C.S., § 5625; am. 1921, ch. 133, § 1, p. 320; I.C.A., § 41-702.]

CHAPTER 9

DISTRIBUTION OF WATER TO CONSUMERS

SECTION.

- 42-901. Appointment of watermaster — Appointment by court.
- 42-902. Injuring ditch or headgate — Triple damages.
- 42-903. Headgates and measuring devices — Water companies to furnish.
- 42-904. Division of land into classes by priority.
- 42-905. Point of delivery.
- 42-906. Amount and lien of rental or maintenance.
- 42-907. Duties of consumers — Appointment of manager of distributing lateral.
- 42-908. Manager of distributing lateral — Alternative method of selection.
- 42-909. Manager of distributing lateral — Appointment by district

SECTION.

- watermaster — By directors of irrigation district — Payment of compensation.
- 42-910. Duties of manager of distributing lateral — Assessment of repair and maintenance costs — Appeals.
- 42-911. Users of water defined.
- 42-912. Company to furnish water on demand.
- 42-913. Application for water.
- 42-914. Sale or rental constitutes a dedication — Domestic purposes construed — Liability for violation.
- 42-915. Consumer's title not affected by transfer of ditch.
- 42-916. Liability for waste of water.

42-901. Appointment of watermaster — Appointment by court. —

It shall be the duty of those owning or controlling any ditch, canal or lateral to appoint a superintendent or watermaster, whose duty it shall be to measure the water from such ditch, canal or lateral through the outlet of those entitled thereto, according to his or her pro rata share: provided, that any vicinity or neighborhood, the inhabitants of which use the waters of any ditch, canal or lateral for the purpose of irrigation, or have or claim a common right to the waters of any ditch or lateral for such purposes, provided the waters so claimed or used have not been allotted to the individual users thereof, shall constitute a water district.

Any one or more of said joint owners so using the water of any ditch, canal or lateral as aforesaid, when the appointment of a watermaster can not be agreed upon, may petition the judge of the district court in whose district the

ditch, canal or lateral may be located for the appointment of a watermaster for said ditch, canal or lateral, and shall set forth in said petition the facts of his or her ownership in said ditch, canal or lateral; the ownership and interest of all other joint owners; the location and length of said ditch, canal or lateral, and requesting said district court to appoint a watermaster to take charge of the same. Upon due notice being given to all of the water users under said ditch, canal or lateral, and after hearing before said court, it shall be the duty of the judge of said district court if he deem it necessary or equitable in order that the rights of all water users under said ditch, canal or lateral may be protected, to appoint a watermaster for the ditch, canal or lateral described in the petition. Said watermaster to receive such compensation as the court in his judgment may deem adequate, and shall be paid in the same manner as is provided for the payment of watermasters under chapter 5 [6] of this title, and shall perform the same duties and have the same power and authority as other watermasters appointed or elected in accordance with the provisions of this code. [1899, p. 380, § 17; reen. R.C., § 3284; am. 1909, p. 104, § 1; reen. C.L., § 3284; C.S., § 5626; I.C.A., § 41-801.]

Compiler's notes. The bracketed number "6" near the end of the section was inserted by the compiler.

Cross ref. Election of watermaster in water districts, § 42-605.

Fish and game laws, arrest of violators

authorized, § 36-1301.

Cited in: Walbridge v. Robinson, 22 Idaho 236, 125 P. 812, 43 L.R.A. (n.s.) 240 (1912); Brunzell v. Stephenson, 30 Idaho 202, 164 P. 89 (1917).

42-902. Injuring ditch or headgate — Triple damages. — Any person who, without the consent of the watermaster of the district, diverts any water from the ditch or channel where it was placed, or caused, or left to run by the watermaster or his deputies, or who shuts or opens any ditch, gate or dam with intent so to divert any water, and thereby deprive any person of the use of the same during any part of the time he is entitled to such use, or who, without the consent of the watermaster, cuts any ditch or the banks thereof, or breaks or destroys any gate or flume, is liable in a civil action to any person injured thereby in three (3) times the actual damage sustained in consequence of any such wrongful act or acts. [1881, p. 275; R.S., § 3205; am. R.C. & C.L., § 3285; C.S., § 5627; I.C.A., § 41-802.]

42-903. Headgates and measuring devices — Water companies to furnish. — Any person, association or corporation delivering or distributing water under any fixed annual charge or rental shall provide the necessary gates and measuring devices to render possible and practicable a measurement of the quantity of water being delivered to any consumer (or number of consumers using a common lateral or distributing ditch); and the price charged for the annual use of the water so distributed shall be in proportion to the quantity of water delivered from the works of such person, association or corporation. Such measuring devices shall be of such a character, and provided with such gauges or scales, that the quantity of water being delivered at any time can be ascertained by inspection; and shall be of such general plan as shall meet with the approval of the department of water

resources, which shall inspect any such devices whenever possible to ascertain their character, and the department shall furnish such general information and instructions to any consumer, or the watermaster of any number of consumers of water, as may be necessary to enable him to ascertain the quantity of water flowing through any such measuring device. [1897, p. 127, § 2; compiled R.C. & C.L., § 3286; C.S., § 5628; I.C.A., § 41-803.]

Compiler's notes. The name of the department of water administration (formerly the department of reclamation) has been changed to the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).
The words enclosed in parentheses so appeared in the law as enacted.

Cross ref. Appropriators and users of public waters to maintain headgates and measuring devices, § 42-701.
Cited in: Johnson v. Strong Arm Reservoir Irrigation Dist., 82 Idaho 478, 356 P.2d 67 (1960); Savage Lateral Ditch Water Users Ass'n v. Pulley, 125 Idaho 237, 869 P.2d 554 (1994).

42-904. Division of land into classes by priority. — When any ditch, canal or reservoir delivering or distributing water to several users has one or more rights or priorities by reason of enlargements made from time to time, the right of the land being irrigated by such works shall be divided into classes; rights of the first class belonging to those lands reclaimed between the dates of the first and second priorities or rights of such works; rights of the second class belonging to those lands reclaimed between the dates of the second and third priorities of such works; rights of any other class being determined in like manner; but all the rights belonging to the same class shall be equal and subject alike to the regulations of their respective class. [1901, p. 191, § 9a; reen. R.C. & C.L., § 3287; C.S., § 5629; I.C.A., § 41-804.]

Cited in: Bradshaw v. Milner Low Lift Irrigation Dist., 85 Idaho 528, 381 P.2d 440 (1963).

ANALYSIS

- Classification by board.
- Constitutionality.
- Effect on rights of water users.
- Judicial determination of priority.
- Priority in use.

Classification by Board.
Board must classify land the best it can under such evidence it has or may be able to obtain and in accordance with law. Brose v. Board of Dirs., 24 Idaho 116, 132 P. 799 (1913).

Constitutionality.
This section does not contravene Const., Art. 5, §§ 3, 5. Brose v. Board of Dirs., 20 Idaho 281, 118 P. 504 (1911).

Effect on Rights of Water Users.
Any classification made by irrigation company under provisions of this section could in no way affect or control question of priorities between users, and in no way prohibited or

limited any user of water in having question of priority between users settled and adjudicated in proper court of state. Brose v. Board of Dirs., 20 Idaho 281, 118 P. 504 (1911).
Canal company was not given right to ultimately decide question of priority as between water users as that power remains with court, and adjustment of land into classes was not permanent unless water users decided so. Brose v. Board of Dirs., 24 Idaho 116, 132 P. 799 (1913).

Judicial Determination of Priority.
A decree determining the priority of use of water in an irrigation canal did not affect appropriators who were not made parties thereto. Scott v. Nampa Meridian Irrigation Dist., 55 Idaho 672, 45 P.2d 1062 (1934).

Priority in Use.
As between the various classes of users, their rights would appear to be governed by the doctrine that priority in use, or first in time of use, gives superiority of right under the statutory system of distribution governing irrigation districts. Scott v. Nampa Meridian Irrigation Dist., 55 Idaho 672, 45 P.2d 1062 (1934).

Where the owners of the original lands of an irrigation district had acquired and, for many years, applied to the irrigation of their lands valuable water rights which had become appurtenant and dedicated to their lands and which were held in trust by the district for their use, they could not, without

their consent, upon the annexation of new lands to the district, be deprived of that water when needed to irrigate their lands. *Bradshaw v. Milner Low Lift Irrigation Dist.*, 85 Idaho 528, 381 P.2d 440 (1963).

Collateral References. 94 C.J.S., Waters, §§ 874-902.

42-905. Point of delivery. — Any person, association or corporation which may contract to deliver a certain quantity of water to any party or parties, shall deliver the same to such party or parties, together with a reasonable and necessary allowance for loss by evaporation and seepage, at some convenient point on the main ditch, canal or reservoir of said person, association or corporation, or on any branch or lateral thereof belonging to the owner or owners of such ditch, canal or reservoir. [1895, p. 174, part of § 17; reen. R.C. & C.L., § 3288; C.S., § 5630; I.C.A., § 41-805.]

Cross ref. Duties of consumers, §§ 42-907, 42-908.

Sec. to sec. ref. This section is referred to in §§ 42-907, 42-908.

ANALYSIS

Community ditch.

Construction.

Duty of canal company.

Rights of water users.

Community Ditch.

There is no law making company furnishing water responsible for its distribution among users through community ditch and thus when it has turned into such ditch aggregate amount of water required, its responsibility is ended. *Preis v. Idaho Irrigation Co.*, 37 Idaho 109, 215 P. 466 (1923).

Construction.

This and following sections clearly authorize parties to contract with reference to delivery of water from reservoir or canal and to fix and determine amount to be charged as an

annual maintenance fee therefor. *Jackson v. Indian Creek Reservoir Ditch & Irrigation Co.*, 16 Idaho 430, 101 P. 814 (1909).

A company may use canal it does not own, provided it has a lawful right to use it. *Dukes v. Canyon Hill Ditch Co.*, 38 Idaho 696, 224 P. 85 (1924).

Duty of Canal Company.

It was the duty of canal company to keep its ditches and canals in repair and to turn water for consumer out of its main canal or lateral at such place as would be most convenient for consumer and cause least waste by seepage and evaporation. *Niday v. Barker*, 16 Idaho 73, 101 P. 254 (1909).

Rights of Water Users.

Water users were entitled to organize and provide for transfer of management of laterals owned by them to a ditch company pursuant to a unilateral agreement signed by the majority of the water users. *Hale v. McCammon Ditch Co.*, 72 Idaho 478, 244 P.2d 151 (1951).

42-906. Amount and lien of rental or maintenance. — The amount to be paid by said party or parties for the delivery of said water, which amount may be fixed by contract, or may be as provided by law, is a first lien upon the land for the irrigation of which said water is furnished and delivered. But if the title to said tract of land is in the United States or the state of Idaho, then the said amount shall be a first lien upon any crop or crops which may be raised upon said tract of land, which said lien shall be recorded and collected as provided by law for other liens in this state. And any mortgage or other lien upon such tracts of land that may hereafter be given shall in all cases be subject to the lien for price of water as provided in this section. [1895, p. 174, part of § 17; reen. R.C., § 3288; reen. C.L., § 3288a; C.S., § 5631; I.C.A., § 41-806.]

Cross ref. Land mortgaged to secure state endowment funds, § 43-2007.

Cited in: Portneuf-Marsh Valley Canal Co. v. Brown, 274 U.S. 630, 47 S. Ct. 692, 71 L. Ed. 1243 (1927).

ANALYSIS

Alternative remedy.
Construction.
Maintenance charges.
Preferential rate.
Unpaid assessments.

Alternative Remedy.

For user's default in payment of maintenance, water company may have proceeded either under this section or under § 42-101. Adams v. Twin Falls-Oakley Land & Water Co., 29 Idaho 357, 161 P. 322 (1916); Blaine County Canal Co. v. Hansen, 49 Idaho 649, 292 P. 240 (1930).

Construction.

This section clearly authorizes parties to contract with reference to the delivery of

water and to fix and determine amount to be charged as an annual maintenance fee therefor. Jackson v. Indian Creek Reservoir Ditch & Irrigation Co., 16 Idaho 430, 101 P. 814 (1909).

Maintenance Charges.

Maintenance charges may be recovered in action in quantum meruit. Blaine County Canal Co. v. Hansen, 49 Idaho 649, 292 P. 240 (1930).

Preferential Rate.

Canal company, not a common carrier, may allow a valid preferential maintenance rate. Nampa & Meridian Irrigation Dist. v. Briggs, 27 Idaho 84, 147 P. 75 (1915).

Unpaid Assessments.

This section provides remedy for unpaid assessments by foreclosure of lien on premises as this furnishes ample protection and works no injustice to user of water. Reynolds v. North Side Canal Co., 36 Idaho 622, 213 P. 344 (1923).

42-907. Duties of consumers — Appointment of manager of distributing lateral. — Where two (2) or more parties take water from said ditch, canal or reservoir at the same point, to be conveyed to their respective premises for any distance through the same lateral or distributing ditch, such parties shall, on or before April first of each year, select some person to have charge during the succeeding season of the distribution of water from such lateral, whose duty it shall be to ascertain and see that the amount of water to which each of the parties interested is entitled is properly apportioned and distributed. It shall be his further duty to see that the said person, association or corporation, contracting to furnish such water shall deliver the amount as provided in section 42-905, and in case of dispute between such person and the said person, association or corporation as to the quantity of water to be delivered, or the amount actually delivered, the matter shall be referred to the department of water resources. The parties entitled to said water shall keep their ditches and laterals in good condition for carrying and distributing the same. In case the parties entitled to the use of water as in this section stated shall neglect or refuse to perform the duties imposed upon them by this section, they shall have no cause for damage against the person, association or corporation furnishing said water for failure to properly furnish and distribute the same. [1895, p. 174, part of § 17; reen. R.C. § 3288; reen. C.L., § 3288b; C.S., § 5632; I.C.A., § 41-807.]

Compiler's notes. The name of the department of water administration (formerly the department of reclamation) has been changed to the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

Cross ref. Appointment by district watermaster or directors of irrigation district, § 42-909.

Duties of manager, § 42-910.

Sec. to sec. ref. This section is referred to in §§ 42-910, 42-1302.

ANALYSIS

Construction.
Construction of prior decree.
Costs of repair and maintenance.
Effect of failure to appoint.

Nature of office.

Rights of water users.

Construction.

Viewing provisions of this section in connection with other sections of chapter, it would seem that purpose of legislature was simply to provide means of insuring equitable distribution of water received through community ditch and enforcing payment by each user of his part of expenses necessarily incurred. *Preis v. Idaho Irrigation Co.*, 37 Idaho 109, 215 P. 466 (1923).

There is nothing in S.L. 1899, p. 380, or S.L. 1903, p. 223, repugnant or inconsistent with provisions of this section, and it is not thereby repealed. *Preis v. Idaho Irrigation Co.*, 37 Idaho 109, 215 P. 466 (1923).

Where water users fail to select watermaster, company was not liable for unfair distribution of water from community ditch, although it had not delivered the full amount of water contracted for. *Preis v. Idaho Irrigation Co.*, 37 Idaho 109, 215 P. 466 (1923).

Construction of Prior Decree.

Since this statute was enacted subsequent to decree as to water rights, it could not be considered as controlling in construing that decree, and the decree should have been construed in the light of the facts in the case and the law as it existed when the decree was entered. *Anderson v. Dewey*, 82 Idaho 173, 350 P.2d 734 (1960).

42-908. Manager of distributing lateral — Alternative method of selection. — Wherever two or more persons take water from any main ditch, canal or reservoir, at the same point, to be conveyed to their respective premises for any distance through the same lateral or distributing ditch, as provided in section 42-905, the person to be selected by such parties on or before April first of each year, as provided in section 42-907, may be selected and appointed by a written instrument designating such person, signed by the majority of such persons so using the said ditch for their said water, and filed with the watermaster or other managing agent or director of such main canal, ditch or reservoir. [1909, p. 108, § 1; reen. C.L., § 3288c; C.S., § 5633; I.C.A., § 41-808.]

Cited in: *Hale v. McCammon Ditch Co.*, 72 Idaho 478, 244 P.2d 151 (1951).

Water Decree Prior to Statute.

Since this statute was enacted subsequent to decree as to water rights, it could not be considered as controlling in construing that

Costs of Repair and Maintenance.

If the servient estate landowner's use of irrigation ditch had increased the cost of repairs and maintenance he would have been responsible for the additional costs, but since his use did not increase those costs, he had no obligation to pay for any portion of those costs. *Sellers v. Powell*, 120 Idaho 250, 815 P.2d 448 (1991).

Effect of Failure to Appoint.

Failure of plaintiff to select watermaster for ditches used by himself and others jointly was not ground upon which motion for nonsuit could be sustained in action against water company for failure to deliver water. *Preis v. Idaho Irrigation Co.*, 37 Idaho 109, 215 P. 466 (1923); *Meservy v. Idaho Irrigation Co.*, 37 Idaho 227, 217 P. 595 (1923).

Nature of Office.

Manager of distributing lateral is not public officer in any sense of term. He gives no bond and takes no oath, nor is he paid from public treasury. *Carter v. Niday*, 46 Idaho 505, 269 P. 91 (1928).

Rights of Water Users.

Water users were entitled to organize and provide for transfer of management of laterals owned by them to a ditch company pursuant to a unilateral agreement signed by the majority of the water users. *Hale v. McCammon Ditch Co.*, 72 Idaho 478, 244 P.2d 151 (1951).

decree as the decree is to be construed in light of the facts in the case and the law as it existed when the decree was entered. *Anderson v. Dewey*, 82 Idaho 173, 350 P.2d 734 (1960).

42-909. Manager of distributing lateral — Appointment by district watermaster — By directors of irrigation district — Payment of compensation. — If two (2) or more parties taking water from any main

ditch, canal or reservoir at the same point to be conveyed to their respective premises for any distance, through the same lateral or distributing ditch, do not select a manager for said lateral, as provided in section 42-907 or section 42-908, the watermaster of the water district, shall on the written demand of any one or more of said parties, appoint a manager for said lateral, who shall have and exercise all the powers and perform all of the duties of a manager of the distributing lateral as provided in section 42-910: provided, that if an irrigation district is owner of the main ditch, canal or reservoir, then the board of directors of such district shall, upon such demand, make such appointment.

The compensation of said manager shall be fixed by said watermaster, and shall be paid in the manner provided by section 42-910 for the payment of expenses incurred by him. If not paid, it may be collected, with other damages in the action provided by said section: provided, that if an irrigation district is the owner of the main ditch, canal or reservoir, the board of directors of such district shall fix the compensation of said manager; and at the end of the irrigation season upon the request of such manager the secretary of such district shall prorate the amount of such compensation among the several parties taking water through such lateral, or distributing ditch upon the basis of the number of acres irrigated by each, and mail each a statement of the amount prorated to such party, requesting that remittance be made to such secretary for and on behalf of such manager. In the event such parties or either of them, not later than the date when irrigation district assessments are delinquent, remit to such secretary, he shall, upon receiving same, and without making any entry in his books of account, deliver it to such manager. Should such parties or either of them fail or refuse at such time to remit to said secretary, then such manager may collect as hereinbefore provided. [C.S., § 5633-A, as added by 1925, ch. 99, § 1, p. 144; am. 1929, ch. 45, § 1, p. 57; am. 1931, ch. 62, § 1, p. 105; I.C.A., § 41-809.]

Cited in: Cronwall v. Talboy, 45 Idaho 459, 262 P. 871 (1928); Hale v. McCammon Ditch Co., 72 Idaho 478, 244 P.2d 151 (1951).

42-910. Duties of manager of distributing lateral — Assessment of repair and maintenance costs — Appeals. — Such person shall be known as the manager of such distributing lateral for the season for which he is selected, and in addition to the powers granted to him by section 42-907 he shall have power to require of each user of such lateral such user's proportion of the amount of labor, material or money reasonably necessary for the proper repair and maintenance of such lateral, and to require measuring weirs, head-gates and checks to be installed for distributing the water among the users, and each user of such lateral shall furnish his proportion of such labor, material or money upon three (3) days' notice so to do, and, in default of so doing, such manager may employ other labor in his place, or furnish the material or money necessary, and such user shall pay to the manager the reasonable value of such material or labor so furnished by the manager, upon demand, in case of default in payment by such user

the said manager may sue and collect the same in any court of competent jurisdiction, and in addition to all costs, the court shall allow said manager his reasonable attorney's fees incurred in that behalf.

In the event such water user or water users shall not furnish his or their respective share of such labor, material or money within three (3) days after notice so to do, as hereinabove provided, then said manager may, if he elects, notify the association or corporation delivering water into said distributing lateral of the failure, neglect or refusal of said water users or any of them to furnish his or their respective share of such labor, material or money for the proper repair and maintenance of such lateral or for the furnishing and installation of measuring weirs, head-gates and checks, and upon receipt of such notice said association or corporation may, if it chooses to do so, proceed to furnish all labor, material and money necessary for the proper repair and maintenance of such lateral and for the furnishing and installation of measuring weirs, head-gates and checks, or it may, if it chooses so to do, proceed to repair and maintain said laterals and furnish and install such measuring weirs, head-gates and checks as it shall deem necessary or proper for the distribution of water among the several water users. The cost of such repair and maintenance and the cost of furnishing and installing such measuring devices, head-gates, and checks shall be apportioned among the several water users on the basis of benefits derived therefrom by said water users, and the said association or corporation furnishing said funds or doing the aforesaid things or any of them shall within thirty days after completion thereof give each of such water users written notice of the amount or amounts to be paid by him and demand payment thereof. Should the water users or any of them desire to contest the assessment and apportionment made by such association or corporation, appeal may be taken from such assessment and apportionment to the district court in the county where the principal office of said association or corporation is located within ten (10) days after receipt of said notice and demand for payment, in the same manner as in the case of appeals from the boards of county commissioners. In case of appeal any sum or sums determined by said district court to be due, or in the event no appeal is taken then any sum or sums determined by such association or corporation to be due from any water users, shall be paid by such water user within ninety (90) days and the said association or corporation may refuse to deliver any water to any such water user until the amount due shall have been paid in full. [1909, p. 108, § 2; reen. C.L., § 3288d; C.S., § 5634; I.C.A., § 41-810; am. 1939, ch. 213, § 1, p. 435.]

Sec. to sec. ref. This section is referred to in § 42-1302.

ANALYSIS

Attorney's fees.
Expenses and salary.
Legislative purpose.
Set-off.

Attorney's Fees.

In order to recover attorney's fees in action by watermaster against users of system it

was necessary to allege and prove three days' verbal notice or service of written demand to contribute his proportion for maintenance and subsequent failure to comply. *Carter v. Niday*, 46 Idaho 505, 269 P. 91 (1928).

Expenses and Salary.

Legislature intended that cost of repairs and maintenance should be borne by water users individually without recourse to any public fund and watermaster's salary should

be paid in same way. *Carter v. Niday*, 46 Idaho 505, 269 P. 91 (1928).

Legislative Purpose.

Purpose of legislature was simply to provide means of insuring an equitable distribution of water received through community ditch, apportioning expense of operating and maintaining such community ditch and enforcing payment by each user of his part of expenses necessarily incurred. *Preis v. Idaho Irrigation Co.*, 37 Idaho 109, 215 P. 466 (1923).

42-911. Users of water defined. — The term “users of water” from a community ditch shall be understood to include the owner of the land on which the water is used, or any tenant or other person in possession and control of said premises. [1909, p. 108, § 3; reen. C.L., § 3288e; C.S., § 5635; I.C.A., § 41-811.]

42-912. Company to furnish water on demand. — Any person, company or corporation owning or controlling any canal or irrigation works for the distribution of water under a sale or rental thereof, shall furnish water to any person or persons owning or controlling any land under such canal or irrigation works for the purpose of irrigating such land or for domestic purposes, upon a proper demand being made and reasonable security being given for the payment thereof: provided, that no person, company or corporation shall contract to deliver more water than such person, company or corporation has a title to, by reason of having complied with the laws in regard to the appropriation of the public waters of this state. [1899, p. 380, § 19; reen. R.C. & C.L., § 3289; C.S., § 5636; I.C.A., § 41-812.]

Cross ref. Penalty for neglect to deliver water, § 18-4310.

ANALYSIS

- Action for damages.
- Action to compel delivery.
- Construction.
- Estoppel.
- Illegal contracts.
- Limit on sale of water.
- Priorities.
- Rights and remedies of water company.
- Writ of mandate.

Action for Damages.

Water user makes prima facie case by proving contract and failure in delivery of water according to its terms, together with damages resulting to his crops and it is incumbent upon water company to prove failure of water supply on account of extraordinary drought and that it delivered to user his just proportion of water supply which it had. *Tapper v. Idaho Irrigation Co.*, 36 Idaho 78, 210 P. 591

Set-off.

In action by watermaster for failure of user to contribute for maintenance, such water user could not set off against claim, expenses and damages incurred in maintaining mandamus proceedings to protect his rights as such damages should have been recovered in mandamus proceeding and could not be litigated in collateral action. *Carter v. Niday*, 46 Idaho 505, 269 P. 91 (1928).

(1922); *Preis v. Idaho Irrigation Co.*, 37 Idaho 109, 215 P. 466 (1923).

Action to Compel Delivery.

Applicant for use of water who had complied with provisions of this act and who was refused water, although company had sufficient unsold water to supply him, was entitled to writ of mandate to compel delivery of water. *Bardsly v. Boise City Irrigation & Land Co.*, 8 Idaho 155, 67 P. 428 (1901).

Complaint must allege demand and must tender compensation or security for payment of charges for delivery and it was insufficient to allege that plaintiff offered to secure payment of such charges. *Bardsly v. Boise City Irrigation & Land Co.*, 8 Idaho 155, 67 P. 428 (1901).

Construction.

This section does not provide its own penalty for violations. *Sanderson v. Salmon River Canal Co.*, 34 Idaho 303, 200 P. 341, 26 A.L.R. 292 (1921), appeal dismissed, 260 U.S. 755, 43 S. Ct. 94, 57 L. Ed. 497 (1922).

Estoppel.

State, in dealing with Carey Act project, acts by virtue of its sovereignty and not in capacity of private owner, and doctrine of estoppel cannot be invoked against it but this does not apply to individual contract holders who, having obtained rights under contract providing that there shall be no priorities among them, are estopped to claim priorities as against each other. *Sanderson v. Salmon River Canal Co.*, 34 Idaho 303, 200 P. 341, 26 A.L.R. 292 (1921), appeal dismissed, 260 U.S. 755, 43 S. Ct. 94, 67 L. Ed. 497 (1922).

Illegal Contracts.

Contracts whereby irrigation company agreed to furnish more water than it had ability to furnish were illegal. *Gerber v. Nampa & Meridian Irrigation Dist.*, 16 Idaho 1, 100 P. 80 (1908).

Where party was entitled to water from ditch company and did everything that the constitution and laws of the state required him to do in order to get it, water company was bound to deliver him water and could not require him to sign a special contract binding him to do things which the law did not require him to do in order to get the water. *Green v. Byers*, 16 Idaho 178, 101 P. 79 (1909).

Under this section any water company or corporation is forbidden to contract or sell more water than it is entitled to and must not sell more water than it has. *State v. Twin Falls Salmon River Land & Water Co.*, 30 Idaho 41, 166 P. 220 (1916).

Provision in contract that no water should be delivered to purchaser while he is in default as to any toll or assessment was invalid and void as to tolls and assessments for preceding year, but valid as to such charges for current year. *Parrot v. Twin Falls Salmon River Land & Water Co.*, 32 Idaho 759, 188 P. 451 (1920).

Limit on Sale of Water.

Carey Act company could not sell water rights it did not have. *Idaho Irrigation Co. v. Gooding*, 265 U.S. 518, 44 S. Ct. 618, 68 L. Ed. 1157 (1924).

State land board was without authority to authorize construction company to sell indefinite fractional water right to settlers under Carey Act project, but was required to limit such sales to amount of water available from company's appropriation, which could be

seasonably delivered by proposed system. *State v. Twin Falls Land & Water Co.*, 37 Idaho 73, 217 P. 252 (1923).

Priorities.

All settlers who purchase water rights and apply water to land shall be in same class without priorities among themselves. *Sanderson v. Salmon River Canal Co.*, 34 Idaho 303, 200 P. 341, 26 A.L.R. 292 (1921), appeal dismissed, 260 U.S. 755, 43 S. Ct. 94, 67 L. Ed. 497 (1922).

Rights and Remedies of Water Company.

Carey Act company furnishing all water good husbandry required could foreclose liens therefor, although it had not furnished the full amount of water contracted for. *Sallee v. Commonwealth Trust Co.*, 8 F.2d 227 (9th Cir. 1925).

This section did not repeal § 42-1206, and water company which delivered water to consumer without demanding prepayment of charges therefor may sue at law to recover amount of such charges already earned by it, but cannot shut off consumer's water because he refused to make payment. *Shelby v. Farmers Coop. Ditch Co.*, 10 Idaho 723, 80 P. 222 (1905).

Company may require persons claiming water to pay or give security for payment of maintenance assessments in advance of furnishing water. *Reynolds v. North Side Canal Co.*, 36 Idaho 622, 213 P. 344 (1923).

Writ of Mandate.

Writ of mandate would not issue to compel Carey Act company to issue shares where shares of stock already sold were in excess of available water supply and contract between company and state was entered into under mutual mistake of material fact. *State v. Twin Falls Salmon River Land & Water Co.*, 30 Idaho 41, 166 P. 220 (1916); *Sanderson v. Salmon River Canal Co.*, 34 Idaho 303, 200 P. 341, 26 A.L.R. 292 (1921), appeal dismissed, 260 U.S. 755, 43 S. Ct. 94, 67 L. Ed. 497 (1922).

Collateral References. Liability of irrigation district for failure to supply water, and for negligent construction or operation of ditches and canals. 69 A.L.R. 1232; 160 A.L.R. 1165; 169 A.L.R. 536.

Damages for a breach of duty to furnish water. 108 A.L.R. 1176.

42-913. Application for water. — Any person or persons owning or controlling land which has or has not been irrigated from any such canal, shall on or before January first of any year, inform the owner or person in control of such canal whether or not he desires the water from said canal for the irrigation of land during the succeeding season, stating also the quantity of water needed. In distributing water from any such canal, ditch or conduit

during any season, preference shall be given to those applications for water for land irrigated from said canal the preceding season, and a surplus of water, if any there be, shall be distributed to the lands in the numerical order of the applications for it. But no demand for the purchase of a so called perpetual water right, or any contract fixing the annual charges or the quantity of water to be used per acre, shall be imposed as a condition precedent to the delivery of water annually as provided in this chapter; but the consumer of water shall be the judge of the amount and the duty of the water required for the irrigation of his land; and the annual charges to be made and to be fixed under the further provisions of this title, shall hereafter be based upon the quantity of water delivered to consumers, and shall not in any case depend upon the number of acres irrigated by means of such amount of water delivered. [1899, p. 380, § 20; reen. R.C. & C.L., § 3290; C.S., § 5637; I.C.A., § 41-813.]

Cited in: *Bardsly v. Boise City Irrigation & Land Co.*, 8 Idaho 155, 67 P. 428 (1901).

Application of Section.

This section had no application to case where all prior applications for water had been supplied and ditch company still had water for rental and distribution, and in such case applicant could have enforced delivery of water, although he did not make his applica-

tion prior to January 1. *Helphery v. Perrault*, 12 Idaho 451, 86 P. 417 (1906).

Collateral References. Right of owner of land within reclamation project in respect to which a water right was allowed upon application pursuant to reclamation act, to perpetual right beyond control of federal government for sufficient amount beneficially to irrigate land. 115 A.L.R. 1320.

42-914. Sale or rental constitutes a dedication — Domestic purposes construed — Liability for violation. — Whenever any waters have been or shall be appropriated or used for agricultural or domestic purposes under a sale, rental or distribution thereof, such sale, rental or distribution shall be deemed an exclusive dedication to such use upon the tract of land for which such appropriation or use has been secured, and, whenever such waters so dedicated shall have once been sold, rented or distributed to any person who has settled upon or improved land for agricultural purposes with the view of receiving the benefit of such water under such dedication, such person, his heirs, executors, administrators, successors or assigns, shall not thereafter be deprived of the annual use of the same when needed for agricultural or domestic purposes upon the tract of land for which such appropriation or use has been secured, or to irrigate the land so settled upon or improved, upon payment therefor, and compliance with such equitable terms and conditions as to the quantity used and times of use as may be prescribed by law. "Domestic purposes" shall not be construed to include any manner of land irrigation. Any person, association or corporation violating any of the provisions of this section, shall be liable for all damage to any party or parties injured thereby, which damage shall be determined by the proper court. [1895, p. 174, § 14; reen. R.C. & C.L., § 3291; C.S., § 5638; I.C.A., § 41-814.]

Cross ref. Domestic purposes defined, § 42-111.

Continuing rights to water guaranteed, Const., Art. 15, § 4.

ANALYSIS

Delivery outside district.

Determination of conditions of use.

Enlargement of district.

United States party to adjudication action.

Delivery Outside District.

Delivery of water outside irrigation district, when same was not needed by users within district, was not a dedication and did not confer vested right in owner outside district. *Yaden v. Gem Irrigation Dist.*, 37 Idaho 300, 216 P. 250 (1923).

Determination of Conditions of Use.

Terms and conditions upon which a person is entitled to use of water from ditch or canal company are to be determined by courts. *Wilterding v. Green*, 4 Idaho 773, 45 P. 134 (1896).

Enlargement of District.

Where the owners of the original lands of an irrigation district had acquired and, for many years, applied to the irrigation of their lands valuable water rights which had become appurtenant and dedicated to their lands and which were held in trust by the district for their use, they could not, without their consent, upon the annexation of new lands to the district, be deprived of that water when needed to irrigate their lands. *Bradshaw v. Milner Low Lift Irrigation Dist.*, 85 Idaho 528, 381 P.2d 440 (1963).

United States Party to Adjudication Action.

Where the United States was interested in a contract with an irrigation district and such

district brought an action for an adjudication of its water rights, which were affected by said contract, the United States was an indispensable party to such suit and this was true notwithstanding the fact that the secretary of the interior was made a party, and that the contract in question was made and executed through and by him and neither was the situation changed by the fact that there had been a prior decree of the state court adjudicating such rights wherein the secretary was a party defendant. *American Falls Reservoir Dist. No. 2 v. Crandall*, 82 F.2d 973 (9th Cir. 1936); modified on other grounds, 85 F.2d 864 (9th Cir. 1936).

Collateral References. Use of injunction against repeated or continuing trespasses in cases involving water rights. 32 A.L.R. 546; 60 A.L.R.2d 310.

Right to injunction to protect water rights as affected by fact that party seeking injunction contemplates no immediate use of rights, or by doctrine of comparative injury. 106 A.L.R. 687.

Rights of user of water as to discontinuance of use of water. 112 A.L.R. 230.

Divisibility of easement in gross or license in respect to water. 130 A.L.R. 1253.

Deed involving water rights as conveying fee or easement. 136 A.L.R. 404.

42-915. Consumer's title not affected by transfer of ditch. — When any payment is made under the terms of a contract, by means of which payment a perpetual right to the use of water necessary to irrigate a certain tract of land is secured, said water right shall forever remain a part of said tract of land, and the title to the use of said water can never be affected in any way by any subsequent transfer of the canal or ditch property or by any foreclosure or any bond, mortgage or other lien thereon; but the owner of said tract of land, his heirs or assigns, shall forever be entitled to the use of the water necessary to properly irrigate the same, by complying with such reasonable regulations as may be agreed upon, or as may from time to time be imposed by law. And said payment for said water right shall be a release of any bond or mortgage upon the canal property of the person or company from whom such right is purchased or their successors or assigns, to the amount of such water right thus purchased and paid for, and said person or company from whom such water right is purchased shall furnish to the party or parties purchasing such right a release, or a good and sufficient bond for a release, from said mortgage or bonded indebtedness to the amount of the water right thus purchased. [1895, p. 174, § 16; reen. R.C. & C.L., § 3292; C.S., § 5639; I.C.A., § 41-815.]

Cited in: *Brown v. Portneuf-Marsh Valley Irrigation Co.*, 299 F. 338 (D. Idaho 1924).

ANALYSIS

Construction.

Mortgage foreclosure.

Construction.

This section was intended to apply to such water rights as are described in Const., Art. 15, § 4, that is, a water right only where there has been an actual application of water to land for a beneficial use. *Hewitt v. Great W. Beet Sugar Co.*, 20 Idaho 235, 118 P. 296 (1911).

Mortgage Foreclosure.

Upon purchase and payment of permanent water right, such water right thereafter was

in no way affected by the lien of any mortgage given by company from whom such water right was purchased, or by any foreclosure of any such mortgage, whether given before or after the sale of such water right. *Hewitt v. Great W. Beet Sugar Co.*, 20 Idaho 235, 118 P. 296 (1911).

Collateral References. Constitutionality of statutes affecting riparian rights. 56 A.L.R. 277.

Prescriptive right of riparian owners to continuance of artificial channel or ditches. 88 A.L.R. 134.

Deed or mortgage foreclosure as passing rights in ditch company. 98 A.L.R. 134.

Rights of user of water as to discontinuance of use of water. 112 A.L.R. 230.

42-916. Liability for waste of water. — No person entitled to the use of water from any such ditch or canal, must, under any circumstances, use more water than good husbandry requires for the crop or crops that he cultivates; and any person using an excess of water, is liable to the owner of such ditch or canal for the value of such excess; and in addition thereto, is liable for all damages sustained by any other person, who would have been entitled to the use of such excess water, as fixed by this section. [1881, p. 273; R.S., § 3190; reen. R.C. & C.L., § 3293; C.S., § 5640; I.C.A., § 41-816.]

ANALYSIS

Law a part of contracts.

Public policy.

Waste water.

Law a Part of Contracts.

Provision that water user must not use more water than good husbandry requires is read into Carey Act contracts. *Idaho Irrigation Co. v. Gooding*, 265 U.S. 518, 44 S. Ct. 618, 68 L. Ed. 1157 (1924); *Sallee v. Commonwealth Trust Co.*, 8 F.2d 227 (9th Cir. 1925).

By reading this section into a water contract, water user is entitled to receive amount of water specified in his contract to the extent necessary to irrigate the crop or crops which he cultivates in accordance with the usages of good husbandry but he is not entitled to receive a greater amount than is necessary to irrigate his crops, nor, in any event, a greater amount than that specified in the contract. *State v. Twin Falls Salmon River Land & Water Co.*, 30 Idaho 41, 166 P. 220 (1916).

Public Policy.

Duty of careful and economical use of water is one that by statute as well as public policy is imposed upon every water user. *State v. Twin Falls Canal Co.*, 21 Idaho 410, 121 P. 1039 (1911), writ of error dismissed, 235 U.S. 690, 35 S. Ct. 205, 59 L. Ed. 427 (1914).

It is against the public policy of state, as

well as against express enactments, for a water user to take more of the water to which he is entitled than is necessary for the beneficial use for which he has appropriated it. *Glavin v. Salmon River Canal Co.*, 44 Idaho 583, 258 P. 532 (1927).

Since it is the policy of the law of Idaho to prevent the wasting of water, at such times during the irrigation season as water is not being used and beneficially applied, other users are entitled to use and beneficially apply such water. *Knutson v. Huggins*, 62 Idaho 662, 115 P.2d 421 (1941).

Waste Water.

Where an excess amount of water must be diverted and utilized in order to sufficiently and economically irrigate land, the excess so diverted is not waste within meaning of this section and § 18-4117 (repealed) since what constitutes a reasonable use of water is a question of fact and depends upon the circumstances of each case. *Beasley v. Engstrom*, 31 Idaho 14, 168 P. 1145 (1917).

Appropriator of waste water cannot require the owner of the water right to continue to waste the water for the benefit of the appropriator. *Colthorp v. Mountain Home Irrigation Dist.*, 66 Idaho 173, 157 P.2d 1005 (1945).

Collateral References. Constitutionality of a statute limiting or controlling exploitation of waste of water. 24 A.L.R. 307; 78 A.L.R. 834.

CHAPTER 10

FIXING WATER RATES

SECTION.

- 42-1001. Application to county commissioners.
 42-1002. Setting date for hearing.
 42-1003. Service of notice of hearing — Depositions.

SECTION.

- 42-1004. Conduct of hearing — Order — Appeal.
 42-1005. Matters considered in fixing rate.

42-1001. Application to county commissioners. — The county commissioners of each county now organized, and of each county to be hereafter organized in this state, shall, at their regular session in January of each year and at such other sessions as they in their discretion may deem proper, hear and consider all applications which may be made to them by any party or parties interested in either furnishing or delivering for compensation, or by any person or persons using or consuming, water for irrigation or other beneficial purpose or purposes from any ditch, canal or conduit, the whole or any part of which shall be in such county, which application shall be supported by such affidavit as the applicant or applicants may present, showing reasonable cause for such board of county commissioners to proceed to fix a maximum rate of compensation for water thereafter delivered from such ditch, canal or conduit within such county: provided, that when any ditch, canal or conduit shall extend into two (2) or more counties, the county commissioners of each of such counties shall fix the maximum rate for water used in that county. [1899, p. 380, § 26; reen. R.C. & C.L., § 3294; C.S., § 5641; I.C.A., § 41-901.]

Cross ref. Manner in which reasonable maximum rates for water use may be established, Const., Art. 15, § 6.

Cited in: Walbridge v. Robinson, 22 Idaho 236, 125 P. 812, 43 L.R.A. (n.s.) 240 (1912); Public Utils. Comm'n v. Natatorium Co., 36 Idaho 287, 211 P. 533 (1922); South Boise Water Co. v. McDonald, 50 Idaho 409, 296 P. 591 (1931).

ANALYSIS

Change of rates.
 Laborers.
 Rates fixed by contract.

Change of Rates.

Rate, adjudged reasonable, must be presumed to have remained reasonable until such time as such rate is changed in conformity with the statute. Green v. Jones, 22 Idaho 560, 126 P. 1051 (1912).

At any time after expiration of one year from the time rates were established any party in interest may petition board to fix a new rate. Green v. Jones, 22 Idaho 560, 126 P. 1051 (1912).

Laborers.

Laborers tending and maintaining water canals and reservoirs were agricultural workers for purposes of unemployment compensation act. Big Wood Canal Co. v. Unemployment Comp. Div., 61 Idaho 252, 100 P.2d 49 (1940).

Rates Fixed by Contract.

Private contracts granting water rights at fixed prices entered into prior to act of March 7, 1895 (1895, p. 174), first legislation providing for fixing rates, were not affected by such act or subsequent legislation. Boise City Irrigation & Land Co. v. Turner, 176 F. 373 (C.C.D. Idaho 1905).

While county commissioners are authorized by this section to fix water rates, legislature has by § 42-905 also authorized parties to enter into a contract with reference to rate to be charged and such contract, when made before commissioners have established any rates, will be enforced. Jackson v. Indian Creek Reservoir Ditch & Irrigation Co., 16 Idaho 430, 101 P. 814 (1909).

Collateral References. 94 C.J.S., Waters, §§ 666-728.

42-1002. Setting date for hearing. — Every such board of county commissioners shall, upon examination of such affidavit or affidavits, or from the oaths of witnesses thereto, if they find that the facts sworn to show the application to be in good faith, and that there are reasonable grounds to believe that unjust rates of compensation are, or are likely to be, charged or demanded for water from such ditch, canal, or conduit, enter an order fixing a day not sooner than ten (10) days thereafter, nor later than twenty (20) days (a special meeting may be called for that purpose), when they will hear all parties interested in such water-works aforesaid, or in procuring water therefrom, for any of the said purposes as well as all documentary or oral evidence or depositions taken according to law, touching said ditch or other water-works aforesaid, and the cost of furnishing water therefrom. [1889, p. 380, § 27; reen. R.C. & C.L., § 3295; C.S., § 5642; I.C.A., § 41-902.]

Compiler's notes. The words enclosed in parentheses so appeared in the law as enacted.

42-1003. Service of notice of hearing — Depositions. — At the time so fixed all persons interested as aforesaid, on either side of the controversy, in lands which may be irrigated by such ditch or other water-works aforesaid, may appear by themselves or by their agents or attorneys, and said commissioners shall then proceed to take action in the matter of fixing such rates of compensation for the delivery of water: provided, the applicant or applicants, if the application be made by a party or parties as aforesaid desirous of procuring water, shall, within ten (10) days from the time of entering the said order fixing the hearing, cause a copy of such order, duly certified, to be delivered to the owner or owners of such ditch, canal or conduit or to the president, secretary, or agent of the company, if it be owned by a corporation or association having such officers; if any such owner cannot be found, a copy shall be left at the usual place of business of the company of which he is such officer, or at his residence if such company have no place of business. And if such ditch or water-works aforesaid shall be owned by several owners, not being an incorporated company, it shall be sufficient to serve such notice by delivering a copy to a majority of them. If the applicant be the owner or party controlling such ditch, canal or conduit, such notice shall be given by causing printed copies of such order in handbill form, in conspicuous type, to be posted securely in ten (10) or more places throughout the county and section watered by such ditch or other water-works aforesaid, if the water be used for irrigation. The person or persons making such services or posting such printed copies shall make affidavit of the manner in which the same has been done, which affidavit shall be filed with the board of county commissioners. Depositions mentioned in the preceding section to be used before said commissioners shall be taken by any officer in the state authorized by law to take depositions, upon reasonable notice being given to the opposite party of the time and place of taking the same. [1899, p. 380, § 28; reen. R.C. & C.L., § 3296; C.S., § 5643; I.C.A., § 41-903.]

42-1004. Conduct of hearing — Order — Appeal. — Said board of commissioners may adjourn or postpone any hearing from time to time as may be found necessary; but when in session they shall hear and examine all legal testimony or proofs offered by any party interested as aforesaid, as well as concerning the original cost and present value of the works and structure of such ditch, canal or conduit, as well as the cost and expense of maintaining and operating the same, and all matters which may affect the establishment of reasonable maximum rates for water to be furnished and delivered therefrom, and they may issue subpoenas for witnesses, which subpoenas shall be served in the same manner in which subpoenas are served in civil cases; and said board may also issue subpoenas for the production of all books and papers required before them. The district court of the proper county, or the judge thereof in vacation, may, in case of refusal to obey the subpoenas of the board of county commissioners, compel obedience thereto, or punish for refusal to obey after hearing as in cases of attachment for contempt of such district court. Upon hearing and considering all the evidence and facts and matters involved in the case, said board of county commissioners shall enter an order describing the ditch, canal or conduit, or other water-works in question, with sufficient certainty, and fixing a just and reasonable maximum rate of compensation for water thereafter delivered from such ditch or other water-works as last aforesaid, within the county in which such commissioners act; and such rate shall not be changed within one (1) year from the time when such rate shall be so fixed: provided, that an appeal may be taken to the district court from any act, order or proceeding of the board by any person or corporation aggrieved thereby, as in other cases under the general statute of the state of Idaho, governing appeals from an order or proceeding of the board of county commissioners. [1899, p. 380, § 29; am. 1905, p. 3, § 1; reen. R.C. & C.L., § 3297; C.S., § 5644; I.C.A., § 41-904.]

Cross ref. Appeals from county commissioners, §§ 31-1509 et seq.

Attachment for contempt, §§ 7-601 — 7-614.

Service of subpoenas, IRCP, Rule 4.

ANALYSIS

Appeal.

Intent.

Appeal.

This section expressly confers jurisdiction upon district court to hear appeals from or-

ders of boards of county commissioners fixing water rates. *Rust v. Stewart*, 7 Idaho 558, 64 P. 222 (1901).

Intent.

Intent of this provision is that water rate, once established, is to remain in force until the establishment of a new one in conformity with law. *Green v. Jones*, 22 Idaho 560, 126 P. 1051 (1912).

42-1005. Matters considered in fixing rate. — In fixing the rates at which water shall be furnished, the board of commissioners shall take into consideration the cost of the works, the expense of keeping the same in repair, and all other conditions that affect the cost of delivering the same. Whenever it shall appear to the board of county commissioners from competent evidence that any consumer or consumers of water distributed through any ditch or canal, is entitled to the distribution or use of any water

therefrom, at not to exceed a proportionate amount of the actual cost of maintenance and operation of said ditch or canal, they shall, upon request of such person or persons so entitled, fix the rate per cubic foot per second to be charged to such consumer or consumers for the current year. [1899, p. 380, § 30; reen. R.C. & C.L., § 3298; C.S., § 5645; I.C.A., § 41-905.]

CHAPTER 11

RIGHTS OF WAY

SECTION.

42-1101. Rights of landowners to water.

42-1102. Owners of land — Right to right-of-way.

42-1103. Owners of springs and streams — Right to right of way.

42-1104. Right of way over state lands.

SECTION.

42-1105. Right of way for riparian proprietors.

42-1106. Right of eminent domain.

42-1107. Right of way for drains.

42-1108. Right to cross ditches.

42-1101. Rights of landowners to water. — All persons, companies and corporations owning or claiming any lands situated on the banks or in the vicinity of any stream, are entitled to the use of the waters of such stream for the purpose of irrigating the land so held or claimed. [R.S., § 3180; reen. R.C. & C.L., § 3299; C.S., § 5646; I.C.A., § 41-1001.]

Riparian Rights.

In the dissenting opinion this section was cited in support of the application of the doctrine of riparian rights to the irrigation law, but the majority of the court, without citing this section, declared, in effect, that the doctrine of riparian rights has no place in the jurisprudence of this state. *Drake v. Earhart*, 2 Idaho 750, 23 P. 541 (1890).

Riparian rights are substantial property rights which may not be arbitrarily destroyed, but they are subject to the police power of the

state and, within reasonable limits, may be modified by legislation passed in the interest of the general welfare. *California-Oregon Power Co. v. Beaver Portland Cement Co.*, 73 F.2d 555 (9th Cir. 1934), aff'd, 295 U.S. 142, 55 S. Ct. 725, 79 L. Ed. 1356 (1935).

Collateral References. Constitutionality of statutes affecting riparian rights. 56 A.L.R. 277.

Prescriptive right of riparian owners to continuance of an artificial channel or ditches. 88 A.L.R. 134.

42-1102. Owners of land — Right to right-of-way. — When any such owners or claimants to land have not sufficient length of frontage on a stream to afford the requisite fall for a ditch, canal or other conduit on their own premises for the proper irrigation thereof, or where the land proposed to be irrigated is back from the banks of such stream, and convenient facilities otherwise for the watering of said lands cannot be had, such owners or claimants are entitled to a right-of-way through the lands of others, for the purposes of irrigation. The right-of-way shall include, but is not limited to, the right to enter the land across which the right-of-way extends, for the purposes of cleaning, maintaining and repairing the ditch, canal or conduit, and to occupy such width of the land along the banks of the ditch, canal or conduit as is necessary to properly do the work of cleaning, maintaining and repairing the ditch, canal or conduit with personnel and with such equipment as is commonly used, or is reasonably adapted, to that work. The right-of-way also includes the right to deposit on the banks of the ditch or canal the debris and other matter necessarily required to be taken from the ditch or canal to properly clean and maintain it, but no greater

width of land along the banks of the canal or ditch than is absolutely necessary for such deposits shall be occupied by the removed debris or other matter. Provided, that in the making, constructing, keeping up and maintenance of such ditch, canal or conduit, through the lands of others, the person, company or corporation, proceeding under this section, and those succeeding to the interests of such person, company or corporation, must keep such ditch, canal or other conduit in good repair, and are liable to the owners or claimants of the lands crossed by such work or aqueduct for all damages occasioned by the overflow thereof, or resulting from any neglect or accident (unless the same be unavoidable) to such ditch or aqueduct.

The existence of a visible ditch, canal or conduit shall constitute notice to the owner, or any subsequent purchaser, of the underlying servient estate, that the owner of the ditch, canal or conduit has the right-of-way and incidental rights confirmed or granted by this section.

This section shall apply to ditches, canals or other conduits existing on the effective date [March 12, 1996] of this act, as well as to ditches, canals or other conduits constructed after such effective date. [1881, p. 269; R.S., § 3181; reen. R.C. & C.L., § 3300; C.S., § 5647; I.C.A., § 42-1002; am. 1996, ch. 187, § 1, p. 594.]

Compiler's notes. The words in parentheses so appeared in the law as enacted.

Section 2 of S.L. 1996, ch. 187 is compiled as § 42-1204.

Section 3 of S.L. 1996, ch. 187 declared an emergency. Approved March 12, 1996.

ANALYSIS

Condemnation for right of way.
Repair and maintenance costs.
Rights of servient and dominant owners.
Use of existing canal.

Condemnation for Right of Way.

Where an owner of land was denied access for irrigation water across the lands of an adjacent landowner, the owner could condemn a right of way to supply the water under the law of eminent domain. *White v. Marty*, 97 Idaho 85, 540 P.2d 270 (1975), overruled on other grounds, *Carr v. Magistrate Court*, 108 Idaho 546, 700 P.2d 949 (1985).

Landlocked individuals may condemn a right of way through the lands of others for purposes of irrigation. *Canyon View Irrigation Co. v. Twin Falls Canal Co.*, 101 Idaho 604, 619 P.2d 122 (1980), cert. denied, 451 U.S. 912, 101 S. Ct. 1983, 68 L. Ed. 2d 301 (1981).

Repair and Maintenance Costs.

If the servient estate landowner's use of irrigation ditch had increased the cost of repairs and maintenance he would have been responsible for the additional costs, but since his use did not increase those costs, he had no obligation to pay for any portion of those costs. *Sellers v. Powell*, 120 Idaho 250, 815 P.2d 448 (1991).

Rights of Servient and Dominant Owners.

Where irrigation district sought an injunction to prohibit servient owner from constructing a sidewalk and fence on property over which the district had an irrigation easement, it was determined that the irrigation district's easement was not exclusive, and the district failed to produce evidence showing that construction of the sidewalk and fence along the side of the irrigation lateral would unreasonably interfere with its rights under the easement, regardless of whether those rights arose from the grant of the channel change easement or this section. *Nampa & Meridian Irrigation Dist. v. Washington Fed. Sav.*, 135 Idaho 518, 20 P.3d 702 (2001).

Use of Existing Canal.

Where an irrigation company had purchased approximately 300 cfs of Snake River water and sought to put that water to beneficial use on land located west of an existing canal system, but where the irrigation company had no canal and there existed no natural waterway by which its water could be transported by gravity to its stockholders' lands, the irrigation company could condemn the right to enlarge and use the existing canal in common with the canal company and thus the irrigation company could divert its water from the Snake River into the canal company's canal system and then reclaim a like amount, with due allowance for seepage and evaporation, at a headgate closer to its irrigation project site. *Canyon View Irrigation Co. v. Twin Falls Canal Co.*, 101 Idaho 604, 619 P.2d 122 (1980), cert. denied, 451 U.S. 912, 101 S. Ct. 1983, 68 L. Ed. 2d 301 (1981).

Collateral References. 26 Am. Jur. 2d, Eminent Domain, §§ 1-9, 189-198.
 29A C.J.S., Eminent Domain, §§ 1-5, 38.
 Constitutionality of statutes affecting riparian rights. 56 A.L.R. 277.
 Liability of irrigation district for failure to supply water, and for negligent construction or operation of ditches or canals. 69 A.L.R.

1232; 160 A.L.R. 1165; 169 A.L.R. 536.
 Prescriptive right of riparian owners to continuance of an artificial channel or ditches. 88 A.L.R. 134.
 Right of owner to alter his easement in such a way as to deprive servient estate of incidental benefits. 172 A.L.R. 193.

42-1103. Owners of springs and streams — Right to right of way. — Where the owners of any spring, or the appropriators thereof, or of any stream, desire to conduct the waters thereof to any lands for the purposes of irrigation, or to any city or town for the use of the inhabitants thereof, or to any factory, or to any distant place, with the intent to apply the same to a beneficial use, and to accomplish such object it is necessary to cross with ditches, flumes or other conduit, the lands owned or occupied by others than the owners or appropriators of such spring or stream, the right of way over and across the lands of others for conducting said water may be acquired in the manner above provided. [1881, p. 271; R.S., § 3185; reen. R.C. & C.L., § 3301; C.S., § 5648; I.C.A., § 41-1003.]

Collateral References. 26 Am. Jur. 2d, Eminent Domain, §§ 1-9, 189-198.
 29A C.J.S., Eminent Domain, §§ 1-5, 38.
 Constitutionality of statutes affecting riparian rights. 56 A.L.R. 277.
 Liability of irrigation district for failure to supply water, and for negligent construction or operation of ditches or canals. 69 A.L.R.

1232; 160 A.L.R. 1165; 169 A.L.R. 536.
 Prescriptive right of riparian owners to continuance of an artificial channel or ditches. 88 A.L.R. 134.
 Right of owner to alter his easement in such a way as to deprive servient estate of incidental benefits. 172 A.L.R. 193.

42-1104. Right of way over state lands. — The right of way over and upon any and all lands owned or controlled by the state of Idaho is hereby granted to any and all persons for the purpose of constructing and maintaining any ditch, canal, conduit or other works for the diversion or carrying of water for any beneficial use: provided, that no property shall be taken under the provisions of this section until a just compensation shall be paid therefor, to be ascertained in the manner prescribed by law for the taking of private property for a public use. [1899, p. 380, § 13; reen. R.C. & C.L., § 3302; C.S., § 5649; I.C.A., § 41-1004.]

Cross ref. Procurement of right of way over state lands, § 58-601.
 Right of eminent domain, §§ 7-701 — 7-721.
 Running water across public highway, construction of bridges and culverts, § 40-2321.
Cited in: Dayley v. Burley, 96 Idaho 101, 524 P.2d 1073 (1974).

Compensation.
 Right of way over state land can be acquired only after just compensation is paid therefor, to be ascertained in the manner prescribed by law. Tobey v. Bridgewood, 22 Idaho 566, 127 P. 178 (1912), overruled on other grounds, Idaho-Iowa Lateral & Reservoir Co. v. Fisher, 27 Idaho 695, 151 P. 1002 (1915).

Condemnation of State Lands.
 This section, taken in conjunction with R. S., § 5212 (§ 7-703 herein), authorizes action in district court to condemn state lands for public use. Hollister v. State, 9 Idaho 8, 71 P. 541 (1903).

ANALYSIS
 Compensation.
 Condemnation of state lands.
 Easements.
 Federal authority to condemn lands.

Easements.

Where irrigation ditch extended in part across school section, and owners had not acquired easement therefor in the statutory manner, private party could not question such owners' right to the easement. *Swan v. Sproat*, 36 Idaho 75, 209 P. 1070 (1922).

Federal Authority to Condemn Lands.

The state of Idaho has consented to be sued in condemnation proceedings involving lands belonging to the state, and the federal government has the authority to condemn and acquire endowed school lands belonging to the state for purposes of an irrigation canal right of way for a migratory waterfowl refuge. *United States v. Forty Acres, More or Less, of Land*, 24 F. Supp. 390 (D. Idaho 1938).

Collateral References. 26 Am. Jur. 2d, Eminent Domain, §§ 1-9, 189-198.

29A C.J.S., Eminent Domain, §§ 1-5, 38.

Constitutionality of statutes affecting riparian rights. 56 A.L.R. 277.

Liability of irrigation district for failure to supply water, and for negligent construction of operation of ditches or canals. 69 A.L.R. 1232; 160 A.L.R. 1165; 169 A.L.R. 536.

Prescriptive right of riparian owners to continuance of an artificial channel or ditches. 88 A.L.R. 134.

Right of owner to alter his easement in such a way as to deprive servient estate of incidental benefits. 172 A.L.R. 193.

42-1105. Right of way for riparian proprietors. — All persons, companies and corporations owning or having the possessory title or right to lands adjacent to any stream, have the right to place in the channel or upon the banks or margin of the same, rams or other machines for the purpose of raising the waters thereof to a level above the banks, requisite for the flow thereof to and upon such adjacent lands; and the right of way over and across the lands of others, for conducting said waters, may be acquired in the manner prescribed in the following section. [1881, p. 271; R.S., § 3184; am. R.C. & C.L., § 3303; C.S., § 5650; I.C.A., § 41-1005.]

Nature of Right.

License given by this section does not confer any power to appropriate, without reference to beneficial use, the entire volume of a river or its current, to the destruction of the rights of others to make appropriations of the unused water. *Schodde v. Twin Falls Land & Water Co.*, 224 U.S. 107, 32 S. Ct. 470, 56 L. Ed. 686 (1912).

This section gives mere license to use an appropriate method for raising water, but the method or means adopted does not attach as an appurtenance to the appropriation of the water as against other appropriators. *Schodde v. Twin Falls Land & Water Co.*, 161 F. 43 (9th Cir. 1908), aff'd, 224 U.S. 107, 32 S. Ct. 470, 56 L. Ed. 686 (1912).

Collateral References. 26 Am. Jur. 2d, Eminent Domain, §§ 1-9, 189-198.

29A C.J.S., Eminent Domain, §§ 1-5, 38.

Constitutionality of statutes affecting riparian rights. 56 A.L.R. 277.

Liability of irrigation district for failure to supply water, and for negligent construction of operation of ditches or canals. 69 A.L.R. 1232; 160 A.L.R. 1165; 169 A.L.R. 536.

Prescriptive right of riparian owners to continuance of an artificial channel or ditches. 88 A.L.R. 134.

Right of owner to alter his easement in such a way as to deprive servient estate of incidental benefits. 172 A.L.R. 193.

42-1106. Right of eminent domain. — In case of the refusal of the owners or claimants of any lands, through which any ditch, canal or conduit is proposed to be made or constructed, to allow passage thereof, the person or persons desiring the right of way may proceed as in the law of eminent domain. [1899, p. 380, § 14; reen. R.C. & C.L., § 3304; C.S., § 5651; I.C.A., § 41-1006.]

Cross ref. Law of eminent domain, §§ 7-701 — 7-721.

Cited in: *Branson v. Miracle*, 107 Idaho

221, 687 P.2d 1348 (1984); *Branson v. Miracle*, 111 Idaho 933, 729 P.2d 408 (Ct. App. 1986).

ANALYSIS

Failure to condemn easement.
 Injunction to prevent trespass.
 Right to condemn right of way.
 Use of existing canal.

Failure to Condemn Easement.

The plaintiff was not unjustly enriched by the levy of a maintenance assessment against the defendants where the defendants had failed to use legal remedies available to them to condemn an easement for a replacement ditch. *Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 982 P.2d 917 (1999).

Injunction to Prevent Trespass.

An injunction will issue against trespass on owner's land by reservoir company for maintenance purposes of ditches, etc., where reservoir company had not used water for period of 12 years. *Condie v. Swainston*, 62 Idaho 473, 112 P.2d 787 (1941).

Right to Condemn Right of Way.

Where an owner of land was denied access for irrigation water across the lands of an adjacent landowner, the owner could condemn a right of way to supply the water under the law of eminent domain. *White v. Marty*, 97 Idaho 85, 540 P.2d 270 (1975), overruled on other grounds, *Carr v. Magistrate Court*, 108 Idaho 546, 700 P.2d 949 (1985).

Landlocked individuals may condemn a right of way through the lands of others for purposes of irrigation. *Canyon View Irrigation Co. v. Twin Falls Canal Co.*, 101 Idaho

604, 619 P.2d 122 (1980), cert. denied, 451 U.S. 912, 101 S. Ct. 1983, 68 L. Ed. 2d 301 (1981).

Use of Existing Canal.

Where an irrigation company had purchased approximately 300 cfs of Snake River water and sought to put that water to beneficial use on land located west of an existing canal system, but where the irrigation company had no canal and there existed no natural waterway by which its water could be transported by gravity to its stockholders' lands, the irrigation company could condemn the right to enlarge and use the existing canal in common with the canal company and thus the irrigation company could divert its water from the Snake River into the canal company's canal system and then reclaim a like amount, with due allowance for seepage and evaporation, at a headgate closer to its irrigation project site. *Canyon View Irrigation Co. v. Twin Falls Canal Co.*, 101 Idaho 604, 619 P.2d 122 (1980), cert. denied, 451 U.S. 912, 101 S. Ct. 1983, 68 L. Ed. 2d 301 (1981).

Collateral References. 26 Am. Jur. 2d, Eminent Domain, §§ 1-9, 44, 66, 189-198.

29A C.J.S., Eminent Domain, §§ 1-5, 38, 71, 107.

Exercise of eminent domain for purpose of irrigating land of private owner. 9 A.L.R. 583; 27 A.L.R. 519.

Effect of combination of public and private purposes in exercise of eminent domain for irrigation purposes. 53 A.L.R. 18.

42-1107. Right of way for drains. — Whenever the owner or owners of any parcel or parcels of land desire to construct a drain for the purpose of carrying off surplus water, and they cannot agree among themselves or with the parties who own land below through which it is expedient to carry the drain in order to reach a natural waterway, then proceedings may be had in the same manner as in cases of eminent domain affecting irrigating works of diversion, and the right of way for such drains shall be regarded as equal to that of irrigation canals. [1911, ch. 125, § 1, p. 413; *reen. C.L.*, § 3304a; *C.S.*, § 5652; *I.C.A.*, § 41-1007.]

Easement.

Turning of waste water into drainage ditch system constructed by plaintiffs could ripen into an easement only if there was an interference with the rights of another for the prescriptive period. *Poole v. Olaveson*, 82 Idaho 496, 356 P.2d 61 (1960).

Collateral References. 26 Am. Jur. 2d, Eminent Domain, § 44.

Tax exemption of property as affecting its inclusion in determining requisite consent of property owners to construction of drain. 146 A.L.R. 1260.

42-1108. Right to cross ditches. — Any person, company or corporation, owners of any ditch, flume or other conduit, cannot lawfully deny to any other person, company or corporation the right to cross their right of way with another ditch, flume or conduit either upon a higher or lower level,

where the same can be done in a convenient and safe manner: provided, that such second person, company or corporation shall be liable for all damages that may accrue from the construction of such ditch, flume or other conduit across the conduit of another. [1899, p. 380, last half of § 10; am. R.C. & C.L., § 3305; C.S., § 5653; I.C.A., § 41-1008.]

Maintenance of Flume.

Where in crossing another's ditch there was temporary elimination of same, and flume was constructed to take its place, crossing

company was required to keep flume in good condition and was liable for all damages resulting from failure to do so. *Mahaffey v. Carlson*, 39 Idaho 162, 228 P. 793 (1924).

CHAPTER 12

MAINTENANCE AND REPAIR OF DITCHES

SECTION.

- 42-1201. Ditches to be kept full.
- 42-1202. Maintenance of ditch.
- 42-1203. Maintenance of embankments.
- 42-1204. Prevention of damage to others.
- 42-1205. Bridges over ditches.
- 42-1206. Repair of community ditches.

SECTION.

- 42-1207. Change of ditch, canal, lateral, drain or buried irrigation conduit.
- 42-1208. Rights-of-way not subject to adverse possession.

42-1201. Ditches to be kept full. — Every person, company or corporation owning or controlling any ditch, canal or conduit for the purpose of irrigation shall, during the time from April first to the first day of November of each year, keep a flow of water therein sufficient to the requirements of such persons as are properly entitled to the use of water therefrom: provided, however, that when the public streams or other natural water sources from which the water is obtained is too low and inadequate for that purpose, or when the board of directors or governing body of an organization or entity furnishing water deem it in the best interests of that organization or entity to adjust the dates of availability and provide for termination of irrigation water, then such ditch, canal or conduit shall be kept with as full a flow of water therein as may be practicable, subject, however, to the rights of priority from the streams or other natural sources as provided by law. [1899, p. 380, § 15; reen. R.C. & C.L., § 3306; C.S., § 5654; I.C.A., § 41-1101; am. 1989, ch. 236, § 1, p. 573.]

Cross ref. Killing muskrats along irrigation ditches, § 36-1107.

Cited in: *Twin Falls Land & Water Co. v. Lind*, 14 Idaho 348, 94 P. 164 (1908).

Water Decree Prior to Statute.

Since this statute was enacted subsequent

to decree as to water rights, it could not be considered as controlling in construing that decree, rather the decree should have been construed in the light of the facts in the case and the law as it existed when the decree was entered. *Anderson v. Dewey*, 82 Idaho 173, 350 P.2d 734 (1960).

42-1202. Maintenance of ditch. — The owners or persons in control of any ditch, canal or conduit used for irrigating purposes shall maintain the same in good order and repair, ready to deliver water by the first of April in each year, and shall construct the necessary outlets in the banks of the ditches, canals or conduits for a proper delivery of water to persons having rights to the use of the water. [1899, p. 380, § 16; reen. R.C. & C.L., § 3307; C.S., § 5655; I.C.A., § 41-1102.]

Cross ref. Canal rights of way infested with insect pests, or plant diseases, abatement as nuisance, § 22-103.

Fish screens in ditches, canals, flumes or other water conduits required, § 36-906.

Injuring ditch or headgate, § 42-902.

Cited in: *Niday v. Barker*, 16 Idaho 73, 101 P. 254 (1909).

ANALYSIS

Conflicting evidence.

Liability for costs.

Water decree prior to statute.

Conflicting Evidence.

Where there was conflicting evidence concerning the adequacy of water supply and the court might have inferred that the water shortage resulted from construction defects in new ditch, but also could have inferred that the shortage was attributable to such other causes as lack of maintenance, for which the defendant contractor was not responsible, the court's determination, under I.R.C.P. 41(b) motion for involuntary dismissal, that the plaintiff landowners failed to prove a right to damages resulting from alteration of an irrigation ditch by a highway construction con-

tractor, was proper. *Allen v. Burggraf Constr. Co.*, 106 Idaho 451, 680 P.2d 873 (Ct. App. 1984).

Liability for Costs.

If the servient estate landowner's use of irrigation ditch had increased the cost of repairs and maintenance he would have been responsible for the additional costs, but since his use did not increase those costs, he had no obligation to pay for any portion of those costs. *Sellers v. Powell*, 120 Idaho 250, 815 P.2d 448 (1991).

Water Decree Prior to Statute.

Since this statute was enacted subsequent to decree as to water rights it could not be considered as controlling in construing that decree, rather the decree should have been construed in the light of the facts in the case and the law as it existed when the decree was entered. *Anderson v. Dewey*, 82 Idaho 173, 350 P.2d 734 (1960).

Collateral References. Liability of irrigation district for failure to supply water, and for negligent construction or operation of ditches or canals. 69 A.L.R. 1232; 160 A.L.R. 1171; 169 A.L.R. 536.

42-1203. Maintenance of embankments. — The owner or owners of any irrigating ditch, canal or conduit shall carefully keep and maintain the embankments thereof in good repair, in order to prevent the water from wasting during the irrigation season, and shall not at any time permit a greater quantity of water to be turned into said ditch, canal or conduit than the banks thereof will easily contain or than can be used for beneficial or useful purposes; it being the meaning of this section to prevent the wasting and useless discharge and running away of water. [1899, p. 380, § 22; reen. R.C. & C.L., § 3308; C.S., § 5656; I.C.A., § 41-1103.]

Cross ref. Muskrats may be killed along banks or irrigation ditches or canals, reservoirs or dams, § 36-1107.

Penalty for wasting water, § 18-4302.

Instructions to Jury.

Giving instruction substantially embodying provisions of this section, in action by landowner for damages to crops caused by water seeping and percolating from defendant's canal, was not improper. *Stephenson v. Pioneer*

Irrigation Dist., 49 Idaho 189, 288 P. 421, 69 A.L.R. 1225 (1930).

Collateral References. 78 Am. Jur. 2d, Waters, §§ 252, 253.

93 C.J.S., Waters, §§ 301-303.

Liability of irrigation district for failure to supply water, and for negligent construction or operation of ditches or canals. 69 A.L.R. 1232; 160 A.L.R. 1165; 169 A.L.R. 536.

42-1204. Prevention of damage to others. — The owners or constructors of ditches, canals, works or other aqueducts, and their successors in interest, using and employing the same to convey the waters of any stream or spring, whether the said ditches, canals, works or aqueducts be upon the lands owned or claimed by them, or upon other lands, must carefully keep and maintain the same, and the embankments, flumes or other conduits, by which such waters are or may be conducted, in good repair and condition, so

as not to damage or in any way injure the property or premises of others. The owners or constructors have the right to enter the land across which the right-of-way extends, for the purposes of cleaning, maintaining and repairing the ditch, canal or conduit, and to occupy such width of the land along the banks of the ditch, canal or conduit as is necessary to properly do the work of cleaning, maintaining and repairing the ditch, canal or conduit with personnel and with such equipment as is commonly used, or is reasonably adapted, to that work. The right-of-way also includes the right to deposit on the banks of the ditch or canal the debris and other matter necessarily required to be taken from the ditch or canal to properly clean and maintain it, but no greater width of land along the banks of the canal or ditch than is absolutely necessary for such deposits shall be occupied by the removed debris or other matter. [1881, p. 271; R.S., § 3186; reen. R.C. & C.L., § 3309; C.S., § 5657; I.C.A., § 41-1104; am. 1996, ch. 187, § 2, p. 594.]

Compiler's notes. Section 1 of S.L. 1996, ch. 187 is compiled as § 42-1102.

Section 3 of S.L. 1996, ch. 187 declared an emergency. Approved March 12, 1996.

ANALYSIS

Crossing ditch of another.

In general.

Instructions to jury.

Liability for crop losses.

Negligence per se.

Negligent construction or maintenance.

Owner's testimony for appraisal.

Ownership and water rights distinguished.

Crossing Ditch of Another.

Where in crossing another's ditch there was temporary elimination of same, and flume was constructed to take its place, crossing company was required to keep flume in good condition and was liable for all damages resulting from failure to do so. *Mahaffey v. Carlson*, 39 Idaho 162, 228 P. 793 (1924).

In General.

It was not the province of the court to prescribe the nature, purpose or kind of a structure that could be constructed in the area referred to, the important thing was that such structure did not cause damage to or in any way injure the properties or premises of others. *Smith v. Big Lost River Irrigation Dist.*, 83 Idaho 374, 364 P.2d 146 (1961); *Pence v. Big Lost River Irrigation Dist.*, 83 Idaho 393, 364 P.2d 158 (1961); *Donahue v. Big Lost River Irrigation Dist.*, 83 Idaho 393, 364 P.2d 158 (1961); *Johnson v. Big Lost River Irrigation Dist.*, 83 Idaho 394, 364 P.2d 159 (1961).

Although this section imposes a duty to carefully keep and maintain canal banks in good repair, it does not define a standard of care by which the trier of fact may determine whether a defendant has failed to carefully

keep and repair its canal banks. *Brizendine v. Nampa Meridian Irrigation Dist.*, 97 Idaho 580, 548 P.2d 80 (1976).

Instructions to Jury.

Giving instruction substantially embodying provisions of this section, in action by landowner for damages to crops caused by water seeping and percolating from defendant's canal, was not improper. *Stephenson v. Pioneer Irrigation Dist.*, 49 Idaho 189, 288 P. 421, 69 A.L.R. 1225 (1930).

An instruction that one who undertakes the construction of an artificial channel must build, operate and maintain it in such manner as not to cause damage to others did not conflict with an instruction covering the situation where the artificial channel was not the proximate cause of the damage. *Smith v. Big Lost River Irrigation Dist.*, 83 Idaho 374, 364 P.2d 146 (1961); *Pence v. Big Lost River Irrigation Dist.*, 83 Idaho 393, 364 P.2d 158 (1961); *Donahue v. Big Lost River Irrigation Dist.*, 83 Idaho 393, 364 P.2d 158 (1961); *Johnson v. Big Lost River Irrigation Dist.*, 83 Idaho 394, 364 P.2d 159 (1961).

Liability for Crop Losses.

The owner of irrigation ditch was liable in damages for crop losses caused by seepage from ditch. *Albrethson v. Carey Valley Reservoir Co.*, 67 Idaho 529, 186 P.2d 853 (1947).

The contractor who had constructed a new irrigation ditch for the department of highways to facilitate the construction of a new highway through the area was not liable to a property owner for crop damage resulting from failure to properly repair damage to the ditch from trampling of the levee by pastured cows after the ditch was completed and accepted by the department of highways. *Gates v. Pickett & Nelson Constr. Co.*, 91 Idaho 836, 432 P.2d 780 (1967), overruled on other grounds, *Smith v. State*, 93 Idaho 795, 473 P.2d 937 (1970).

Negligence Per Se.

This section does not require a permit or application, but rather requires the owners or constructors of ditches, canals, works, or other aqueducts to prevent damage to others. Therefore, this section does not create a negligence per se action, but only codifies that ditch owners and constructors can be held liable for damages occurring to others as a result of negligence. *Stott ex rel. Dougall v. Finney*, 130 Idaho 894, 950 P.2d 709 (1997).

Negligent Construction or Maintenance.

The owner of an irrigation ditch was liable for damage resulting from negligence in constructing or maintaining the ditch. *Albrethson v. Carey Valley Reservoir Co.*, 67 Idaho 529, 186 P.2d 853 (1947).

In action brought to recover damages for injury to a crop of potatoes, a finding by the jury of negligence on the appellant's part in maintaining the lateral was justified where either water in some considerable quantity, more than the lateral could safely carry, was emptied into the lateral while checked and backed up by flash boards, causing the banks of the lateral to overflow and break, or seepage through a gopher hole enlarged to a stream sufficient to break the bank of the lateral. *Johnson v. Burley Irrigation Dist.*, 78 Idaho 392, 304 P.2d 912 (1956).

The owner of an irrigation canal was liable for property damage resulting from water from the canal seeping into the residence basement of an abutting property owner. *Harris v. Preston-Whitney Irrigation Co.*, 92 Idaho 398, 443 P.2d 482 (1968).

In landowners' action for damages for injury to property caused by flooding which resulted when irrigation district's canal bank broke, an engineer's testimony that the break was caused by a combination of factors including inadequate design, poor construction procedures, and gopher holes penetrating the

embankment supported the trial court's findings that the canal would not have broken in the absence of negligence and that the irrigation district was thereby liable. *Brizendine v. Nampa Meridian Irrigation Dist.*, 97 Idaho 580, 548 P.2d 80 (1976).

Owner's Testimony for Appraisement.

Since it is a settled rule in this state that the owner of property is a competent witness as to its value, the owner's failure or inability to explain the basis for his appraisal affected the weight of his testimony but it did not disqualify him as a witness. *Smith v. Big Lost River Irrigation Dist.*, 83 Idaho 374, 364 P.2d 146 (1961); *Pence v. Big Lost River Irrigation Dist.*, 83 Idaho 393, 364 P.2d 158 (1961); *Donahue v. Big Lost River Irrigation Dist.*, 83 Idaho 393, 364 P.2d 158 (1961); *Johnson v. Big Lost River Irrigation Dist.*, 83 Idaho 394, 364 P.2d 159 (1961).

Ownership and Water Rights Distinguished.

The fact that water is stored in a reservoir does not make those who have rights to the water the owners of the dam that creates the reservoir. *Marty v. State*, 117 Idaho 133, 786 P.2d 524 (1989).

Collateral References. 26 Am. Jur. 2d, Eminent Domain, §§ 1-9, 189-198.

29A C.J.S., Eminent Domain, §§ 1-5, 38.

Constitutionality of statutes affecting riparian rights. 56 A.L.R. 277.

Liability of irrigation district for failure to supply water, and for negligent construction or operation of ditches or canals. 69 A.L.R. 1232; 160 A.L.R. 1165; 169 A.L.R. 536.

Prescriptive rights of riparian owners to continuance of an artificial channel or ditches. 88 A.L.R. 134.

Right of owner to alter his easement in such a way as to deprive servient estate of incidental benefits. 172 A.L.R. 193.

42-1205. Bridges over ditches. — All owners of any ditch, canal or conduit, or any other means for conveying water, shall build substantial bridges not less than sixteen (16) feet wide, and with boards not less than two (2) inches in thickness (unless the same shall be on a county or state road, when such boards shall not be less than three (3) inches thick), at all places where any county or state road crosses the same, or any road kept open and used by any neighborhood of people for their benefit and convenience. In case of neglect or refusal of such owners to build such bridges as above required, after a notice of ten (10) days being given by the said board of county commissioners of the proper county, said board shall proceed to the construction of the same, and shall collect the cost thereof together with the costs of suit: provided, that after any bridge shall have been constructed across any ditch, canal or conduit on any county or state road in accordance with the provisions of this section, it shall thereafter be maintained at the

public expense. [1899, p. 380, § 25; reen. R.C., § 3310; compiled and reen. C.L., § 3310; C.S., § 5658; I.C.A., § 41-1105.]

Compiler's notes. The words enclosed in parentheses so appeared in the law as enacted.

The concluding proviso of this section, as it appeared in the 1899 act read, "provided, that after said bridge shall have been constructed across any county or state road _____." The change is made on authority of *MacCammelly v. Pioneer Irr. Dist.* (1909), 17 Idaho 415, 105 P. 1076.

Liability for Cost.

County must construct all bridges to complete highway over ditch laid out after the

ditch has been constructed, but not if highway built first. *MacCammelly v. Pioneer Irrigation Dist.*, 17 Idaho 415, 105 P. 1076 (1909).

If ditch or canal was constructed prior to establishment of public highway which intersects it, expense of building bridge must be borne by county or highway district. *Gooding Hwy. Dist. v. Idaho Irrigation Co.*, 30 Idaho 232, 164 P. 99 (1917).

42-1206. Repair of community ditches. — Where a ditch is common property, or there is a common right to the use of the water of a ditch without payment therefor, and any labor or materials are necessary for the repair or cleaning of the ditch, or any gate or flume thereon or thereunto belonging, the watermaster of the district may make a fair pro rata assessment of labor or materials against the inhabitants of the district claiming the use of such water, according to the benefits received by each; and if any person so assessed neglects or refuses, for the period of three (3) days after notice so to do from the watermaster or his deputy, to furnish his just proportion of the necessary labor or materials, according to such assessment, he must pay his pro rata in cash, to be recovered, with costs, in an action by the watermaster in his own name. [1881, p. 275; R.S., § 3203; reen. R.C. & C.L., § 3311; C.S., § 5659; I.C.A., § 41-1106.]

Remedy of Water Company.

This section was not repealed by S.L. 1899, p. 380, and water company which delivered water to consumer without obtaining prepayment of charges therefor could not shut off consumer's water because of his refusal to pay

such charges, but could maintain an action to recover amount of charges. *Shelby v. Farmers Coop. Ditch Co.*, 10 Idaho 723, 80 P. 222 (1905).

Collateral References. 78 Am. Jur. 2d, Waters, § 253.

42-1207. Change of ditch, canal, lateral, drain or buried irrigation conduit. — Where any ditch, canal, lateral or drain or buried irrigation conduit has heretofore been, or may hereafter be, constructed across or beneath the lands of another, the person or persons owning or controlling said land shall have the right at their own expense to change said ditch, canal, lateral or drain or buried irrigation conduit to any other part of said land, but such change must be made in such a manner as not to impede the flow of the water therein, or to otherwise injure any person or persons using or interested in such ditch, canal, lateral or drain or buried irrigation conduit. Any increased operation and maintenance shall be the responsibility of the landowner who makes the change.

A landowner shall also have the right to bury the ditch, canal, lateral or drain of another in pipe on the landowner's property, provided that the pipe, installation and backfill reasonably meet standard specifications for such materials and construction, as set forth in the Idaho standards for public

works construction or other standards recognized by the city or county in which the burying is to be done. The right and responsibility for operation and maintenance shall remain with the owner of the ditch, canal, lateral or drain, but the landowner shall be responsible for any increased operation and maintenance costs, including rehabilitation and replacement, unless otherwise agreed in writing with the owner.

The written permission of the owner of a ditch, canal, lateral, drain or buried irrigation conduit must first be obtained before it is changed or placed in buried pipe by the landowner.

While the owner of a ditch, canal, lateral, drain or buried irrigation conduit shall have no right to relocate it on the property of another without permission, a ditch, canal, lateral or drain owner shall have the right to place it in a buried conduit within the easement or right-of-way on the property of another in accordance with standard specifications for pipe, materials, installation and backfill, as set forth in the Idaho standards for public works construction or other standards recognized by the city or county in which the burying is to be done, and so long as the pipe and the construction is accomplished in a manner that the surface of the owner's property and the owner's use thereof is not disrupted and is restored to the condition of adjacent property as expeditiously as possible, but not to exceed five (5) days after the start of construction. A landowner shall have the right to direct that the conduit be relocated to a different route than the route of the ditch, canal, lateral or drain, provided that the landowner shall agree in writing to be responsible for any increased construction or future maintenance costs necessitated by said relocation. Maintenance of the buried conduit shall be the responsibility of the conduit owner.

No more than five (5) days after the start of construction, a landowner or ditch owner who buries a ditch, canal, lateral, or drain in pipe shall record the location and specifications of the buried irrigation or drainage conduit, including primary and secondary easements, in the county in which the burying is done, and shall provide the irrigation or drainage entity that owns the ditch, canal, lateral or drain, with a copy of such location and specifications and the construction plans utilized. The irrigation or drainage entity shall keep and maintain such records and have them available for the public. [1907, p. 237, § 4; reen. R.C. & C.L., § 3311a; C.S., § 5660; I.C.A., § 41-1107; am. 1994, ch. 151, § 1, p. 345; am. 2002, ch. 115, § 4, p. 326.]

Compiler's notes. This section is also compiled as § 18-4308 in the Penal Code.
Section 2 of S.L. 1994, ch. 151 is compiled as § 18-4308.
Section 3 of S.L. 2002, ch. 115, is compiled as § 18-4308.

ANALYSIS

- Compliance with statutory requirement.
- Conflicting evidence.
- Historical flow of water.
- Impediment to water flow.
- Increased maintenance burden to others.
- Maintenance of changed ditch.
- Proof of causation.
- Scope.

Compliance with Statutory Requirement.

Servient estate seeking to change location of ditch must comply with statutory requirement, since prior to enactment of statutory law there was no right to change a ditch. *Simonson v. Moon*, 72 Idaho 39, 237 P.2d 93 (1951).

Conflicting Evidence.

Where there was conflicting evidence concerning the adequacy of water supply and the court might have inferred that the water shortage resulted from construction defects in new ditch, but also could have inferred that

the shortage was attributable to such other causes as lack of maintenance, for which the defendant contractor was not responsible, the court's determination, under an I.R.C.P. 41(b) motion for involuntary dismissal, that the plaintiff landowners failed to prove a right to damages resulting from alteration of an irrigation ditch by a highway construction contractor, was proper. *Allen v. Burggraf Constr. Co.*, 106 Idaho 451, 680 P.2d 873 (Ct. App. 1984).

Historical Flow of Water.

A decrease in the amount of water to which users of water from an irrigation ditch are entitled, measured in terms of miners' inches or c.f.s., may be the best method of establishing that the flow has been impeded, but it is not the only method to prove this occurrence. Ditch rights are determined by the flow of water historically conveyed through the ditch and not necessarily by the amount of water to which its users are entitled under the water laws of this state. *Savage Lateral Ditch Water Users Ass'n v. Pulley*, 125 Idaho 237, 869 P.2d 554 (1994).

Impediment to Water Flow.

Defendant could not recover under this section because he failed to introduce any evidence of the historic flow rate of water to his property before and after plaintiff's changes, and another property owner whose property received water from the new concrete collection box through an outlet at the same level in the collection box as the outlet to defendant's property, testified that she received more water after plaintiff's changes. *Weaver v. Stafford*, 134 Idaho 691, 8 P.3d 1234 (2000).

Increased Maintenance Burden to Others.

An increased maintenance burden caused other users is an injury prohibited under this section; although a minor increase in the length of a ditch or other conditions which negligibly increase its maintenance are insufficient injuries by themselves to constitute a violation of the statute, when such burdens are accompanied by forced rotation of ditch use or other inconvenience, the combined injuries are sufficient. *Savage Lateral Ditch Water Users Ass'n v. Pulley*, 125 Idaho 237, 869 P.2d 554 (1994).

Maintenance of Changed Ditch.

One, across whose land a lateral ditch was constructed, could change its location only at his own expense, but he need not thereafter maintain ditch. *Crawford v. Inglin*, 44 Idaho 663, 258 P. 541 (1927).

Ditch should be maintained by persons interested in ditch. *Earhart v. Wright*, 50 Idaho 270, 295 P. 630 (1931).

Where servient estate cut off side ditch used by defendant for part of his water supply, but constructed a new ditch for use of defendant, burden of proof in proceeding to enjoin prosecution for cutting off ditch was on plaintiff to show that new ditch would convey same amount of water as conveyed by old ditch without impeding the flow in the main ditch. *Simonson v. Moon*, 72 Idaho 39, 237 P.2d 93 (1951).

If change in location of side ditch required rotation in use of water by users of main ditch, there was a substantial impediment in flow of water. *Simonson v. Moon*, 72 Idaho 39, 237 P.2d 93 (1951).

The installation of the Jamerson pipeline and the diversion works would in nowise change or affect respondent's easement in the East Ditch, to transmit therein to his land 60 miners inches of water when needed or desired, such installation only changing the location of such easement in an open surface ditch to an underground ditch, such being accomplished through the cooperation of both landowners and by agreement arrived at between them. *Ramseyer v. Jamerson*, 78 Idaho 504, 305 P.2d 1088 (1957).

The trial court failed to recognize the application of this section although the parties themselves had applied the same in compromise and settlement of the controversy regarding appellant's right to an easement sufficient to accommodate the diagonal lateral over respondent's land or in lieu thereof, to a corresponding easement for a ditch over respondent's lands changed to a location at respondent's expense, different from that of the diagonal lateral. *Aguirre v. Hamlin*, 80 Idaho 176, 327 P.2d 349 (1958).

Plaintiff did not become entitled to a ditch of greater size and capacity and to an easement thereof, than his original diagonal lateral destroyed by respondent and the easement over respondent's lands should have been of similar construction as the diagonal lateral, over the route as designated by respondent to a point where the diagonal lateral formerly entered appellant's property. *Aguirre v. Hamlin*, 80 Idaho 176, 327 P.2d 349 (1958).

Where irrigation district entered into agreement with school district to place irrigation ditch in an underground pipe and to construct a cement inlet collar and safety/trash screen for such ditch to be located on the plaintiffs' property, this section gave the school district the right to place the ditch underground on its property and gave plaintiffs the right to move the cement inlet collar and safety/trash screen to the back of their property where it would be less offensive to them, at their expense, if the requirements of the statute were met. *Abbott v. Nampa Sch.*

Dist. No. 131, 119 Idaho 544, 808 P.2d 1289 (1991).

Proof of Causation.

Whether liability for diminished water flow was predicated upon negligence, or upon violation of this section, the plaintiff landowners were required to show that relocation of the ditch actually caused a diminished flow of water to their properties since proof of causation is essential to invoke the statute. *Allen v. Burggraf Constr. Co.*, 106 Idaho 451, 680 P.2d 873 (Ct. App. 1984).

Scope.

This section is broadly worded and does not

specify that it is only the amount of water to which downstream users are entitled under the water laws of this state which may not be impeded. *Savage Lateral Ditch Water Users Ass'n v. Pulley*, 125 Idaho 237, 869 P.2d 554 (1994).

Collateral References. Prescriptive right of riparian owners to continuance of artificial channel or ditch. 88 A.L.R. 134.

Right of owner to alter his easement in such a way as to deprive servient estate of incidental benefits. 172 A.L.R. 193.

42-1208. Rights-of-way not subject to adverse possession. — Rights-of-way of irrigation districts, Carey act operating companies, non-profit irrigation entities, and lateral ditch associations, are not subject to adverse possession, and no person shall prevent free access of authorized personnel on rights-of-way or construct any obstruction on rights-of-way in an effort to adversely possess said right-of-way. [I.C., § 42-1208, as added by 1981, ch. 344, § 1, p. 713.]

CHAPTER 13

LATERAL DITCH WATER USERS' ASSOCIATIONS

SECTION.

42-1301. Organization — Officers — Rules.

42-1302. Lateral manager — Election — Duties.

42-1303. Lateral ditches — Repairs, improvements, and maintenance — Assessment of costs.

42-1304. Assessments — Notice — Penalties for delinquency.

42-1305. Delinquent users not entitled to water.

SECTION.

42-1306. Collection and disbursement of funds.

42-1307. Action for assessment — Attorneys' fees.

42-1308. Appointment of lateral manager by director of department of water resources.

42-1309. Association authorized to borrow money, mortgage or pledge assets.

42-1301. Organization — Officers — Rules. — Where three (3) or more parties take water from same canal or reservoir at the same point to be conveyed to their respective premises for any distance through a lateral or distributing ditch or laterals or distributing ditches such parties shall constitute a water users' association known as "Water Users' Association of Lateral or Laterals." Such water users' association may meet and organize at any time after thirty (30) days after this chapter shall take effect, and shall meet annually thereafter between January first and the last Monday in March of each year, at the call of the secretary of such association, said secretary to give ten (10) days' notice by mail of such annual meeting; provided that if for any reason the secretary should fail to call a meeting, then the annual meeting of such association shall be held on the last Monday in March of each year. At such annual meetings each water user shall be entitled to one (1) vote in person, for each inch and a fractional vote

for each fraction of an inch of water which such water user is entitled to receive from such laterals, and a corporation shall vote by one (1) of its officers designated by it. Such association shall organize by the election of a chairman, vice-chairman and a secretary-treasurer, which officers shall also constitute the board of directors of such association, and shall hold office for one (1) year and until their successors are elected. Such association at the annual meeting shall also elect a manager of said lateral or laterals to be known as "lateral manager" for the succeeding season and shall fix the compensation of said manager, and of all officers. Such association may adopt such rules and regulations for the management of said lateral or laterals or distributing ditch or ditches and the delivery of water therefrom as they deem best, and may, by majority vote, if it be deemed for the best interests of the association, combine one or more laterals and abandon laterals not in use, and do any and all things not in conflict with the provisions of this chapter or the laws of this state wherein the best interests of the association will be furthered. [1927, ch. 213, § 1, p. 295; I.C.A., § 41-1201; am. 1941, ch. 99, § 1, p. 178; am. 1947, ch. 172, § 1, p. 429.]

Compiler's notes. This chapter (S.L. 1927, ch. 213) was approved March 12, 1927, and carried an emergency clause.

Section 2 of S.L. 1941, ch. 99 declared an emergency. Approved March 6, 1941.

Cross ref. Water users' associations organized in conformity with provisions of federal reclamation laws, exemptions from taxes, § 30-804.

Sec. to sec. ref. This chapter is referred to in § 43-404A.

Rights of Water Users.

Water users are entitled to organize and are authorized to provide for transfer of management of laterals owned by them to a ditch company pursuant to a unilateral agreement signed by the majority of the water users. *Hale v. McCammon Ditch Co.*, 72 Idaho 478, 244 P.2d 151 (1951).

Collateral References. 94 C.J.S., Waters, §§ 839-857.

42-1302. Lateral manager — Election — Duties. — Should any water users' association at its annual meeting fail to elect a lateral manager or fix his compensation such lateral manager may be elected by the board of directors of such association, who may also fix his compensation. The manager of any lateral shall, in addition to the duties prescribed by the association, perform all duties fixed for such lateral manager under the provisions of sections 42-907 and 42-910, except as modified by this chapter. [1927, ch. 213, § 2, p. 295; I.C.A., § 41-1202.]

Cross ref. Appointment of manager of distributing lateral, § 42-907.

Duties of manager of distributing lateral, § 42-910.

Collateral References. 94 C.J.S., Waters, §§ 851, 852.

42-1303. Lateral ditches — Repairs, improvements, and maintenance — Assessment of costs. — Immediately after the annual meeting of any such association the directors thereof and the lateral manager shall make an examination of the lateral or distributing ditch or ditches, and make an estimate as to the cost of the necessary repairs and improvements thereon, and the maintenance thereof for the succeeding season, including the compensation of officers and lateral manager and such total cost and charges shall be assessed pro rata to each water user from said lateral, in

the following manner, if agricultural land in proportion to the water which the owner is entitled to receive from such lateral or ditch, and if lots within any city or village, then the assessment may be made upon the basis of each lot, the same to be uniform upon lots of the same size. The improvement, repair and maintenance of any such lateral or distributing ditch shall be under the direction of the directors of the association. [1927, ch. 213, § 3, p. 295; I.C.A., § 41-1203.]

Sec. to sec. ref. This section is referred to in § 43-404A.

42-1304. Assessments — Notice — Penalties for delinquency. — On or before the fifteenth day of April in each year the secretary of the association shall notify each water user of the amount assessed against him for that year as herein authorized, and the same shall be due and payable on the first day of May of each year and if not so paid on or before the fifteenth day of June of such year, a penalty of ten per cent (10%) shall be added thereto, and the total amount due shall then draw interest at the rate of ten per cent (10%) per annum from said fifteenth day of June of such year until paid. [1927, ch. 213, § 4, p. 295; I.C.A., § 41-1204; am. 1977, ch. 247, § 1, p. 724.]

Compiler's notes. Section 2 of S.L. 1977, ch. 247 contained a repeal.

Section 3 of S.L. 1977, ch. 247 declared an emergency. Approved March 31, 1977.

Collateral References. 94 C.J.S., Waters, §§ 806-834.

Inclusion of amount to cover delinquencies in assessment for public improvement as contrary to constitutional guaranties. 40 A.L.R. 1352; 42 A.L.R. 1185.

42-1305. Delinquent users not entitled to water. — No water user shall be entitled to demand or receive water from said lateral whenever any such assessment is due and unpaid, and the lateral manager shall not distribute any water to such water user while delinquent in such payment except upon order of the board of directors of the association who shall have authority to cause such water to be delivered: provided, the water user shall give such security for the payment of such assessment against him as shall be required by the board of directors. [1927, ch. 213, § 5, p. 295; I.C.A., § 41-1205.]

42-1306. Collection and disbursement of funds. — The lateral manager shall collect all assessments so made and pay the same to the secretary-treasurer taking his receipt therefor. The secretary-treasurer of this association shall keep the funds of the association in the name of the association and shall draw warrants or checks thereon to pay the costs and expenses of the management of said lateral as herein provided for upon the order of the board of directors, and shall perform such other duties as the association may prescribe. [1927, ch. 213, § 6, p. 295; I.C.A., § 41-1206.]

42-1307. Action for assessment — Attorneys' fees. — In case any assessment, as herein provided for is due and unpaid the association may sue to collect the same, in the name of its secretary-treasurer as such, in any

court of competent jurisdiction, and in addition to the amount due including all penalties and interest, and all costs incurred in said action, may collect a reasonable attorney's fee in such action to be fixed by the court. [1927, ch. 213, § 7, p. 295; I.C.A., § 41-1207.]

Collateral References. Amount of attorney's compensation for services in actions involving waters and water rights. 143 A.L.R. 833.

42-1308. Appointment of lateral manager by director of department of water resources. — (1) In the event that the water users or the board of directors of any lateral or ditch association do not meet and elect a lateral manager as provided for in this chapter or a lateral manager is not selected as otherwise provided by law, then, the director of the department of water resources may appoint and fix the compensation of a lateral manager, upon the written petition of a water user alleging that water is not being apportioned and distributed properly among the users from the ditch or lateral and that the rights of the water user are being injured thereby.

(2) If the water users also have failed to elect association officers, the lateral manager appointed by the director may exercise the duties of the association officers, including the making and collection of assessments, but not the borrowing of money, as is necessary to achieve the proper allocation and distribution of water from the ditch or lateral and without regard to the statutory dates for the performance of these duties.

(3) The lateral manager appointed by the director shall hold office only for the period of time fixed by the order of appointment and in no event beyond the remainder of the year in which appointed.

(4) If the lateral is located within a water district established pursuant to chapter 6, title 42, Idaho Code, the director shall advise the district watermaster of the receipt of the petition and invite the watermaster to make recommendations concerning the need for appointment of a lateral manager and the person to be appointed.

(5) Upon receipt of a petition filed pursuant to subsection (1) of this section, the director shall make a reasonable effort to provide written notice of the petition to any irrigation district, canal company, or other water distribution entity that supplies water to the lateral, and to all persons having rights to the use of water from the lateral. Except in the case of serious threat of imminent injury to person or property, the director shall allow fourteen (14) days for written response to the petition.

(6) Based upon a review of the petition, the responses thereto, the recommendations of the watermaster, if any, and any investigation by the department of water resources, the director shall issue an order with findings either appointing a lateral manager or declining to appoint a lateral manager. Any person aggrieved by the order of the director shall be entitled to request a hearing before the director pursuant to section 42-1701A, Idaho Code. [I.C., § 42-1308, as added by 1999, ch. 217, § 1, p. 577.]

Compiler's notes. Former § 42-1308, I.C.A., § 41-1208, was repealed by S.L. 1977, which comprised 1927, ch. 213, § 8, p. 295; ch. 247, § 2.

42-1309. Association authorized to borrow money, mortgage or pledge assets. — Lateral ditch water users' associations are expressly authorized to borrow money from any private or governmental source, to be repaid over a period of years, and to levy assessments over such period of years for the purpose of repaying said loan, and they are also authorized and empowered to mortgage and/or pledge any of the assets of said associations as security for said loan; providing, however, that before any money can be borrowed or any mortgage or pledge can be made and entered into, all members of said association shall be notified of an election by two (2) weekly publications in a legally authorized newspaper, as defined in section 60-106, Idaho Code, within the county in which the association is located, said notice to provide that an election is being called to determine whether or not the association shall be authorized to borrow money and mortgage and/or pledge its assets, and shall also state the date, time and place of said election, which shall be held within ten days after the date of the last publication of said notice.

If a majority of the total outstanding shares shall vote at said election in favor of borrowing said money and mortgaging and/or pledging said assets, then said association, through its president and secretary, shall be authorized to borrow said money and mortgage and/or pledge its assets. [I.C., § 42-1309, as added by 1957, ch. 59, § 1, p. 101.]

Compiler's notes. Section 2 of S.L. 1957, ch. 59 declared an emergency. Approved February 20, 1957.

CHAPTER 14

ADJUDICATION OF WATER RIGHTS

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- 42-1401C. Role of state agencies other than the Idaho department of water resources in an adjudication.
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SECTION.

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- 42-1426. Enlargements — Waiver of mandatory permit requirements.
- 42-1427. Descriptions of water rights — Reporting and decreeing elements of a decreed or licensed water right.
- 42-1428. Severability.

42-1401. Legislative intent. — The legislature finds and declares that the state laws and procedures for the adjudication of rights to the use of water need to be modified:

(1) to provide a statutory procedure for incorporating a negotiated agreement between a federal reserved water right claimant and the state of Idaho into an adjudication;

(2) to provide a more efficient method for adjudications;

(3) to assure that state laws and procedures provide a fair and impartial forum for the adjudication of the rights of all claimants; and

(4) to assure that state laws and procedures are adequate as a matter of federal law to adjudicate all water rights claimed to have been established under federal law and to administer such rights. [I.C., § 42-1401, as added by 1986, ch. 220, § 2, p. 558; am. 1994, ch. 454, § 1, p. 1443.]

Compiler's notes. Former § 42-1401, which comprised 1903, p. 223, § 37; am. 1905, p. 357, § 4; reen. R.C. & C.L. § 4620; C.S., § 7032; I.C.A., § 41-1301; am. 1969, ch. 279, § 1, p. 822; am. 1981, ch. 265, § 2, p. 561, was repealed by S.L. 1986, ch. 220, § 1.

Section 1 of S.L. 1986, ch. 220 contains repeals.

Sec. to sec. ref. This chapter is referred to in §§ 42-1427 and 42-5102.

Cited in: *Sagewillow, Inc. v. Idaho Dep't of*

Water Res., — Idaho —, 70 P.3d 669 (2003).

Department of Water Resources Reports.

Reports compiled by personnel at the Idaho Department of Water Resources and signed by supervisory personnel or the Director are not inadmissible because they are not made on the personal knowledge of the signatory. *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 947 P.2d 409 (1997).

42-1401A. Definitions. — The following terms are defined for purposes of this chapter as follows:

(1) "Claimant" means any person asserting ownership of rights to the use of water within the state of Idaho or on whose behalf ownership of rights to the use of water is asserted.

(2) "Department" means the Idaho department of water resources.

(3) "Director" means collectively the director of the Idaho department of water resources and the Idaho department of water resources.

(4) "Domestic use" is defined in section 42-111, Idaho Code.

(5) "General adjudication" means an action both for the judicial determination of the extent and priority of the rights of all persons to use water from

any water system within the state of Idaho that is conclusive as to the nature of all rights to the use of water in the adjudicated water system, except as provided in section 42-1420, Idaho Code, and for the administration of those rights.

(6) "Party" means any person who is a claimant or any person who is served or joined.

(7) "Person" means an individual, a partnership, a trust, an estate, a corporation, a municipal corporation, the state of Idaho or any political subdivision, the United States, an Indian tribe, or any other public or private entity, except that "person" does not include the director of the department or the department.

(8) "Private adjudication" means an action commenced in accordance with section 42-1404, Idaho Code, for the judicial determination of both the extent and priority of the rights of named persons to the use of water from any water system within the state of Idaho, for which a general adjudication has not been commenced or completed, that binds only those persons joined in the action and for the administration of such rights.

(9) "Purchaser" means any successor in interest of a claimant, whether the interest is acquired by purchase, gift, inheritance, or other means.

(10) "Supplemental adjudication" means an action commenced in accordance with section 42-1424, Idaho Code, for the judicial determination of both the extent and priority of the rights of a person to the use of water from any water system within the state of Idaho which has been adjudicated in a general adjudication or in a private adjudication.

(11) "Stock watering use" means the use of water solely for livestock or wildlife where the total diversion is not in excess of thirteen thousand (13,000) gallons per day.

(12) "Water system" includes all rivers, streams, lakes, springs, ground waters, or other sources within this state, including any river system or other source, as used in 43 U.S.C. section 666. [I.C., § 42-1401A, as added by 1986, ch. 220, § 3, p. 558 and ch. 234, § 1, p. 645; am. 1990, ch. 319, § 6, p. 870; am. 1994, ch. 454, § 2, p. 1443; am. 1996, ch. 186, § 1, p. 584; am. 1997, ch. 374, § 2, p. 1192.]

Compiler's notes. Section 5 of S.L. 1990, ch. 319 is compiled as § 42-243.

Section 2 of S.L. 1996, ch. 186 is compiled as § 42-1411.

Sections 1 and 3 of S.L. 1997, ch. 374 are compiled as §§ 42-701 and 42-1409 respectively.

Sec. to sec. ref. This section is referred to in §§ 42-111, 42-701.

ANALYSIS

Legislative authority.

Party.

Standing to sue.

Legislative Authority.

While Article II of the Idaho Constitution prohibits the legislature from usurping powers properly belonging to the judicial depart-

ment, it also prohibits the judiciary from improperly invading the province of the legislature; thus, the 1994 legislative revisions and amendments to the Snake River Basin Adjudication (SRBA) statutes, which redefined the role of the Director of the Idaho Department of Water Resources and the role of various state agencies in the SRBA, were a proper exercise of legislative authority to the extent that the statutes prescribe substantive law and do not conflict with rules of the court. *State ex rel. Higginson v. United States*, 128 Idaho 246, 912 P.2d 614 (1995).

Party.

Canal companies could not seek action for declaratory judgment of administrative rules concerning conjunctive management of ground and surface water rights for the entire state adopted by Idaho Department of Water

Resources (IDWR) in Snake River Basin Adjudication (SRBA) since IDWR must be a party to the action and IDWR cannot be a party to SRBA. *Twin Falls Canal Co. v. Idaho Dep't of Water Resources*, 127 Idaho 688, 905 P.2d 89 (1995).

Standing to Sue.

The Fort Hill Water Users Association did not have standing to sue under this section

because it had only a contractual right to the use of the water and not an ownership right therein. *Fort Hall Water Users Ass'n v. United States*, 129 Idaho 39, 921 P.2d 739 (1996).

42-1401B. Role of the director in an adjudication. — (1) The director's role under this chapter is as an independent expert and technical assistant to assure that claims to water rights acquired under state law are accurately reported in accordance with the procedures of chapter 14, title 42, Idaho Code. The director shall make recommendations as to the extent of beneficial use and administration of each water right under state law and may use uniform parameters for quantification of beneficial use recommended for rights within climatic regions of the state.

(2) The director shall not be a claimant on behalf of the state or any subdivision of the state in an adjudication.

(3) The director shall not be a party to an adjudication. [I.C., § 42-1401B, as added by 1994, ch. 454, § 3, p. 1443.]

ANALYSIS

Declaratory judgment of administrative rules.

— Parties.

Legislative authority.

Declaratory Judgment of Administrative Rules.

— Parties.

Canal companies could not seek action for declaratory judgment of administrative rules concerning conjunctive management of ground and surface water rights for the entire state adopted by Idaho Department of Water Resources (IDWR) in Snake River Basin Adjudication (SRBA) since IDWR must be a party to the action and IDWR cannot be a party to SRBA. *Twin Falls Canal Co. v. Idaho*

Dep't of Water Resources, 127 Idaho 688, 905 P.2d 89 (1995).

Legislative Authority.

While Article II of the Idaho Constitution prohibits the legislature from usurping powers properly belonging to the judicial department, it also prohibits the judiciary from improperly invading the province of the legislature; thus, the 1994 legislative revisions and amendments to the Snake River Basin Adjudication (SRBA) statutes, which redefined the role of the Director of the Idaho Department of Water Resources and the role of various state agencies in the SRBA, were a proper exercise of legislative authority to the extent that the statutes prescribe substantive law and do not conflict with rules of the court. *State ex rel. Higginson v. United States*, 128 Idaho 246, 912 P.2d 614 (1995).

42-1401C. Role of state agencies other than the Idaho department of water resources in an adjudication. — (1) Each state agency, and the Idaho water resource board may file a claim and appear separately in any adjudication through the attorney general. This section shall not apply to the Idaho department of water resources.

(2) The attorney general may appear in any adjudication and shall represent the position of the state of Idaho. [I.C., § 42-1401C, as added by 1994, ch. 454, § 4, p. 1443.]

Legislative Authority.

While Article II of the Idaho Constitution prohibits the legislature from usurping powers properly belonging to the judicial depart-

ment, it also prohibits the judiciary from improperly invading the province of the legislature; thus, the 1994 legislative revisions and amendments to the Snake River Basin

Adjudication (SRBA) statutes, which redefined the role of the Director of the Idaho Department of Water Resources and the role of various state agencies in the SRBA, were a proper exercise of legislative authority to the

extent that the statutes prescribe substantive law and do not conflict with rules of the court. *State ex rel. Higginson v. United States*, 128 Idaho 246, 912 P.2d 614 (1995).

42-1401D. Jurisdictional limitation. — Review of an agency action of the department of water resources, which is subject to judicial review or declaratory judgment under the provisions of chapter 52, title 67, Idaho Code, shall not be heard in any water rights adjudication proceeding commenced under this chapter. Venue and jurisdiction over any such action pending on the effective date of this section [March 2, 2001], or initiated subsequent thereto, shall be in the district court as authorized under the provisions of section 67-5272, Idaho Code, without regard to any other provision of law. [I.C., § 42-1401D, as added by 2001, ch. 31, § 2, p. 47.]

Legislative Intent. Section 1 of S.L. 2001, ch. 31, read: "A principal goal of the Legislature is the timely completion of the pending Snake River Basin Adjudication resulting in a judicial determination of all water rights within the Snake River basin in accordance with the provisions of Chapter 14, Title 42, Idaho Code. A recent judicial decision holding that the Snake River Basin Adjudication district court has exclusive jurisdiction to provide judicial review of administrative actions by the Department of Water Resources affecting rights to the use of water in the Snake River basin potentially frustrates this legislative goal."

"It is and has been the intention of the Legislature that the district court presiding over a water rights adjudication proceeding under the provisions of Chapter 14, Title 42, Idaho Code, exercises unique jurisdiction over the "judicial determination" of the elements of the water rights subject to the court's jurisdiction. Further, it is and has been the inten-

tion of the Legislature that judicial review of an agency action by the Department of Water Resources under the provisions of Chapter 52, Title 67, Idaho Code, does not provide a judicial determination of the elements of a water right. Rather, a judicial review proceeding potentially results only in confirmation of an administrative determination of one (1) or more elements of a water right, which then shall constitute prima facie evidence of those elements consistent with the provisions of Section 42-220, Idaho Code. In order not to burden and delay the adjudication proceeding with actions for judicial review, the Legislature finds it necessary to enact the following statutory amendment, which is intended to apply to all actions for judicial review pending on the date of enactment as well as future actions."

Compiler's notes. The bracketed date "March 2, 2001" was inserted by the compiler.

Section 3 of S.L. 2001, ch. 31 declared an emergency. Approved March 2, 2001.

42-1402. Decreed rights appurtenant to land — Water rights established under federal law excepted. — In allotting the waters of any water system by the district court according to the rights and priorities of those using such waters, such allotment shall be made to the use to which such water is beneficially applied, except where water rights established under federal law are involved, in which case the allotment shall be made in accordance with federal law. The right confirmed by such decree or allotment shall be appurtenant to and shall become a part of the land on which the water is used, and such right will pass with the conveyance of such land, and such decree shall describe the land to which such water shall become so appurtenant. The amount of water so allotted shall never be in excess of the amount actually used for beneficial purposes for which such right is claimed, or in the case of a water right established under federal law, in excess of that amount determined by federal law. [1903, p. 223, § 38; reen. R.C., § 4621; am. 1913, ch. 35, § 1, p. 133; C.L., § 4621; C.S., § 7033; I.C.A., § 41-1302;

am. 1969, ch. 279, § 2, p. 822; am. 1986, ch. 220, § 4, p. 558; am. 1994, ch. 454, § 5, p. 1443.]

Compiler's notes. Section 3 of S.L. 1969, ch. 279 repealed § 42-1404, and section 4 of S.L. 1969, ch. 279 is compiled as § 42-1406.

Cross ref. Issuance of license, § 42-219.

Proof of application to beneficial use, § 42-217.

ANALYSIS

Application of proviso.

Application of section.

Carey Act Contracts.

Compliance with statute required.

Description of land.

Application of Proviso.

Proviso in this section was applicable only where litigant was in position to profit by the doctrine of relation, and one claiming by appropriation merely, without compliance with the statutes of this state, was not so entitled. *Reno v. Richards*, 32 Idaho 1, 178 P. 81 (1918).

Application of Section.

This section and cognate sections have application only where there is a full compliance with the statutes, and in the absence of such full compliance with respect to appropriation of water, the doctrine of relation cannot be

invoked. *Bachman v. Reynolds Irrigation Dist.*, 56 Idaho 508, 55 P.2d 1314 (1936).

Carey Act Contracts.

Provision of this section limiting allotment to amount actually used for beneficial purposes is read into contracts under Carey Act. *Idaho Irrigation Co. v. Gooding*, 265 U.S. 518, 44 S. Ct. 618, 68 L. Ed. 1157 (1924); *Sallee v. Commonwealth Trust Co.*, 8 F.2d 227 (9th Cir. 1925).

Compliance With Statute Required.

In the absence of the issuance of a permit and compliance therewith under this and other sections, an irrigation district was not entitled to prove beneficial use of any additional amount of water from a natural stream. *Bachman v. Reynolds Irrigation Dist.*, 56 Idaho 508, 55 P.2d 1314 (1936).

Description of Land.

Land to which decreed right is appurtenant or on which it is used need not always be described in decree, particularly in case of rental rights. *Farmers' Coop. Ditch Co. v. Riverside Irrigation Dist.*, 14 Idaho 450, 94 P. 761 (1908).

42-1403. Certified copies of allotments. — It shall be the duty of the clerk of the district court in each of the counties of this state to prepare at the expense of the county, and transmit without delay to the department of water resources by express or registered mail, a certified copy of the allotments of the various streams, made by the district court and now on file in the offices of the district court in the various counties of the state: provided, that said clerk may, in place of such transcript, transmit such original records of such decrees as are recorded in books kept for that purpose. Immediately upon receipt of said transcripts or said original records, it shall be the duty of the department to record them in its files, and to classify and arrange said decrees by placing all the rights to water of one stream and its tributaries together, and the department shall send to each watermaster a certified copy of the allotments made by the district court of all the streams within his district. And when an allotment of the waters of a stream shall be made by the district court, the clerk of such district court shall immediately prepare, at the expense of the county, and transmit to the department of water resources, a certified copy of the decree allotting such waters. The director may issue an abstract of decreed water right which shall describe the elements of a water right as contained in the water right decree. [1903, p. 223, § 39; reen. R.C. & C.L., § 4622; C.S., § 7034; I.C.A., § 41-1303; am. 1994, ch. 454, § 6, p. 1443.]

Compiler's notes. The name of the department of water administration (formerly

the department of reclamation) has been changed to the department of water resources

on the authority of S.L. 1974, ch. 286, § 1 and
S.L. 1974, ch. 20, § 28 (§ 42-1801a).

Sec. to sec. ref. This section is referred to
in §§ 42-1412 and 42-1413.

42-1404. Private actions for adjudication of water rights. —

(1) Any claimant may file suit in the district court for the county in which the point of diversion or place of use of the claimed right is located for the purpose of adjudicating rights to the use of water from any water system for which a general adjudication has not been commenced or completed. The claimant shall set forth in his complaint the claimed water right in a notice of claim form furnished by the director. The claimant shall join all claimants of rights to the use of water from the water system whose joinder is necessary to resolve the dispute over rights to the use of water from the water system. The claimant shall also publish notice of the action in the manner specified in subsection (2)(b) of section 42-1408A [42-1408], Idaho Code.

(2) Any party who may be injured and who objects to the water right claimed by the claimant shall, within forty-five (45) days of the date of first publication of notice, file with the district court written notice of such objection stating the reasons for the objection. A copy of the objection shall be served upon the claimant, all other parties of record in the action, the watermasters, and the director.

(3) Any claimant of a right to the use of water from the water system being adjudicated shall be entitled to intervene and have the claimed right adjudicated. Any such claimant requesting intervention shall set forth the claimed water right in a notice of claim form furnished by the director. The court may request a director's report of the director, as described in section 42-1411, Idaho Code, as to those rights to be determined. The director shall advise the district court as to whether the director will commence an examination of the water system in accordance with the provisions of section 42-1410, Idaho Code. If the director elects not to conduct an examination, the adjudication shall proceed based on the description of the water right in the notice of claim form. Each claimant shall have the burden of proof of establishing each element of a water right described in the claimants notice of claim form.

(4) The director shall provide to the court an estimate of the costs that will be incurred in conducting the examination and in preparing the director's report and an approximate time when the director's report will be completed. The court shall order the claimants of the rights to be determined to submit a notice of claim to the director in accordance with section 42-1409, Idaho Code, except that the fee as described in section 42-1414, Idaho Code, shall not apply. Upon the completion of claims-taking, the director shall bill each claimant for a claim fee equal to that claimant's proportionate share of the total estimated cost to the state relative to that claimant's share of the total amount of water claimed by all claimants or for an amount as determined by the court. Any notice of claim for a water right for which the fee is unpaid after thirty (30) days from billing by the director shall be incomplete and may be rejected. Prior to filing of the report with the court, the claimants shall pay the balance of the department's verified costs

or be refunded any unused estimated costs advanced to the department in the same proportion as described above. In the event that a claimant shall contest the department's costs, the court shall then determine the reasonable costs to be paid by each claimant.

(5) Notice of the filing of the director's report shall be given and objections to the director's report shall be made and heard as provided in sections 42-1411 and 42-1412, Idaho Code.

(6) The decree, which shall be entered pursuant to section 42-1412, Idaho Code, shall contain or incorporate a statement of each element of a water right as stated in subsection (2) of section 42-1411, Idaho Code, as applicable. The decree shall also determine all other matters necessary for the efficient administration of the water rights. The decree shall be conclusive as to the rights determined in the proceeding only as to those persons party to the proceeding.

(7) Any party who has appeared and is aggrieved by the decree of the district court may appeal in accordance with the Idaho appellate rules. [I.C., § 42-1404, as added by 1986, ch. 220, § 5, p. 558; am. 1994, ch. 454, § 7, p. 1443.]

Compiler's notes. A former § 42-1404, which comprised S.L. 1903, p. 223, § 40; reen. R.C. & C.L., § 4623; C.S., § 7035; I.C.A., § 41-1304, was repealed by S.L. 1969, ch. 279, § 3.

The bracketed reference "42-1408" in subsection (1) was inserted by the compiler since § 42-1408A was amended and redesignated as § 42-1408 by S.L. 1994, ch. 454, § 14.

Section 4 of S.L. 1986, ch. 220 is compiled as § 42-1402.

Section 8 of S.L. 1994, ch. 454 is compiled as § 42-1424.

Sec. to sec. ref. This section is referred to in §§ 42-1401A, 42-1410 and 42-1424.

Cited in: *Sagewillow, Inc. v. Idaho Dep't of Water Resources*, 135 Idaho 24, 13 P.3d 855 (2000).

ANALYSIS

Legislative intent.

Real property right.

Right of action.

Water within a well.

Snake river basin adjudication.

Legislative Intent.

The Idaho legislature intended to prevent private adjudications of claimed water rights to water systems for which a general adjudication has been commenced or completed. *Devil Creek Ranch, Inc. v. Cedar Creek Reservoir & Canal Co.*, 126 Idaho 202, 879 P.2d 1135 (1994).

Real Property Right.

The right to appropriate water is a real property right separate and apart from the property rights in the land from which the

water has been diverted. *Bear Island Water Ass'n v. Brown*, 125 Idaho 717, 874 P.2d 528 (1994).

Right of Action.

Until all of the underlying issues of fraud and self-dealing were determined by the trial court there was no determination necessary of any essential element of a water right and the Snake River Adjudication Court did not have jurisdiction until the underlying issues were decided. *Bischoff v. Salem Union Canal Co.*, 130 Idaho 455, 943 P.2d 45 (1997).

Water Within a Well.

Although the parties filed claims to adjudicate their respective right to the real property comprising a water well, neither party filed an action for adjudication of any water rights in compliance with this section; therefore, district court's order granting exclusive water rights to one party was vacated. *Bear Island Water Ass'n v. Brown*, 125 Idaho 717, 874 P.2d 528 (1994).

Snake River Basin Adjudication.

The Snake River Basin Adjudication (SRBA) district court is, in effect, a separate division of the district courts and exercises the unique jurisdiction given it by the legislature. Thus, once SRBA has commenced, jurisdiction to resolve all of the water rights claims within the scope of the general adjudication is in the SRBA district court only. *Walker v. Big Lost River Irrigation Dist.*, 124 Idaho 78, 856 P.2d 868 (1993).

Trial court lacked jurisdiction to grant a writ of mandate and a permanent injunction compelling irrigation district to deliver stored water outside of irrigation district's bound-

aries, where the case required the trial court to determine the right to the use of water, which could only be addressed as part of the

Snake River Basin Adjudication (SRBA). Walker v. Big Lost River Irrigation Dist., 124 Idaho 78, 856 P.2d 868 (1993).

42-1405. General adjudication — Public interest. — (1) Five (5) or more or a majority of the users of water from any water system may petition the director to request the attorney general to file an action to commence a general adjudication. If the director deems that the public interest and necessity will be served by a determination of the water rights of that water system, the director shall request the attorney general to file an action to commence the general adjudication.

(2) If the director deems that the public interest and necessity will be served by a determination of the water rights of any water system, the director, upon his own initiative, may request the attorney general to file an action to commence a general adjudication. [I.C., § 42-1406, as added by 1969, ch. 279, § 4, p. 822; am. 1986, ch. 220, § 7, p. 558; am. and redesign. 1994, ch. 454, § 10, p. 1443.]

Compiler’s notes. This section was formerly compiled as § 42-1406.

Former § 42-1405 was amended and redesignated as § 42-1424.

Section 3 of S.L. 1969, ch. 279 repealed § 42-1404.

Sec. to sec. ref. This section is referred to in § 42-1424.

Cited in: Olson v. Idaho Dep’t of Water Resources, 105 Idaho 98, 666 P.2d 188 (1983).

ANALYSIS

Combining districts.
Fees charged to United States.

Combining Districts.

Where the department of water resources wishes to combine two water districts on the

same creek into one and it determines that there are insufficient uncontested rights to develop a workable plan for water distribution, it should proceed to an adjudication pursuant to this section before combining the two districts. Nettleton v. Higginson, 98 Idaho 87, 558 P.2d 1048 (1977).

Fees Charged to United States.

The McCarran Amendment (43 U.S.C. § 666(a)) does not waive the United States’ sovereign immunity from fees required by § 42-1414. United States v. Idaho ex rel. Dir., Idaho Dep’t of Water Resources, 508 U.S. 1, 113 S. Ct. 1893, 123 L. Ed. 2d 563 (1993).

Collateral References. 93 C.J.S., Waters, §§ 410-436.

42-1405a. Construction of §§ 42-1404 and 42-1406. [Repealed.]

Compiler’s notes. This section, which comprised 1986, ch. 220, § 29, p. 558, was

repealed by S.L. 1994, ch. 454, § 9, effective April 12, 1994.

42-1406. General adjudication — Contents of petition. — (1) A petition for a general adjudication shall contain among other things, the following:

- (a) a description of the proposed boundaries of the water system to be adjudicated and administered;
- (b) a statement of why the public interest and necessity would be served by a general adjudication;
- (c) a list of counties where the water system proposed to be adjudicated and administered is located and a designation of whether all or only a portion of the county is included within the boundaries of the proposed general adjudication;

(d) a description of the general method proposed to ascertain and to serve claimants not disclosed following completion of the service required by paragraphs (a) through (d) of subsection (2) of section 42-1408, Idaho Code; and

(e) a prayer for relief requesting the district court to enter an order that commences the general adjudication.

(2) A petition for entry of an order commencing a general adjudication shall be captioned: "In Re the General Adjudication of Rights to the Use of Water From the Water System." Such action shall have no other caption. [I.C., § 42-1407, as added by 1986, ch. 220, § 8, p. 558; am. and redesisg. 1994, ch. 454, § 12, p. 1443.]

Compiler's notes. This section was formerly compiled as § 42-1407.

Former § 42-1406 was amended and redesignated as § 42-1405.

42-1406A. Snake River basin adjudication — Commencement. [Uncodified.]

Compiler's notes. Section 42-1406A, which comprised I.C., § 42-1406A, as added by 1985, ch. 18, § 1, p. 27; am. 1985, ch. 118, § 1, p. 286, was uncodified and amended by S.L. 1994, ch. 454, § 11, effective April 12, 1994.

As so uncodified and amended § 42-1406A reads: "(1) Effective management in the public interest of the waters of the Snake River basin requires that a comprehensive determination of the nature, extent and priority of the rights of all users of surface and ground water from that system be determined. Therefore, the director of the department of water resources shall petition the district court to commence an adjudication within the terms of the McCarran amendment, 43 U.S.C. section 666, of the water rights of the Snake River basin either through initiation of a new proceeding or the enlargement of an ongoing adjudication proceeding. The petition shall describe:

"(a) The boundaries of the system within the state to be adjudicated;

"(b) Any class of water users within the system and the boundaries of any hydrologic sub-basins within the system for which the director intends to proceed separately with respect to the actions required or authorized to be taken pursuant to sections 42-1408 through 42-1414, Idaho Code; and

"(c) The uses of water, if any, within the system that are recommended to be excluded from the adjudication proceeding.

"(2) Upon issuance of an order by the district court which:

"(a) Authorizes the director to commence an investigation and determination of the various water rights to be adjudicated within the system;

"(b) Defines the boundaries of the system

within the state to be adjudicated;

"(c) Defines the classes of water users within the system and the boundaries of any hydrologic sub-basins within the system for which proceedings may advance separately pursuant to sections 42-1408 through 42-1414, Idaho Code; and

"(d) Defines any uses of water excluded from the adjudication proceedings; the adjudication shall proceed in the manner provided under the provisions of chapter 14, title 42, Idaho Code, with the exception of section 42-1406, Idaho Code.

"(3) On November 19, 1987, the fifth judicial district court in and for the county of Twin Falls issued an order commencing an adjudication of the Snake River basin pursuant to this section. By this act [S.L. 1994, ch. 454], the legislature is amending the procedures that govern that proceeding. To the extent that the provisions of this section conflict with other provisions of this chapter, as amended, such other provisions shall govern."

ANALYSIS

Exclusive jurisdiction.

Intervention.

—"Public trust doctrine."

Exclusive Jurisdiction.

The Snake River Basin Adjudication (SRBA) district court is, in effect, a separate division of the district courts and exercises the unique jurisdiction given it by the legislature. Thus, once SRBA has commenced, jurisdiction to resolve all of the water rights claims within the scope of the general adjudication is in the SRBA district court only. *Walker v. Big Lost River Irrigation Dist.*, 124 Idaho 78, 856 P.2d 868 (1993).

Trial court lacked jurisdiction to grant a

writ of mandate and a permanent injunction compelling irrigation district to deliver stored water outside of irrigation district's boundaries, where the case required the trial court to determine the right to the use of water, which could only be addressed as part of the Snake River Basin Adjudication (SRBA). *Walker v. Big Lost River Irrigation Dist.*, 124 Idaho 78, 856 P.2d 868 (1993).

Intervention.

—“Public Trust Doctrine.”

Where conservation groups petitioned for leave to intervene in the Snake River Basin

Adjudication (SRBA) to represent the interests of the public through the public trust doctrine, the district court did not err in denying the conservation groups' motion to intervene, concluding that the public trust doctrine is not an element of a water right used to determine the priority of that water right in relation to the competing claims of other water right claimants. *Idaho Conservation League, Inc. v. State*, 128 Idaho 155, 911 P.2d 748 (1995).

42-1407. General adjudication — Venue — Notice of filing — Commencement order. — (1) A general adjudication shall be brought in any district court in which any part of the water system within the state of Idaho is located. The clerk of the district court in which the petition is filed shall send to the supreme court a true and certified copy of the petition. The supreme court, by order, shall assign the judge to preside over the general adjudication. Venue of the general adjudication shall be determined by order or rule of the supreme court and venue of hearings under the general adjudication shall be determined by order of the presiding judge.

(2) The director shall prepare, in plain and concise language, and publish a notice of filing of a petition for entry of an order commencing a general adjudication for three (3) consecutive weeks in a newspaper of general circulation published in each county in which any part of the water system proposed to be adjudicated is located. If there is no newspaper published within a county, then the notice shall be published in a newspaper having general circulation in that county. The date set for hearing on the petition shall not be less than twenty (20) days after the last date of publication. The director shall serve the notice of filing a petition on the United States and on the state of Idaho. The director shall file affidavit(s) of service of the notice of filing with the district court upon completion of service.

(3) The notice of filing shall contain:

- (a) a description of the boundaries of the water system proposed for the general adjudication;
- (b) a statement of the date, place, and time of hearing before the district court;
- (c) a concise statement of the matters proposed to be considered before the district court; and
- (d) a statement that the district court will hear evidence and legal argument from any person in response to any matter raised by the petition.

(4) With respect to a general adjudication commenced pursuant to section 42-1405, Idaho Code, if the district court determines that the public interest and necessity will be served by a general adjudication, the district court shall enter an order that includes the following:

- (a) a provision that commences the general adjudication;
- (b) a description of the boundaries of the water system for which a general adjudication is commenced;

(c) a list of counties where the water system to be adjudicated and administered is located and a designation of whether all or only a portion of the county is included within the boundaries of the general adjudication;

(d) a provision that requires all claimants to file a notice of claim or negotiated agreement for all water rights from the water system, except that the court may exclude those types of water rights designated in paragraph (a) of subsection (1) of section 42-1420, Idaho Code;

(e) a determination of the method of service for claimants not disclosed following completion of the service required by paragraphs (a) through (d) of subsection (2) of section 42-1408, Idaho Code; and

(f) a statement that the files of the district court will contain affidavits of service and other documents stating the persons served with a copy of the notice of order commencing the general adjudication.

(5) Upon entry of a commencement order, the general adjudication shall proceed in accordance with this chapter.

(6) Promptly upon entry of the commencement order, the clerk of the district court shall send a certified copy of the order to the director, and shall serve notice of entry of the order on all persons appearing before the court in accordance with the Idaho rules of civil procedure. [I.C., § 42-1408, as added by 1986, ch. 220, § 9, p. 558; am. and redesisg. 1994, ch. 454, § 13, p. 1443.]

Compiler's notes. Former §§ 42-1407 — 42-1413, which comprised 1969, ch. 279, §§ 5-11; am. 1978, ch. 328, § 1; am. 1980, ch. 150, § 1; am. 1981, ch. 48, § 1; am. 1985, ch. 18, § 2, were repealed by S.L. 1986, ch. 220, § 1.

This section was formerly compiled as § 42-1408.

Former § 42-1407 was amended and redesignated as § 42-1406.

42-1408. Service of notice of order commencing a general adjudication. — (1) Upon entry of a district court's order commencing a general adjudication, the director shall prepare a notice of order, using plain and concise language, that contains the following information or enclosures:

(a) an order commencing a general adjudication has been entered, the date of entry of the order, and the district court that entered the order;

(b) an illustration of the boundaries of the water system to be adjudicated and administered;

(c) that section 42-1409, Idaho Code, requires in a general adjudication all claimants, except as specifically excluded by law, to file for each water right, a notice of claim on a form furnished by the director; failure to file a required notice of claim will result in a court determination that no water right exists for the use of water for which the required notice of claim was not filed;

(d) a notice of claim is required for any water right license and for any water right permit on file for which the director requires a permit holder to file a notice of claim in accordance with section 42-1409, Idaho Code; a notice of claim may be filed for any other water right permit;

(e) a notice of claim is not required for a water right evidenced by an application on file with the department;

- (f) a notice of claim, if the court order excludes any uses from an adjudication, may be filed for the excluded use prior to the filing of the director's report with the district court and the right will be determined, even though a notice of claim is not required;
 - (g) a notice of claim is not required for any person who receives water solely by virtue of ownership of shares of stock in, or by being located within the boundaries of, a water delivery organization, if the water delivery organization holds legal title to the water right and if the water delivery organization files a notice of claim;
 - (h) the date set by the director for filing a timely notice of claim, which shall not be less than ninety (90) days after service;
 - (i) that section 42-1409A, Idaho Code, imposes substantial restrictions on the filing of amended or late notices of claim;
 - (j) the locations at which the notice of claim forms will be available;
 - (k) section 42-1414, Idaho Code, requires each claimant, other than those exempted by federal law, to pay a variable fee to the director with a notice of claim; failure to pay the fee will result in rejection of the notice of claim; failure to file a timely notice of claim will result in the assessment of a late fee in the amount of fifty dollars (\$50.00) or fifteen per cent (15%) of the original filing fee, whichever is greater;
 - (l) section 42-1409, Idaho Code, requires that all purchasers of a water right inquire of the director whether a notice of claim has been filed, and if not, to file a notice of claim, except as specifically excluded by law, and that all claimants and purchasers provide the director written notice of any change in ownership, along with some evidence of ownership or of any change in mailing address; and
 - (m) the files of the district court will contain affidavits of service or other documents stating the persons served with a copy of the notice of order.
- (2) The director shall serve copies of the notice of order as follows:
- (a) the director shall serve the notice of order on the state of Idaho and the United States;
 - (b) the director shall serve the notice of order on claimants other than the persons in paragraph (a) of subsection (2) of this section, initially by publication once a week for three (3) consecutive weeks in a newspaper of general circulation published in each county in which any part of the water system, which is the subject of the general adjudication, is located. If there is no newspaper published within a county, then the copies shall be published in a newspaper having general circulation in that county;
 - (c) the director shall post the notice of order in each county courthouse, county recorder's office, and county assessor's office in which any part of the water system is located. The director shall complete the posting on or before the date of the last publication within each county;
 - (d) the director shall serve the notice of order by ordinary mail on each person listed as owning real property on the real property assessment roll within the boundaries of the water system to be adjudicated at the address listed on the real property assessment roll; and
 - (e) the director shall file a copy of the notice of order commencing a general adjudication in the office of the county recorder in each county in

which any part of the water system is located; notwithstanding the provisions of section 5-505, Idaho Code, the notice, from the time it is filed with the recorder for record, is constructive notice of the contents thereof within the county in which the notice is recorded, to subsequent purchasers and mortgagees.

(3) The director shall send the notice of order by ordinary mail to all persons who submit a written request to the director to be notified of the commencement of an adjudication. The director may circulate copies in any additional manner the director deems appropriate.

(4) Upon expiration of the period for filing notices of claims, the director shall conduct a second round of service in conformance with this subsection. The director shall compare the notices of claims with department records and other information reasonably available to determine whether there are any rights to water from the water system for which no notice of claim was filed. In the event the director determines that not all claimants have filed claims, the director shall make a reasonably diligent effort in accordance with the court order to determine the land to which the possible claim is appurtenant, the last known owner of that land, and the last known address of that owner. The director shall prepare a second round notice of order. The director shall serve this notice on the last known owner in accordance with the court order. The notice shall contain the information specified in subsection (1) of this section, except that the notice shall state a final date for filing notices of claims. The final date shall be an additional period of time, in no case less than ninety (90) days from the date the notice is served, in which the notice of claim must be received by the director.

(5) The director shall file with the district court such proof of service as may be required to demonstrate compliance with the above requirements. [I.C., § 42-1408A, as added by 1986, ch. 220, § 10, p. 558 and 1986, ch. 230, § 2, p. 621; am. 1991, ch. 84, § 1, p. 188; am. and redesisg. 1994, ch. 454, § 14, p. 1443.]

Compiler's notes. Former § 42-1408 was repealed. See Compiler's notes, § 42-1407.

Another former § 42-1408 was amended and redesignated as § 42-1407.

This section was formerly compiled as § 42-1408A.

Section 27 of S.L. 1986, ch. 220 read: "The provisions of section 10 of this act, which enacts section 42-1408A, Idaho Code, shall not apply to any adjudication in which an order of joinder was entered prior to July 1, 1986, unless the boundaries of the water system are changed by court order after July 1, 1986."

Section 2 of S.L. 1991, ch. 84 declared an emergency. Approved March 26, 1991.

Sec. to sec. ref. This section is referred to in §§ 31-2402, 42-1404, 42-1406, 42-1409A and 42-1414.

Jurisdiction Over United States.

The McCarran Amendment, 43 U.S.C. 666(a) waives sovereign immunity and subjects the United States to the laws of Idaho in the Snake River Basin Adjudication including the payment of filing fees. Idaho Dep't of Water Resources v. United States, 122 Idaho 116, 832 P.2d 289 (1992).

42-1408A. [Amended and Redesignated.]

Compiler's notes. Former § 42-1408A was amended and redesignated as § 42-1408 by § 14 of S.L. 1994, ch. 454.

42-1409. Notice of claim. — (1) The director shall prepare and furnish on request a standard notice of claim form.

The notice of claim form shall include the following:

(a) the name and address of the claimant;

(b) the source of water;

(c) the quantity of water claimed:

(i) the quantity of water claimed to be used for water rights acquired under state law shall describe the rate of diversion or, for an instream flow claim, a rate of water flow in cubic feet per second or the annual volume of diversion of water for use or storage in acre-feet per year, or both;

(ii) the quantity of water claimed for water rights established under federal law shall describe for each and every purpose the rate of present and future water diversion or, in the case of an instream flow claim the rate of flow in cubic feet per second or annual volume of present and future diversion in acre-feet per year or both;

(d) the date of priority claimed:

(i) the date of priority claimed for water rights acquired under state law shall be from any license, permit, or decree; or if the right is not based upon a license, permit, or decree, then the date when the water was first applied to beneficial use;

(ii) the date of priority claimed for water rights established under federal law shall be determined in accordance with federal law;

(e) the number thereof, if founded upon a right on file with the department; or if the right is founded upon judicial decree not on file with the department, then the title of the court and cause, number of the action and the date of entry;

(f) the legal description of the existing point(s) of diversion; if the claim is for an instream flow, then a legal description of the beginning and ending points of the claimed instream flow;

(g) the purpose(s) of use and the period of use:

(i) the purpose(s) of use for water rights acquired under state law shall describe each purpose of use and the period of the year when water is used for each purpose;

(ii) the purpose(s) of use for a water right established under federal law shall describe the purposes for which the water included in the claim is presently being used, if at all, and the period of the year when water is necessary for the designated purposes;

(h) a legal description of the place of use:

(i) the legal description of the place of use for water rights acquired under state law shall describe the land where the water is beneficially used; if one (1) of the purposes of use is irrigation, then the number of irrigated acres within each forty (40) acre subdivision, except as provided in section 42-219, Idaho Code;

(ii) the legal description of the place of use for a water right established under federal law shall describe the federal reservation and the existing or proposed place of use for each consumptive use;

- (i) the dates of any changes or enlargements in use for water rights acquired under state law, including the dimension of the diversion works as originally constructed and as enlarged;
- (j) conditions on the exercise of any water right included in any decree, license, approved transfer application or other document; and
- (k) such remarks and other matters as are necessary for definition of the right, for clarification of any element of a right or for administration of the right by the director.

(2) With respect to any water right for which a change was approved by the director pursuant to section 42-211 or 42-222, Idaho Code, after filing the notice of claim and prior to filing of the director's report, the claimant shall amend the notice of claim consistent with the determination of the director on the change.

(3) Each claimant shall sign and verify under oath that the statements contained in a notice of claim or amended notice of claim are true and correct.

(4) All claimants of water rights that are included in a general adjudication shall file with the director a notice of claim for all water rights, except for those types of water rights designated in paragraphs (a) through (d) of subsection (1) of section 42-1420, Idaho Code.

(5) Any person who fails to submit a required notice of claim shall be deemed to have been constructively served with notice of a general adjudication by publication and mailing as required by section 42-1408, Idaho Code.

(6) Each purchaser of a water right from the water system shall inquire of the director whether a notice of claim has been filed, and if not, shall file a notice of claim in accordance with this section. All claimants and purchasers shall provide the director written notice of any change in ownership or of any change in mailing address during the pendency of a general adjudication. All purchasers shall submit some evidence of ownership along with the notice of change of ownership.

(7) At least one hundred twenty (120) days prior to filing of the director's report with the court, the director may notify each holder of a permit or license to appropriate water from the water system, for which proof of beneficial use was filed after entry of the court's order commencing a general adjudication, to file a notice of claim within thirty (30) days of mailing of the notice. The director shall notify the holder of the permit or license by certified mail at the most recent address shown in the records of the department.

(8) The district court or director may extend the time for filing a notice of claim. [I.C., § 42-1409, as added by 1986, ch. 220, § 11, p. 558; am. 1994, ch. 454, § 15, p. 1443; am. 1994, ch. 455, § 1, p. 1478; am. 1997, ch. 374, § 3, p. 1192.]

Compiler's notes. Former § 42-1409 was repealed. See Compiler's notes, § 42-1407.

Section 34 of S.L. 1994, ch. 454, as amended by § 7 of S.L. 1994, ch. 455 provides: "(1) The legislature intends that the amendments made in this act shall apply to case no. 39576

in the district court of the fifth judicial district, in and for the county of Twin Falls, subject to the transition provisions of this section.

"(2) The director shall file with the district court amendments to the director's reports for

the three (3) test basins to conform those reports to the new information requirements of this act. The director shall provide the district court written notice of the schedule for completion of the amendments.

“(3) The district court shall provide any claimant of a water right acquired under state law or established under federal law with an opportunity to file new notices of claim or to file amendments to notices of claim to conform them with this act, subject to the following procedures:

“(a) The provisions of subsection (1) of section 42-1409, Idaho Code, do not require the amendment of any notice of claim for water rights acquired under state law. The director shall investigate the notices of claim sufficiently to determine these matters. If any claimant disagrees with the director’s determination of these matters, the claimant may file an objection to the director’s report.

“(b) Objections to an amended director’s report for any of the three (3) test basins shall be governed by section 42-1412, Idaho Code.

“(4) The director shall cease work on any director’s report for water rights established under federal law, subject to the following provisions:

“(a) The new notice and service require-

ments of section 42-1411A, Idaho Code, shall not apply to any water rights established under federal law which are included in any director’s report, which abstracts the notices of claim for a water right established under federal law and which has been filed with the district court prior to the effective date of this act. The other provisions of section 42-1411A, Idaho Code, shall apply to those water rights established under federal law that are included in such director’s reports.

“(b) Objections to an amended director’s report for any of the three (3) test basins shall be governed by section 42-1411A, Idaho Code.

“(5) The director shall transmit to the district court the originals of the notices of claim to water rights established under federal law within sixty (60) days of the effective date of this act.”

Section 2 of S.L. 1994, ch. 455 is compiled as § 42-1411.

Sections 2 and 4 of S.L. 1997, ch. 374 are compiled as §§ 42-1401A and 42-1411.

Sec. to sec. ref. This section is referred to in §§ 42-1420, 42-1427 and 42-1421.

Cited in: Idaho Dep’t of Water Resources v. United States, 122 Idaho 116, 832 P.2d 289 (1992).

DECISIONS UNDER PRIOR LAW

Quantity of Water Claimed.

In an action to adjudicate water rights, wherein the United States claimed reserved nonconsumptive water rights to the entire natural flow of three streams in two national forests, the claim to the entire natural flow, if

it were proved to be necessary to accomplish the purposes of timber and watershed protection, was a sufficient quantification of the claimed reserved rights. *Avondale Irrigation Dist. v. North Idaho Properties, Inc.*, 99 Idaho 30, 577 P.2d 9 (1978).

42-1409A. Amendment of notice of claims — Late notice of claims. — (1) A claimant may amend a notice of claim or file a late notice of claim at any time prior to the final date for filing notices of claim in the notice of second round service as provided in subsection (4) of section 42-1408, Idaho Code.

(2) A claimant may amend the name and address of a claimant at any time.

(3) A claimant may amend a notice of claim or file a late notice of claim after the final date for filing notices of claims in the notice of second round service for good cause shown to the district court or the director.

(4) No amendments to a notice of claim or late notices of claim shall be allowed except as authorized in subsection (1), (2) or (3) of this section. [I.C., § 42-1409A, as added by 1994, ch. 454, § 16, p. 1443.]

Sec. to sec. ref. This section is referred to in § 42-1408.

42-1410. Examination of water system and of claims. — (1) Upon entry of the court's order commencing a general adjudication, or as provided in section 42-1404 or 42-1424, Idaho Code, the director shall commence an examination of the water system, the canals and ditches and other works, and the uses being made of water diverted from the water system for water rights acquired under state law. The examination shall continue in a manner and for such a period of time as the director determines is necessary to evaluate the extent and nature of each water right for which a notice of claim under state law has been filed. The director may conduct any fact-finding hearing necessary for a full and adequate disclosure of the facts.

(2) The director and other employees of the department shall have authority to go upon all lands, both public and private, for the purpose of investigating the uses of water from any water source and may require the cooperation of the claimant in investigating the claimant's water use. The employee investigating the claimant's use shall make a reasonable effort to contact the claimant to schedule a date and approximate time for the examination. If the well or diversion works are located in a building other than an unlocked structure used solely for housing the well or other diversion works in which there is no reasonable expectation of privacy, the employee shall only enter the building in the absence of a court order after requesting and receiving the permission of the claimant or other occupant. The director may request the district court to issue an order compelling inspection and subpoenas requiring the attendance of any witness or the production of documents in accordance with the Idaho rules of civil procedure.

(3) Any maps prepared by the director shall be available for inspection at the offices of the department and any other locations the director may designate, for the purpose of assisting any claimant in preparing and filing claims and objections to the director's report. [I.C., § 42-1410, as added by 1986, ch. 220, § 12, p. 558; am. 1994, ch. 454, § 17, p. 1443.]

Compiler's notes. Former § 42-1410 was repealed. See Compiler's notes, § 42-1407.

Sec. to sec. ref. Sections 42-1410 — 42-1413 are referred to in § 42-1424.

DECISIONS UNDER PRIOR LAW

ANALYSIS

Apportionment of expense.
Duty to file map.

Apportionment of Expense.

Where court, under this section, ordered a survey by state engineer (department of water resources) of ditches and canals diverting water from a stream, and of irrigable lands thereunder, and of those to which water had been applied, and the making of maps thereof, cost of such survey was properly chargeable to the several litigants in the case in proportion to the quantity of water allotted to each, and it was unnecessary for anyone to file a cost bill covering such item of expense. *Farmers' Coop. Ditch Co. v. Riverside Irrigation Dist.*, 14

Idaho 450, 94 P. 761 (1908).

Where department failed to file map with court or place it in court's possession, department was not entitled to have costs apportioned among parties. *Hamilton v. Swendsen*, 46 Idaho 175, 267 P. 229 (1928).

Duty to File Map.

Settlement of case on stipulated findings did not do away with department's duty to file with, or place in possession of, court a map ordered prepared under this section. *Hamilton v. Swendsen*, 46 Idaho 175, 267 P. 229 (1928).

Collateral References. Failure of property owner to avail himself of remedy provided by statute or ordinance as precluding attack based on improper inclusion or exclu-

sion of property from assessment. 100 A.L.R. 1298. local legislation regulating practice in courts of justice. 135 A.L.R. 377.

Statutes in regard to irrigation as special or

42-1411. Report of the director. — (1) The director shall prepare a director's report on the water system. The director may file the director's report in parts as the director deems appropriate. The director may include such explanatory material as he deems appropriate in the director's report. Such explanatory material shall not impose any conditions or restrictions on the rights reported and shall not be subject to objection. This explanatory material shall not be used to support any notice of claim, objection to a notice of claim, or response to an objection.

(2) The director shall determine the following elements, to the extent the director deems appropriate and proper, to define and administer the water rights acquired under state law:

- (a) the name and address of the claimant;
- (b) the source of water;
- (c) the quantity of water used describing the rate of water diversion or, in the case of an instream flow right, the rate of water flow in cubic feet per second or annual volume of diversion of water for use or storage in acre-feet per year as necessary for the proper administration of the water right;
- (d) the date of priority;
- (e) the legal description of the point(s) of diversion; if the claim is for an instream flow, then a legal description of the beginning and ending points of the claimed instream flow;
- (f) the purpose of use;
- (g) the period of the year when water is used for such purposes;
- (h) a legal description of the place of use; if one (1) of the purposes of use is irrigation, then the number of irrigated acres within each forty (40) acre subdivision, except that the place of use may be described using a general description in the manner provided under section 42-219, Idaho Code, which may consist of a digital boundary as defined in section 42-202B, Idaho Code, if the irrigation project would qualify to be so described under section 42-219, Idaho Code;
- (i) conditions on the exercise of any water right included in any decree, license, or approved transfer application; and
- (j) such remarks and other matters as are necessary for definition of the right, for clarification of any element of a right, or for administration of the right by the director.

(3) The director may include such general provisions in the director's report, as the director deems appropriate and proper, to define and to administer all water rights.

(4) The director shall file the director's report with the district court, and the director's report shall be a part of the record. Upon filing with the court, the director's report, except for the explanatory material referred to in subsection (1) of this section, shall constitute prima facie evidence of the nature and extent of the water rights acquired under state law. The unobjected to portions of the director's report shall be decreed as reported.

(5) Each claimant of a water right acquired under state law has the ultimate burden of persuasion for each element of a water right. Since the director's report is *prima facie* evidence of the nature and extent of the water rights acquired under state law, a claimant of a water right acquired under state law has the burden of going forward with the evidence to establish any element of a water right which is in addition to or inconsistent with the description in a director's report. Any party filing an objection to any portion of the director's report shall have the burden of going forward with the evidence to rebut the director's report as to all issues raised by the objection. Provided however, that a claimant objecting to the director's recommended place of use described by a digital boundary or other similar technology shall not be required to produce digital boundary or other similar technology-generated evidence in order to meet the burden provided by this section. Places of use described using digital boundaries or other similar technology-based descriptions shall not be entitled to any greater weight than descriptions by metes and bounds, the number of irrigated acres within each forty (40) acre subdivision, or other method adequate for the description of water rights. Any other party to the proceeding may submit evidence in opposition to the objector's position and in support of the director's report. All such proceedings shall be governed by the Idaho rules of civil procedure and Idaho rules of evidence.

(6) The director shall file an original of the director's report with the district court. The director shall also distribute for display and review at least one (1) copy of the director's report to the office of the clerk of the district court for each county in which any part of the water system is located. The director shall also serve on each claimant or the claimant's attorney whose water right is listed in the director's report a notice of filing of the director's report. Notice shall be sent to the last known address of the claimant or the claimant's attorney. The notice shall be prepared by the director using plain and concise language and shall include:

- (a) a statement that the director's report of the various water rights acquired under state law has been filed with the district court, naming the district court(s) to which the report was filed;
- (b) a copy of that portion of the report setting forth the claimant's water right;
- (c) a statement that a complete copy of the director's report is available for inspection, listing the locations at which the director's report is available, which shall include the office of the clerk of the district court for each county in which any part of the water system is located, the offices of the department, and any other locations the director may designate;
- (d) a statement that all or a portion of the director's report is available upon request at the offices of the department, subject to payment of a reasonable fee to cover costs of reproduction and mailing;
- (e) a statement that any claimant may file objections to any portion of the director's report with the district court specified in the notice and must mail a copy of the objection to the director, and to the claimant of each claimed right objected to, if the objector is not also the claimant of the right for which the objection is filed;

(f) the date prior to which all objections must be filed, which shall not be less than sixty (60) days for any director's report containing five hundred (500) claims or less, one hundred twenty (120) days for any director's report containing more than five hundred (500) claims and not more than five thousand (5,000) claims, and one hundred eighty (180) days for any director's report containing more than five thousand (5,000) claims; the above-stated periods of time shall commence on the date of service by mail of the notice of filing;

(g) a statement that claimants may file responses with the court to objections filed against their claims, and that a copy of any response must be mailed to the director and to the objector;

(h) the date prior to which all responses to objections must be filed with the court, which shall not be less than sixty (60) days following receipt of a copy of the objection; and

(i) a statement that any part of the report to which no objections are filed shall be decreed by the district court and the time and location set for the hearing at which the unobjected parts of the report will be decreed, which time shall not be less than sixty (60) days following the expiration of the period for filing objections.

(7) The director shall file an affidavit with the district court demonstrating compliance with the notice requirements of subsection (6) of this section. [I.C., § 42-1411, as added by 1986, ch. 220, § 13, p. 558; am. 1994, ch. 454, § 18, p. 1443; am. 1994, ch. 455, § 2, p. 1478; am. 1996, ch. 186, § 2, p. 584; am. 1997, ch. 374, § 4, p. 1192; am. 2002, ch. 12, § 1, p. 14; am. 2002, ch. 13, § 1, p. 17; am. 2002, ch. 306, § 3, p. 870; am. 2003, ch. 167, § 1, p. 472.]

Compiler's notes. Former § 42-1411 was repealed. See Compiler's notes, § 42-1407.

Section 27 of S.L. 1986, ch. 220 read: "The provisions of section 13 of this act, which enacts section 42-1411, Idaho Code, as herein enacted, shall not apply to any adjudication in which a report of the director was filed prior to the effective date [July 1, 1986] of this act."

This section was amended by three 2002 acts — ch. 12, § 1, ch. 13, § 1 and ch. 306, § 3, all effective July 1, 2002 — which do not conflict and have been compiled together.

The 2002 amendment by ch. 12, § 1, in subdivision 6(h), substituted "sixty (60) days" for "one hundred twenty (120) days" following "which shall not be less than."

The 2002 amendment by ch. 13, § 1, in subdivision 6(i), deleted "responses to" following "the period for filing."

The 2002 amendment by ch. 306, § 3, in subdivision 2(h), following "(40) acre subdivision, except," substituted "that the place or use may be described using a general description in the manner provided under section 42-219, Idaho Code, which may consist of a digital boundary as defined in section 42-202B, Idaho Code, if the irrigation project would qualify to be so described under" for "as provided in."

Section 1 of S.L. 1994, ch. 455 is compiled as § 42-1409.

Section 1 of S.L. 1996, ch. 186 is compiled as § 42-1401A.

Section 3 of S.L. 1997, ch. 374 is compiled as § 42-1409.

Section 2 of S.L. 2002, ch. 306 is compiled as § 42-219.

Section 2 of S.L. 2003, ch. 167, is compiled as § 42-1413.

Sec. to sec. ref. This section is referred to in § 42-1424.

Cited in: Idaho Dep't of Water Resources v. United States, 122 Idaho 116, 832 P.2d 289 (1992); State v. Idaho Conservation League, 131 Idaho 329, 955 P.2d 1108 (1998).

ANALYSIS

Burdens of claimant.

Conclusions of special master.

General provisions.

Legislative authority.

Presumptions.

Burdens of Claimant.

This section makes it clear that the claimant bears both the burden of production as well as the burden of proof as to each element of a claimed water right. *State v. Hagerman*

Water Right Owners, Inc., 130 Idaho 736, 947 P.2d 409 (1997).

Conclusions of Special Master.

The special master did not rely upon the prima facie status of the director's report, rather, the record indicated that she based her conclusions of forfeiture and abandonment on the facts of the case as applied to both statutory and common law. *McCray v. Rosenkrance*, 135 Idaho 509, 20 P.3d 693 (2001).

General Provisions.

A general provision is an administrative provision that generally applies to water rights but it need not apply to every water right. *A & B Irrigation Dist. v. Idaho Conservation League*, 131 Idaho 411, 958 P.2d 568 (1998).

Legislative Authority.

While Article II of the Idaho Constitution prohibits the legislature from usurping powers properly belonging to the judicial department, it also prohibits the judiciary from improperly invading the province of the legislature; thus, the 1994 legislative revisions and amendments to the Snake River Basin Adjudication (SRBA) statutes, which redefined the role of the Director of the Idaho Department of Water Resources and the role of various state agencies in the SRBA, were a

proper exercise of legislative authority to the extent that the statutes prescribe substantive law and do not conflict with rules of the court. *State ex rel. Higginson v. United States*, 128 Idaho 246, 912 P.2d 614 (1995).

It was within the legislature's power to enact subdivision (4) of this section, which directs that the contents of the Director of the Idaho Department of Water Resources report shall constitute prima facie evidence of some water rights claims; this direction is recognized in I.R.E. 301 to create an evidentiary presumption, and unless that evidentiary presumption is overcome by the evidence or the application of that presumption is clearly erroneous on its face, the facts set forth in the director's report are established. *State ex rel. Higginson v. United States*, 128 Idaho 246, 912 P.2d 614 (1995).

Presumptions.

While affidavits may dispel the presumed correctness of the facts contained in the report, the facts contained therein still exist as facts. Facts contained in the affidavits create triable issues to the extent they conflict with facts alleged in the report. Once the presumption is rebutted, it disappears and the facts upon which the presumption is based are weighed with all other facts may be relevant. *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 947 P.2d 409 (1997).

DECISIONS UNDER PRIOR LAW

Settlement of Water Rights Dispute.

A water right is defined, not in terms of metes and bounds as in other real property, but in terms of the priority, amount, season of use, purpose of use, point of diversion, and place of use; a compromise, in a stipulation to settle a water rights dispute, to change or exchange any of these definitional factors would be identical to a compromise to change or exchange a portion of the metes and bounds description of real property and, as

such, would fall directly within the statute of frauds. *Olson v. Idaho Dep't of Water Resources*, 105 Idaho 98, 666 P.2d 188 (1983).

Where oral stipulation to settle water rights dispute changed existing water rights by reshuffling priority dates and changing amounts of use, such stipulation was a contract falling within the statute of frauds and, if still executory, was unenforceable. *Olson v. Idaho Dep't of Water Resources*, 105 Idaho 98, 666 P.2d 188 (1983).

42-1411A. Service of notice of and determination of water rights established under federal law. — (1) The district court shall determine the water rights established under federal law in accordance with the procedures established in this section.

(2) The district court shall determine the following procedures for water rights established under federal law:

- (a) The contents of a notice of water right claims established under federal law;
- (b) The method of service of the notice of water right claims established under federal law;
- (c) The location of any depositories of notices of claim for water rights established under federal law, if the district court determines that claim

depositories are necessary to provide other claimants reasonable access to the notices of claims established under federal law.

(3) The district court shall be guided by the following three (3) principles in establishing the procedures required in this section:

(a) The purpose of this notice is to provide notice to other claimants of the filing of water rights established under federal law comparable to the notice of filing for water rights acquired under state law;

(b) The procedures shall not impose any burden greater than the burden placed upon the director to prepare, file, and serve the notice of filing for a director's report; and

(c) The procedure shall comply with the McCarran amendment, 43 USC 666.

(4) Any claimant of a water right established under federal law shall serve all such notices of claim on the other claimants in accordance with the procedures established by the district court.

(5) Any claimant may contract with the director to perform all or any portion of the service required in this section. The director shall require in any contract that the cost of the services provided by the director are reimbursed by the claimant of a water right established under federal law.

(6) The United States, if it filed any notices of claim for a water right established under federal law, and any other claimants of such water rights, shall file an affidavit demonstrating proof of service in compliance with this section.

(7) The district court shall provide at least sixty (60) days for filing objections to water rights established under federal law where the number of those water rights are five hundred (500) or less, at least one hundred twenty (120) days where the number of these water rights are more than five hundred (500) and not more than five thousand (5,000), and at least one hundred eighty (180) days where the number of these water rights are more than five thousand (5,000).

(8) Any claimant who desires to object to a claim established under federal law shall file an objection with the district court within the time specified in the notice of water right claims established under federal law. The claimant shall also send a copy of the objection to the claimant whose claim is the subject of the objection and to the director. Any claimant may file a response to an objection.

(9) The notice of claim, objection, and responses to an objection shall identify the issues to be litigated.

(10) If a claimant of a water right established under federal law has filed notices of claim for one (1) water use based upon state and federal law, the district court shall develop procedures, after an opportunity for hearing, for coordination of the determination of such claims based upon state and federal law.

(11) The district court shall conduct the trial without a jury on an objection or any group of objections in accordance with the Idaho rules of civil procedure.

(12) Each claimant of a water right established under federal law has the ultimate burden of persuasion for each element of a water right. Since no

independent review of the notice of claim has occurred as provided for water rights acquired under state law in a director's report, a claimant of a water right established under federal law has the burden of going forward with the evidence to establish a prima facie case for the water right established under federal law. All such proceedings shall be governed by the Idaho rules of civil procedure and Idaho rules of evidence.

(13) The district court shall enter a partial decree that contains or incorporates a statement of each element of a water right as stated in subsection (1) of section 42-1409, Idaho Code, as applicable, and that contains such general provisions, remarks, and other matters as are necessary for definition of the right, for clarification of any element of a right, or for administration of the right by the director.

(14) If no objections are filed to a notice of claim for a water right established under federal law, the claimant shall appear at a hearing scheduled by the district court and shall demonstrate a prima facie case of the existence of the water right established under federal law prior to entry of a decree for such claimed water right established under federal law. If the claimant fails to present a prima facie case of the existence of the water right established under federal law, then the district court shall enter an order determining that the claimed water right does not exist.

(15) Any party may appeal in accordance with the Idaho rules of civil procedure.

(16) The attorney general shall represent the state of Idaho in all matters regarding claims to water rights established under federal law, including, but not limited to, filing objections to water right claims established under federal law. [I.C., § 42-1411A, as added by 1994, ch. 454, § 19, p. 1443; am. 1994, ch. 455, § 3, p. 1478; am. 1996, ch. 186, § 3, p. 584.]

Compiler's notes. Section 34 of S.L. 1994, ch. 454, as amended by § 7 of S.L. 1994, ch. 455 provides: "(1) The legislature intends that the amendments made in this act shall apply to case no. 39576 in the district court of the fifth judicial district, in and for the county of Twin Falls, subject to the transition provisions of this section.

"(2) The director shall file with the district court amendments to the director's reports for the three (3) test basins to conform those reports to the new information requirements of this act. The director shall provide the district court written notice of the schedule for completion of the amendments.

"(3) The district court shall provide any claimant of a water right acquired under state law or established under federal law with an opportunity to file new notices of claim or to file amendments to notices of claim to conform them with this act, subject to the following procedures:

"(a) The provisions of subsection (1) of section 42-1409, Idaho Code, do not require the amendment of any notice of claim for water rights acquired under state law. The director shall investigate the notices of claim suffi-

ciently to determine these matters. If any claimant disagrees with the director's determination of these matters, the claimant may file an objection to the director's report.

"(b) Objections to an amended director's report for any of the three (3) test basins shall be governed by section 42-1412, Idaho Code.

"(4) The director shall cease work on any director's report for water rights established under federal law, subject to the following provisions:

"(a) The new notice and service requirements of section 42-1411A, Idaho Code, shall not apply to any water rights established under federal law which are included in any director's report, which abstracts the notices of claim for a water right established under federal law and which has been filed with the district court prior to the effective date of this act. The other provisions of section 42-1411A, Idaho Code, shall apply to those water rights established under federal law that are included in such director's reports.

"(b) Objections to an amended director's report for any of the three (3) test basins shall be governed by section 42-1411A, Idaho Code.

"(5) The director shall transmit to the dis-

strict court the originals of the notices of claim to water rights established under federal law within sixty (60) days of the effective date of this act.”

Section 4 of S.L. 1996, ch. 186 is compiled as § 42-1414.

Cited in: State v. United States, 134 Idaho 940, 12 P.3d 1284 (2000).

42-1412. Objections — Responses to objections — Hearing before district judge — Entry of final decree. — (1) Any claimant who desires to object to a water right, or to a general provision in the director’s report, shall file an objection with the district court within the time specified in the notice of filing of the director’s report. The claimant shall also send a copy of the objection to the claimant whose water right claim is the subject of the objection and to the director.

(2) The director may file with the district court a supplemental report to any objection to the director’s report within the time specified in the notice of filing of the report. The director shall file with the district court the original of the notice of claim. The director shall mail a copy of the supplemental report to the objector and the claimant whose right is the subject of the objection. A claimant may file with the district court a response to any objection filed with respect to the claimant’s water right within the time specified in the notice of filing of the report. If a party other than the claimant or the objector desires to participate in the proceeding concerning a particular objection, the party shall file a response to the objection that states the position of the party. In addition, any party may intervene in any objection proceeding in accordance with rules of practice and procedure established by the district court.

(3) The notice of claim, objections, and responses to objections, shall identify the issues to be heard for water rights acquired under state law.

(4) Following expiration of the period for filing objections and responses thereto, the district court shall hear and determine the objections to any water right or to any general provision in the director’s report. The court shall before any trial, however, order a settlement conference to determine whether the matter can be settled. The court may request the director to conduct a further investigation and to submit a supplemental report for any water right acquired under state law that is the subject of an objection. In addition, the district court or a party may request the director or his designee to present the basis for the recommendations in the director’s report.

(5) The district court or special master shall conduct the trial without a jury on an objection or any group of objections in accordance with the Idaho rules of civil procedure.

(6) The district court shall enter a partial decree determining the nature and extent of the water right which is the subject of the objection or other matters which are the subject of the objection. The decree shall contain or incorporate a statement of each element of a water right as stated in subsections (2) and (3) of section 42-1411, Idaho Code, as applicable. The decree shall also contain an express statement that the partial decree is subject to such general provisions necessary for the definition of the rights or for the efficient administration of the water rights. Upon entry of the decree, the clerk of the district court shall send a certified copy of the decree

to the director in accordance with section 42-1403, Idaho Code. The clerk of the district court shall notify the objector and claimant of each right as to which an objection was determined by the district court of entry of the decree in the manner provided in the Idaho rules of civil procedure.

(7) Not less than sixty (60) days after the expiration of the period for filing objections, the director shall file with the district court a statement of those portions of the director's report for which no objection was filed. Following hearing, the district court shall enter a partial decree as to those portions of the director's report for which no objection has been filed. However, the district court may exclude unobjected claims from this list if the unobjected claim may be affected by the outcome of a contested matter. The decree shall contain or incorporate a statement of those elements of a water right contained in the director's report for water rights acquired under state law. Upon entry of the decree, the clerk of the district court shall send a certified copy of the decree to the director in accordance with section 42-1403, Idaho Code. The clerk of the district court shall notify each claimant of entry of the decree in the manner provided in the Idaho rules of civil procedure.

(8) Upon resolution of all objections to water rights acquired under state law, to water rights established under federal law, and to general provisions, and after entry of partial decree(s), the district court shall combine all partial decrees and the general provisions into a final decree.

(9) The district court may extend or shorten the time for filing any objection to the director's report or any response to an objection. [I.C., § 42-1412, as added by 1986, ch. 220, § 14, p. 558; am. 1987, ch. 158, § 1, p. 308; am. 1994, ch. 454, § 20, p. 1443; am. 1994, ch. 455, § 4, p. 1478; am. 1997, ch. 374, § 5, p. 1192; am. 2002, ch. 13, § 2, p. 17.]

Compiler's notes. Former § 42-1412 was repealed. See Compiler's notes, § 42-1407.

Section 34 of S.L. 1994, ch. 454, as amended by § 7 of S.L. 1994, ch. 455 provides: "(1) The legislature intends that the amendments made in this act shall apply to case no. 39576 in the district court of the fifth judicial district, in and for the county of Twin Falls, subject to the transition provisions of this section.

"(2) The director shall file with the district court amendments to the director's reports for the three (3) test basins to conform those reports to the new information requirements of this act. The director shall provide the district court written notice of the schedule for completion of the amendments.

"(3) The district court shall provide any claimant of a water right acquired under state law or established under federal law with an opportunity to file new notices of claim or to file amendments to notices of claim to conform them with this act, subject to the following procedures:

"(a) The provisions of subsection (1) of section 42-1409, Idaho Code, do not require the amendment of any notice of claim for water rights acquired under state law. The director

shall investigate the notices of claim sufficiently to determine these matters. If any claimant disagrees with the director's determination of these matters, the claimant may file an objection to the director's report.

"(b) Objections to an amended director's report for any of the three (3) test basins shall be governed by section 42-1412, Idaho Code.

"(4) The director shall cease work on any director's report for water rights established under federal law, subject to the following provisions:

"(a) The new notice and service requirements of section 42-1411A, Idaho Code, shall not apply to any water rights established under federal law which are included in any director's report, which abstracts the notices of claim for a water right established under federal law and which has been filed with the district court prior to the effective date of this act. The other provisions of section 42-1411A, Idaho Code, shall apply to those water rights established under federal law that are included in such director's reports.

"(b) Objections to an amended director's report for any of the three (3) test basins shall be governed by section 42-1411A, Idaho Code.

"(5) The director shall transmit to the dis-

strict court the originals of the notices of claim to water rights established under federal law within sixty (60) days of the effective date of this act.”

Section 2 of S.L. 1987, ch. 158 is compiled as § 42-1417.

Section 5 of S.L. 1994, ch. 455 is compiled as § 42-1414.

Section 6 of S.L. 1997, ch. 374 is compiled as § 42-1424.

Sec. to sec. ref. This section is referred to in § 42-1424.

Cited in: *Silverstein v. Carlson*, 118 Idaho 456, 797 P.2d 856 (1990); *Idaho Dep’t of Water Resources v. United States*, 122 Idaho 116, 832 P.2d 289 (1992); *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 947 P.2d 409 (1997); *N. Snake Ground Water Dist. v. Gisler*, 136 Idaho 747, 40 P.3d 105 (2002).

ANALYSIS

Early and late season of water rights.

“Excess water.”

Firefighting provision.

General provisions.

Incidental stock watering.

Interconnection and conjunctive management.

Late response.

Legislative authority.

One-party proceedings.

Period of use for irrigation water rights.

Subdivision (6).

Early and Late Season of Water Rights.

The period of use for irrigation must be identified by reference to specific dates, setting forth fixed periods for use of irrigation water rights; factual findings are required to determine whether early and late season general provisions are necessary to define or to efficiently administer rights. *A & B Irrigation Dist. v. Idaho Conservation League*, 131 Idaho 411, 958 P.2d 568 (1998).

“Excess Water.”

A general provision regarding “excess water” or “high flow” is not necessary for inclusion in decrees issued in the Snake River Basin Adjudication. *A & B Irrigation Dist. v. Idaho Conservation League*, 131 Idaho 411, 958 P.2d 568 (1998).

Firefighting Provision.

A general provision allowing for the use of water with or without a water right for the limited and beneficial use of firefighting is necessary, and a general provision regarding firefighting should be included in decrees issued in the Snake River Basin Adjudication. *A & B Irrigation Dist. v. Idaho Conservation League*, 131 Idaho 411, 958 P.2d 568 (1998).

General Provisions.

A general provision is an administrative provision that generally applies to water

rights but it need not apply to every water right. *A & B Irrigation Dist. v. Idaho Conservation League*, 131 Idaho 411, 958 P.2d 568 (1998).

A general provision is “necessary” if it is required to define the water right being decreed or to efficiently administer water rights in a water rights decree. *A & B Irrigation Dist. v. Idaho Conservation League*, 131 Idaho 411, 958 P.2d 568 (1998).

Incidental Stock Watering.

A general provision regarding incidental stock watering is not necessary for inclusion in decrees issued in the Snake River Basin Adjudication. *A & B Irrigation Dist. v. Idaho Conservation League*, 131 Idaho 411, 958 P.2d 568 (1998).

Interconnection and Conjunctive Management.

An order denying inclusion of general provisions dealing with interconnection and conjunctive management of surface and ground water rights in specific basins was vacated and remanded for factual determination whether they were necessary to define or efficiently administer water rights decreed by the court in the particular basins. *A & B Irrigation Dist. v. Idaho Conservation League*, 131 Idaho 411, 958 P.2d 568 (1998).

Where parties had earlier staked water rights claims to springs that historically flowed in different directions but the waters had become commingled so that they were from the same source of supply, the district court did not err in issuing a partial decree for fish hatchery’s water rights. *Clear Springs Foods, Inc. v. Clear Lakes Trout Co.*, 136 Idaho 761, 40 P.3d 119 (2002).

Late Response.

The special master’s denial of a motion to file a late response or participate in the subcase as a matter of right was proper where the response was not filed by either the initial deadline or the extended deadline. *State v. United States*, 134 Idaho 106, 996 P.2d 806 (2000).

Legislative Authority.

While Article II of the Idaho Constitution prohibits the legislature from usurping powers properly belonging to the judicial department, it also prohibits the judiciary from improperly invading the province of the legislature; thus, the 1994 legislative revisions and amendments to the Snake River Basin Adjudication (SRBA) statutes, which redefined the role of the Director of the Idaho Department of Water Resources and the role of various state agencies in the SRBA, were a proper exercise of legislative authority to the extent that the statutes prescribe substantive law and do not conflict with rules of the court.

State ex rel. Higginson v. United States, 128 Idaho 246, 912 P.2d 614 (1995).

One-party proceedings.

In one-party subcases where the claimant alleges facts which differ from those contained in the Director's Report, summary judgment is an inappropriate procedure. An evidentiary hearing must be conducted. State v. Hagerman Water Right Owners, Inc., 130 Idaho 736, 947 P.2d 409 (1997).

Period of Use for Irrigation Water Rights.

Irrigation water rights must be decreed with a specific period of use for each water

right, based on factual determinations as to the appropriate period for each right. A & B Irrigation Dist. v. Idaho Conservation League, 131 Idaho 411, 958 P.2d 568 (1998).

Subdivision (6).

Under subdivision (6) of this section, excess water may be administered along with existing rights, even though there is no water right in the excess water itself. State v. Idaho Conservation League, 131 Idaho 329, 955 P.2d 1108 (1998).

DECISIONS UNDER PRIOR LAW

Timing of Objections.

The provision of former law that claimants shall file objections within 60 days requires the district courts to hear objections raised within that time period but leaves them with discretion to hear objections thereafter. Branson v. Miracle, 107 Idaho 221, 687 P.2d 1348 (1984).

Since the provision of former law requiring

affirmance where no objection has been filed does not require affirmance where the claimant has failed to object within 60 days, but only where the claimant has failed to raise any objections, the court did not err in exercising its discretion in allowing parties to present objections to the report after the 60-day period had elapsed. Branson v. Miracle, 107 Idaho 221, 687 P.2d 1348 (1984).

42-1413. Filing of final decree. — (1) When a decree has become final in an adjudication in which the director filed a report, the director shall file a certified copy of the decree or a transcript thereof in the office of the county recorder of each county in which the place of use or point of diversion of the water rights contained in the decree is located.

(2) Upon entry of a final decree, the director shall administer the water rights by distributing water in accordance with the final decree and with title 42, Idaho Code.

(3) When a decree has become final in an adjudication in which the director has not filed a report, the clerk of the district court in which the decree is entered shall file a certified copy of the decree or a transcript thereof in the office of the county recorder for each county in which the place of use or point of diversion of the water rights decreed is located, and shall send a certified copy of the decree to the director as required in section 42-1403, Idaho Code.

(4) The transcript of decree shall contain the following:

- (a) title of the district court;
- (b) name of the case;
- (c) the case number;
- (d) names of each party;
- (e) date of entry;
- (f) the description of the boundaries of the water system, which is the subject of the general adjudication;
- (g) a statement that the decree is entered in the records of the clerk of the district court;

- (h) a statement that information as to the rights decreed is available at the offices of the department; and
- (i) such other information as may be necessary to assist any person searching the title of a parcel to find the decree.

(5) A decree or transcript recorded pursuant to this section from the time it is filed with the recorder for record, is constructive notice of the contents of the decree within the county in which the decree or transcript is recorded to subsequent purchasers and mortgagees.

(6) Notwithstanding the filing of a certified copy of the decree or a transcript thereof in the office of the county recorder, only the legal description of an irrigation district's boundaries recorded in compliance with title 43, Idaho Code, shall constitute conclusive proof of the district's boundaries. The decree shall not be construed to define, limit or otherwise affect the apportionment of benefits to lands within an irrigation district pursuant to chapter 7, title 43, Idaho Code. A notice consistent with this subsection shall be filed with the certified copy of the decree or a transcript thereof. [I.C., § 42-1413, as added by 1986, ch. 220, § 15, p. 558; am. 1994, ch. 454, § 21, p. 1443; am. 2003, ch. 167, § 2, p. 472.]

Compiler's notes. Former § 42-1413 was repealed. See Compiler's notes, § 42-1407.
Section 16 of S.L. 1986, ch. 220 is compiled as § 42-1415.

Cited in: Idaho Dep't of Water Resources v. United States, 122 Idaho 116, 832 P.2d 289 (1992).

Section 1 of S.L. 2003, ch. 167, is compiled as § 42-1411.

42-1414. Fees for filing notice of claims with the director. — (1) In order to provide an adequate and equitable cost-sharing formula for financing the costs of adjudicating water rights the department of water resources shall accept no notice of claim required under the provisions of section 42-1409, Idaho Code, unless such notice of claim is submitted with a filing fee based upon the fee schedule set forth below. Failure to pay the variable water use fee in accordance with the timetable provided shall be cause for the department to reject and return the notice of claim to the claimant. The fee schedule set forth below applies to adjudication proceedings commenced or enlarged on or after January 1, 1985.

- (a) Flat fee per claim filed:
 - (i) Claims for domestic and/or stock watering rights \$25.00
 - (ii) Claims for all other rights \$50.00
- (b) Additional variable water use fee for claims filed based upon acreage, power generating capacity, c.f.s., or equivalent volume of water:
 - (i) Irrigation use (one fee irrespective of number of claims): \$ 1.00 per acre
 - (ii) Power: \$ 3.50 per kilowatt of capacity (manufacturer's nameplate rating)
 - (iii) Aquaculture: \$ 10.00 per c.f.s.
 - (iv) Municipal, industrial, commercial, mining, heating, cooling: \$100.00 per c.f.s.
 - (v) Public instream flow, public lake level maintenance, wildlife: \$100.00 per c.f.s.

(c) Payment of a variable water use fee of more than one thousand dollars (\$1,000) may be spread out over as many as five (5) annual equal payments with ten percent (10%) interest accruing on the unpaid balance. All fees collected by the department pursuant to this section shall be placed in the water resources adjudication account established in section 42-1777, Idaho Code.

(2) If a claimant increases in an amended notice of claim the amount of water claimed, the amount of land irrigated, or the kilowatt capacity of the generating facility, the claimant shall pay upon filing the amended notice of claim an additional variable fee in accordance with the rates set forth in subsection (1) of this section. Claimants shall be entitled to a return of filing fees or late fees only where the fee was miscalculated at the time the original or amended notice of claim was filed.

(3) If a claimant files a notice of claim after the date set by the director in the notice mailed or served in accordance with subsections (2), (3), or (4) of section 42-1408, Idaho Code, or with subsection (7) of section 42-1409, Idaho Code; the claimant shall pay the fee set forth in subsection (1) of this section, and in addition, the amount of fifty dollars (\$50.00) or fifteen percent (15%) of the original filing fee, whichever is greater. The director may waive the late processing fee or a portion thereof for good cause. [I.C., § 42-1414, as added by 1971, ch. 153, § 1, p. 753; am. 1972, ch. 23, § 1, p. 28; am. 1985, ch. 18, § 3, p. 27; am. 1994, ch. 454, § 22, p. 1443; am. 1994, ch. 455, § 5, p. 1478; am. 1996, ch. 186, § 4, p. 584.]

Compiler's notes. Sections 2 and 4 of S.L. 1985, ch. 18 are compiled as §§ 42-1409 and 42-1777, respectively.

Sections 4 and 6 of S.L. 1994, ch. 455 are compiled as §§ 42-1412 and 42-1427, respectively.

Sections 3 and 5 of S.L. 1996, ch. 186 are compiled as §§ 42-1411A and 42-1420, respectively.

Section 2 of S.L. 1972, ch. 23 declared an emergency. Approved February 19, 1972.

Sec. to sec. ref. This section is referred to

in §§ 42-1408, 42-1423.

Cited in: Idaho Dep't of Water Resources v. United States, 122 Idaho 116, 832 P.2d 289 (1992).

Fees Charged to United States.

The McCarran Amendment (43 U.S.C. § 666(a)) does not waive the United States' sovereign immunity from fees required by this section. United States v. Idaho ex rel. Dir., Idaho Dep't of Water Resources, 508 U.S. 1, 113 S. Ct. 1893, 123 L. Ed. 2d 563 (1993).

42-1415. Enforcement of filing fees. — After filing of the director's report in a general adjudication, the director may prohibit in accordance with chapter 3, title 42, Idaho Code, the diversion and use of water in satisfaction of a right claimed or decreed in the adjudication upon the failure of the claimant to comply with the schedule for payment of variable fees as set forth in subsection (1) of section 42-1414, Idaho Code. [I.C., § 42-1415, as added by 1986, ch. 220, § 16, p. 558; am. 1994, ch. 454, § 23, p. 1443.]

Compiler's notes. Former § 42-1415, which comprised I.C., § 42-1415 as added by 1980, ch. 150, § 2, p. 318, was repealed by

S.L. 1986, ch. 220, § 1.

Sections 15 and 17 of S.L. 1986, ch. 220 are compiled as §§ 42-1413 and 42-1417.

**42-1416, 42-1416A. Presumptions in basin-wide adjudication —
Prior change in point of diversion. [Repealed.]**

Compiler's notes. Former §§ 42-1416 and § 42-1416A, as added by 1989, ch. 97, § 1, p. 42-1416A, which comprised I.C., § 42-1416, 226, were repealed by S.L. 1994, ch. 454, as added by 1985, ch. 19, § 1, p. 31 and I.C., § 24, effective April 12, 1994.

42-1416B. Claim for expanded use in critical ground water area — Determination of water availability. — (1) Within any critical ground water area designated pursuant to section 42-233a, Idaho Code, a claim to the expanded use of a ground water right, which use was expanded in violation of the mandatory permit requirements, may be decreed in a general water rights adjudication if the expansion occurred after the designation of the critical ground water area, before the commencement of the adjudication, and before the date of enactment of this section. The priority date for the right decreed shall be June 30, 1985.

(2) Water shall be deemed unavailable to fill the rights for expanded use, even if decreed in the adjudication, unless the director finds that a management program exists which will, within a time period acceptable to the director, limit the average annual water withdrawals from the aquifer designated in the critical ground water area to no more than the average annual recharge to the aquifer.

(3) Within two (2) years after a decree determining the water rights within a critical ground water area becomes final, but not sooner than four (4) years from the date of enactment of this section, the director of the department of water resources shall make a finding as to whether an adequate management program exists to bring withdrawals into balance with recharge.

(4) If the director finds that an adequate management program to bring withdrawals into balance with recharge does not exist, the director shall order all holders of rights to expanded use of ground water within the area to cease or reduce withdrawal of water until such time as the director determines that withdrawals have been brought into balance with recharge and sufficient ground water is available to resume or increase withdrawals. The director's order shall be issued before September 1 and shall be effective beginning with the following growing season.

(5) For purposes of this section, the following definitions shall apply:

(a) "Expanded use" means an increase in the number of acres irrigated, or other additional use, under a valid ground water right without any increase in the rate of diversion or volume of water diverted.

(b) "Management program" means a program to recharge the aquifer, limit withdrawals from the aquifer or provide surface water supplies for all, or a portion, of the land irrigated with water withdrawn from the aquifer, including any actions designed to bring withdrawals into balance with the average annual recharge to the aquifer.

(c) "Recharge" refers to all processes, natural or artificial, which add water to the aquifer.

(d) "Withdrawal" refers to all processes, natural or artificial, which take water from the aquifer.

(6) The hearing and judicial review provisions of section 42-1701A, Idaho Code, shall apply to any findings and orders issued by the director pursuant to this section.

(7) Nothing contained in this section shall be construed to limit the authority of the director of the department of water resources to administer and enforce any other ground water laws of the state. [I.C., § 42-1416B, as added by 1989, ch. 212, § 1, p. 521.]

Compiler's notes. Section 2 of S.L. 1989, ch. 212 declared an emergency. Approved March 29, 1989.

Cited in: Fremont-Madison Irrigation

Dist. & Mitigation Group v. Idaho Ground Water Appropriators, Inc., 129 Idaho 454, 926 P.2d 1301 (1996).

42-1417. General adjudication — Interim administration of water rights. — (1) The district court may permit the distribution of water pursuant to chapter 6, title 42, Idaho Code:

(a) in accordance with the director's report or as modified by the court's order;

(b) in accordance with applicable partial decree(s) for water rights acquired under state law;

(c) in accordance with applicable partial decree(s) for water rights established under federal law.

(2) The district court may enter the order only:

(a) upon a motion by a party;

(b) after notice by the moving party by mail to the director and each claimant of water from the water system or portion thereof that could reasonably be determined to be adversely affected by entry of the order; and

(c) upon a determination by the court, after hearing, that the interim administration of water rights in accordance with the report, or as the report is modified by the court's order, and in accordance with any partial decree(s), is reasonably necessary to protect senior water rights.

(3) Immediately upon entry of the court's order of interim administration of water rights, the clerk of the district court shall mail a certified copy of the order to the director, and the director shall immediately give notice of the order to the watermaster of the water districts affected by the order.

(4) After entry of the district court's order for interim administration, the director may form a water district pursuant to chapter 6, title 42, Idaho Code. [I.C., § 42-1417, as added by 1986, ch. 220, § 17, p. 558; am. 1987, ch. 158, § 2, p. 308; am. 1994, ch. 454, § 25, p. 1443.]

Compiler's notes. Section 16 of S.L. 1986, ch. 220 is compiled as § 42-1415.

Section 1 of S.L. 1987, ch. 158 is compiled as § 42-1412, and § 3 is compiled as § 42-238a.

Section 26 of S.L. 1994, ch. 454 is compiled as § 42-1420.

42-1418. Appeals. — An appeal may be taken to the supreme court from an order, partial decree, or decree of the district court in any

adjudication proceeding as provided by rule or order of the supreme court. [I.C., § 42-1418, as added by 1986, ch. 230, § 3, p. 621.]

Compiler's notes. This section was enacted by two 1986 acts — ch. 220, § 18, approved April 3, 1986, at 6:06 a.m., effective July 1, 1986, and ch. 230, § 3, approved April 3, 1986, at 1:14 p.m., effective July 1, 1986. Since these enactments are not compatible, the enactment by ch. 230, § 3 has been compiled as the latest expression of the legislature.

The enactment by ch. 220, § 18 read: "**42-1418. Appeals.** The following orders and decrees are appealable under entry:

"(1) an order commencing a general adjudication pursuant to sections 42-1406A or 42-1408, Idaho Code;

"(2) an order of reference to a special matter in a general adjudication pursuant to section 42-1422, Idaho Code;

"(3) a partial decree in a general adjudication pursuant to subsection (9) of section 42-1412, Idaho Code; and

"(4) a decree after hearing on objections in a general adjudication pursuant to subsection (8) of section 42-1412, Idaho Code."

42-1419. Entry of an order commencing a general adjudication on a special docket — Constructive notice — Filing of certified copy of order in other counties. — (1) The clerk of the district court shall enter an order commencing a general adjudication on a special docket for water right adjudications in addition to any other district court record.

(2) From the time of docketing and not before, any order commencing a general adjudication is constructive notice of the contents thereof, within the county in which the order is docketed, to subsequent purchasers and mortgagees.

(3) The director shall file a true and certified copy of any order commencing a general adjudication with the district court for each county of this state where the water system to be adjudicated is located. The clerk of the district court shall file and docket the same as provided in subsection (1) of this section. From the time of such docketing and not before, the order so docketed is constructive notice of the contents thereof within the county in which the order is docketed to subsequent purchasers and mortgagees. [I.C., § 42-1419, as added by 1986, ch. 220, § 19, p. 558.]

42-1420. Binding effect of decree — Exceptions. — (1) The decree entered in a general adjudication shall be conclusive as to the nature and extent of all water rights in the adjudicated water system except that the following described water rights shall not be lost by failure to file a notice of claim:

(a) a water right for domestic use or stock watering use, specifically excluded from the general adjudication by court order;

(b) a water right application for permit filed under chapters 2 or 15, title 42, Idaho Code;

(c) a water right permit issued under chapters 2 or 15, title 42, Idaho Code, unless the director required the permit holder to file a notice of claim in accordance with subsection (7) of section 42-1409, Idaho Code;

(d) a water right license issued under chapter 2 or 15, title 42, Idaho Code, if proof of beneficial use had not been filed on the date of commencement of the general adjudication, unless the director required the license holder to file a notice of claim in accordance with subsection (7) of section 42-1409, Idaho Code; and

(e) a claim to a water right established under federal law, if the priority of the right claimed is later than and junior to the date of entry of the order commencing the general adjudication.

(2) The exceptions from the conclusive effect of a decree in a general adjudication stated in subsection (1) above shall not apply to any water right for which a notice of claim or negotiated agreement is filed. [I.C., § 42-1420, as added by 1986, ch. 220, § 20, p. 558 and 1986, ch. 230, § 4, p. 621; am. 1994, ch. 454, § 26, p. 1443; am. 1996, ch. 186, § 5, p. 584.]

Compiler's notes. Section 25 of S.L. 1994, ch. 454 is compiled as § 42-1417.

Section 4 of S.L. 1996, ch. 186 is compiled as § 42-1414.

Sec. to sec. ref. This section is referred to in §§ 42-1401A, 42-1409 and 42-1424.

42-1421. Procedures for adjudication of unperfected water rights initiated under state law — Director's jurisdiction. — (1) All persons claiming a water right based on an application or permit on the date of entry of the order commencing a general adjudication are not required to file a notice of claim unless required in accordance with subsection (7) of section 42-1409, Idaho Code. If the director approves the application in whole or in part during the pendency of a general adjudication and prior to filing the director's report, the director shall notify the permit holder of the pendency of the general adjudication. A permit holder who is not required by the director to file a notice of claim in accordance with subsection (7) of section 42-1409, Idaho Code, may file a notice of claim at any time prior to filing the director's report.

(2) All persons claiming a water right based on a water right license existing on the date of entry of the order commencing a general adjudication shall file a notice of claim.

(3) The district court shall decree any claimed water right for which proof of beneficial use has not been filed, but shall state that the right is conditioned upon completion of the appropriation in accordance with the laws of the state governing the appropriation of water and that the decreed right shall be subject to the terms of the license to appropriate water that is ultimately issued.

(4) The director retains jurisdiction of all applications, permits and licenses under chapter 2, 3, 6 or 15, title 42, Idaho Code, to take action authorized by the conditions contained in any permit or license or by applicable law and action on any application for transfer under section 42-222, Idaho Code.

(5) The director retains jurisdiction of all decreed water rights under chapters 2, 3 and 6, title 42, Idaho Code, to take action authorized by the conditions of any decree or by applicable law, including action on any application for transfer under section 42-222, Idaho Code.

(6) The director retains jurisdiction of all beneficial use water rights under chapters 2, 3 and 6, title 42, Idaho Code, to take action authorized by applicable law. [I.C., § 42-1421, as added by 1986, ch. 220, § 21, p. 558; am. 1994, ch. 454, § 27, p. 1443; am. 1996, ch. 186, § 6, p. 584.]

Compiler's notes. Section 7 of S.L. 1996, ch. 186 is compiled as § 42-1425.

42-1422. Special master — Appointment — Powers and duties — Compensation — Disqualification — Review of special master's report. — (1) The district court may appoint one (1) or more special masters in any general adjudication.

(2) The district court shall specify the powers and duties of a special master in the order of reference. The compensation and disqualification of a special master shall be governed by order or rule of the supreme court.

(3) Objections to and hearing on the special master's report shall be governed by rule 53(e) of the Idaho rules of civil procedure. [I.C., § 42-1422, as added by 1986, ch. 230, § 5, p. 621; am. 1994, ch. 454, § 28, p. 1443.]

Compiler's notes. This section was enacted by two 1986 acts — ch. 220, § 22, approved April 3, 1986, at 6:06 a.m., effective July 1, 1986, and ch. 230, § 5, approved April 3, 1986 at 1:14 p.m., effective July 1, 1986 — which were not compatible but conflicted and could not be compiled together. Therefore, § 42-1422 as added by ch. 230, § 5 as the

latest expression of the legislature was compiled. S.L. 1994, ch. 454, § 28 amended the compiled version.

Section 29 of S.L. 1994, ch. 454 is compiled as § 42-1428.

Cited in: McCray v. Rosenkrance, 135 Idaho 509, 20 P.3d 693 (2001).

42-1423. Attorneys fees and costs against the state of Idaho, any state agency or any officer or employee. — No judgment for costs or award of attorneys fees against the state of Idaho, any state agency, or any officer or employee of the state of Idaho shall be allowed in any water rights adjudication proceeding pursuant to this chapter. The state of Idaho expressly refuses to waive its sovereign immunity to the imposition of any judgment for costs or award of attorney fees. The state of Idaho, state administrative agency, or any officer or employee shall not be required to pay any fees other than those provided in section 42-1414, Idaho Code, for appearing in a proceeding brought under this chapter or any appeal of a matter arising from such proceeding. [I.C., § 42-1423, as added by 1994, ch. 454, § 30, p. 1443.]

Compiler's notes. Former § 42-1423 was amended and redesignated as § 42-1428.

Sections 29 and 31 of S.L. 1994, ch. 454 are

compiled as §§ 42-1428 and 42-1425, respectively.

42-1424. Summary supplemental adjudication of water rights. —

(1) Where an adjudication of a water system has been commenced prior to July 1, 1986, or where an adjudication of a water system has been commenced pursuant to subsection (3) of section 42-1404, Idaho Code, resulting in a decree of any court of competent jurisdiction, and thereafter it appears that any claimant having the right to the use of any part of those waters was not included in the decree as a party, and the right was not determined thereby, or that a claimant subsequent to the decree has acquired any right to the use of those waters, the claimant may bring an action to have such right adjudicated in the manner specified in subsection (3) of this section.

(2) Where a general adjudication of a water system has been commenced or enlarged after July 1, 1986, pursuant to section 42-1405 or 42-1406, Idaho Code, resulting in a decree of any court of competent jurisdiction, and thereafter, it appears that a claimant subsequent to the decree has acquired any right to the use of those waters, or that a claimant who possesses a water right designated in paragraphs (a) through (d) of subsection (1) of section 42-1420, Idaho Code, did not have those water rights determined, the claimant may bring an action to have those water rights adjudicated in the manner specified in subsection (3) of this section.

(3) The following procedure shall be used for any supplemental adjudication:

(a) A claimant may bring an action in the district court that originally heard the general adjudication to conduct a supplemental adjudication of the water rights of the claimant; and

(b) The claimant shall, in his complaint, set forth his acceptance as binding upon him of all prior applicable decrees and the findings of fact and conclusions of law upon which they are based, shall request the commencement of a supplemental adjudication and shall set forth the claimed water right in a notice of claim form furnished by the director and attached to the complaint. Thereupon, the district court shall issue a summons and it shall be served upon the state of Idaho and the United States; and

(c) After return of service of summons, the claimant shall cause to be published once a week for not less than three (3) weeks, a notice of the pendency and purpose of the action in such newspaper or newspapers as the judge of the district court may order, which notice shall contain the title of the court and the cause, the name and post-office address of the claimant, the date of priority of the water right claimed, the source of the water supply, the amount of water claimed, in general the nature of the water use, the approximate location of the point of diversion, and the place of use; and

(d) Any person who may be injured and who objects to the water right claimed by the claimant, as described in the published notice, shall, within forty-five (45) days of the date of the first publication of notice, file with the district court written notice of such objection stating the reasons for the objection. A copy of the objection shall be served upon the claimant, upon all other parties of record in the action, the watermasters, and the director; and

(e) The district court may request that the director determine the water rights in accordance with the procedures set forth in sections 42-1410 through 42-1413, Idaho Code; and

(f) The director, within thirty (30) days after the district court requests the director to prepare a director's report in accordance with sections 42-1410 through 42-1413, Idaho Code, shall file with the court notification as to whether the director will conduct an examination of the water rights claimed in the complaint in accordance with the procedures set forth in sections 42-1410 through 42-1413, Idaho Code; and

(g) Notification to the court that the director will proceed in accordance with sections 42-1410 through 42-1413, Idaho Code, shall include an

approximation of the time when the director's report will be completed, and an estimate of the director's costs that will be incurred in conducting the examination and in preparing the reports; and

(h) The claimant shall then be required to advance to the director, the estimated costs to be incurred by the director in conducting the examination and in preparing the reports. Prior to the filing of the director's report with the court, the claimant shall pay the balance of the director's verified costs or be refunded any unused estimated costs advanced to the director.

In the event that the claimant shall contest the director's costs, the court shall then determine the reasonable costs to be paid by the claimant; and

(i) The director shall file the report with the court upon completion and shall send a copy thereof to all parties to the action. Objections to the report of the director and hearing upon the objections shall be in accordance with the provisions of section 42-1412, Idaho Code; and

(j) For those cases in which the director notifies the district court that the director does not intend to proceed in accordance with sections 42-1410 through 42-1413, Idaho Code, the cause may thereafter be brought on for hearing in open court, and any claimant having filed a timely objection with the court may appear and defend against the claim.

(4) The court's decree shall determine the rights of the claimant in accordance with the proof submitted but subject to the terms of the original decree or decrees. The decree shall contain or incorporate a statement of each element of a water right as stated in subsections (2) and (3) of section 42-1411, Idaho Code, as applicable. The decree shall also determine all other matters necessary for the efficient administration of the water rights. Whereupon water shall be distributed to the claimant in accordance therewith and in the same manner as though the claimant's right had been included in the decree or decrees.

(5) Any person who has appeared in the action may appeal in accordance with the Idaho appellate rules from the decree entered in the action hereby authorized to be brought. [1911, ch. 224, § 1, p. 708; am. 1915, ch. 34, § 18, p. 112; reen. C.L., § 4623a; C.S., § 7036; I.C.A., § 41-1305; am. 1981, ch. 265, § 3, p. 561; am. 1986, ch. 220, § 6, p. 558; am. 1986, ch. 230, § 1, p. 621; am. and redesi. 1994, ch. 454, § 8, p. 1443; am. 1997, ch. 374, § 6, p. 1192.]

Compiler's notes. This section was formerly compiled as § 42-1405.

Section 2 of S.L. 1981, ch. 265 is compiled as § 42-1401.

Section 7 of S.L. 1994, ch. 454 is compiled as § 42-1404, and § 9 contained a repeal.

Sections 5 and 7 of S.L. 1997, ch. 374 are compiled as §§ 42-1412 and 42-5201.

Section 4 of S.L. 1981, ch. 265 declared an emergency. Approved April 7, 1981.

Section 8 of S.L. 1997, ch. 374 declared an emergency. Approved March 24, 1997.

Cited in: *Wyllie v. Kent*, 28 Idaho 16, 152 P. 194 (1915); *Independent Irrigation Co. v. Baldwin*, 43 Idaho 371, 252 P. 489 (1926); *Parke v. Bell*, 97 Idaho 67, 539 P.2d 995 (1975); *Nettleton v. Higginson*, 98 Idaho 87,

558 P.2d 1048 (1977); *Silverstein v. Carlson*, 118 Idaho 456, 797 P.2d 856 (1990).

ANALYSIS

Application of section.

Definitions.

Effect of decree.

Jurisdiction of courts.

Nature of action.

Parties.

Proof of right.

Application of Section.

This section does not confer jurisdiction to enter summary decree adjudicating right to use water claimed to have been developed and not part of the natural and public waters of the state. *Union Cent. Life Ins. Co. v.*

Albrethsen, 50 Idaho 196, 294 P. 842 (1930).

In action for adjudication of priorities in well waters tributary to lake, complaint was not demurrable because of failure to join all users of water from lake as defendants since users not party to action were not bound by provisions of statute authorizing action and could not be injured by judgment therein, while intervening users had an ample opportunity to protect their rights as if suit had been brought under statute requiring that all water users be made parties. *Owsley Canal Co. v. Henninger*, 66 Idaho 485, 162 P.2d 389 (1945).

Definitions.

The word "acquired" necessarily means more than acquisition from a previous water owner whose rights had been adjudicated because the purchaser would be bound by the decree as to his predecessor in interest. *Owsley Canal Co. v. Henninger*, 66 Idaho 485, 162 P.2d 389 (1945).

The term "waters" is used in the generic sense and therefore includes all water distributed by the watermaster. *Owsley Canal Co. v. Henninger*, 66 Idaho 485, 162 P.2d 389 (1945).

Effect of Decree.

Decree does not adjudicate any right but simply gives prima facie right to delivery of so much water. *Mays v. District Court*, 34 Idaho 200, 200 P. 115 (1921).

Decree may be attacked by action brought in court of competent jurisdiction, at any time, by any aggrieved party. *Mays v. District Court*, 34 Idaho 200, 200 P. 115 (1921).

Anyone bringing action under this section must accept former decree as binding upon him. *Mays v. District Court*, 34 Idaho 200, 200 P. 115 (1921).

While this section refers to former decree as fixing permanent rights in stream, language means permanent between parties to decree or permanent in effect, as distinguished from prima facie effect of remedy herein provided. *Mays v. District Court*, 34 Idaho 200, 200 P. 115 (1921).

Decree void under this section affected rights of no one, raised an estoppel against no one, and did not have effect of making drain ditch appurtenant to land. *Union Cent. Life Ins. Co. v. Albrethsen*, 50 Idaho 196, 294 P. 842 (1930).

Jurisdiction of Courts.

One had right to invoke jurisdiction of courts to protect his right to use of water for irrigation purposes and secure adjudication of priority as against others and such right of action existed independent of statute. *Mays v. District Court*, 34 Idaho 200, 200 P. 115 (1921).

Everything necessary to give jurisdiction must appear by the record in proceedings

under this section. *Union Cent. Life Ins. Co. v. Albrethsen*, 50 Idaho 196, 294 P. 842 (1930).

The district court of county, in which was located all water wherein priority rights had been determined by federal court decree, had jurisdiction to fix priorities of canal company's appropriations of additional waters tributary under permits subsequently granted it by state to bore wells, as well as those of other users of such waters whose priorities had not been fixed. *Owsley Canal Co. v. Henninger*, 66 Idaho 485, 162 P.2d 389 (1945).

Resolution of all claims arising within the scope of the Snake River Basin Adjudication (SRBA) district court are within the exclusive jurisdiction of the SRBA district court; any supplemental adjudication of water rights within the scope of the SRBA must be filed in the district court that originally heard the general adjudication. *Sagewillow, Inc. v. Idaho Dep't of Water Resources*, 135 Idaho 24, 13 P.3d 855 (2000).

Nature of Action.

Remedy provided by this section is not exclusive. *Mays v. District Court*, 34 Idaho 200, 200 P. 115 (1921).

Action to ascertain and decree extent and priority of right to use of water partakes of nature of action to quiet title to real estate (see § 6-401). *Mays v. District Court*, 34 Idaho 200, 200 P. 115 (1921).

Actions under this section are not brought against other water users but against administrative officers who distribute it. *Mays v. District Court*, 34 Idaho 200, 200 P. 115 (1921).

Parties.

Where the United States was interested in a contract with an irrigation district and such district brought an action for an adjudication of its water rights, which were affected by said contract, the United States was an indispensable party to such suit, and this was true notwithstanding the fact that the secretary of the interior was made a party, and that the contract in question was made and executed through and by him, and neither was the situation changed by the fact that there had been prior decree of the state court adjudicating such rights wherein the secretary was a party defendant. *American Falls Reservoir Dist. No. 2 v. Crandall*, 82 F.2d 973 (9th Cir.), modified, 85 F.2d 865 (9th Cir. 1936).

Construction company becoming equitable owner of irrigation works upon completion of system had sufficient interest to maintain action for supplemental adjudication of water rights though no formal conveyance was made until after commencement of action. *Big Wood Canal Co. v. Chapman*, 45 Idaho 380, 263 P. 45 (1927).

Watermaster holds over until his successor is elected or appointed and has qualified, and

when office has not thus been vacated, he is proper party defendant. *Big Wood Canal Co. v. Chapman*, 45 Idaho 380, 263 P. 45 (1927).

Proof of Right.

Water rights are valuable property, and a claimant seeking a decree of a court to confirm his right to the use of water by appropri-

ation must present sufficient evidence to enable the court to make definite and certain findings as to the amount of water actually diverted and applied, as well as the amount necessary for the beneficial use for which the water is claimed. *Head v. Merrick*, 69 Idaho 106, 203 P.2d 608 (1949).

42-1425. Accomplished transfers. — (1) Legislative findings regarding accomplished transfers and the public interest.

(a) The legislature finds and declares that prior to the commencement of the Snake River basin adjudication, many persons entitled to the use of water or owning land to which water has been made appurtenant either by decree of the court or under provisions of the constitution and statutes of this state changed the place of use, point of diversion, nature or purpose of use, or period of use of their water rights without compliance with the transfer provisions of sections 42-108 and 42-222, Idaho Code.

(b) The legislature finds that many of these changes occurred with the knowledge of other water users and that the water has been distributed to the right as changed. The legislature further finds and declares that the continuation of the historic water use patterns resulting from these changes is in the local public interest provided no other existing water right was injured at the time of the change. Denial of a claim based solely upon a failure to comply with sections 42-108 and 42-222, Idaho Code, where no injury or enlargement exists, would cause significant undue financial impact to a claimant and the local economy. Approval of the accomplished transfer through the procedure set forth in this section avoids the harsh economic impacts that would result from a denial of the claim.

(c) The legislature further finds and declares that examination of these changes by the director through the procedures of section 42-222, Idaho Code, would be impractical and unduly burdensome. The more limited examination of these changes provided for in this section, constitutes a reasonable procedure for an expeditious review by the director while ensuring that the changes do not injure other existing water rights or constitute an enlargement of use of the original right.

(2) Any change of place of use, point of diversion, nature or purpose of use or period of use of a water right by any person entitled to use of water or owning any land to which water has been made appurtenant either by decree of the court or under the provisions of the constitution and statutes of this state, prior to November 19, 1987, the date of commencement of the Snake River basin adjudication, may be claimed in a general adjudication even though the person has not complied with sections 42-108 and 42-222, Idaho Code, provided no other water rights existing on the date of the change were injured and the change did not result in an enlargement of the original right. Except for the consent requirements of section 42-108, Idaho Code, all requirements of sections 42-108 and 42-222, Idaho Code, are hereby waived in accordance with the following procedures:

(a) If an objection is filed to a claim for accomplished change of place of use, point of diversion, nature or purpose of use or period of use, the

district court shall remand the water right to the director for further hearing to determine whether the change injured a water right existing on the date of the change or constituted an enlargement of the original right. After a hearing, the director shall submit a supplemental report to the district court setting forth his findings and conclusions. If the claimant or any person who filed an objection to the accomplished transfer is aggrieved by the director's determination, they may seek review before the district court. If the change is disallowed, the claimant shall be entitled to resume use of the original water right, provided such resumption of use will not cause injury or can be mitigated to prevent injury to existing water rights. The unapproved change shall not be deemed a forfeiture or abandonment of the original water right.

(b) This section is not applicable to any claim based upon an enlargement of use. [I.C., § 42-1425, as added by 1994, ch. 454, § 31, p. 1443; am. 1996, ch. 186, § 7, p. 584.]

Compiler's notes. Section 30 of S.L. 1994, ch. 454 is compiled as § 42-1423.

Section 6 of S.L. 1996, ch. 186 is compiled as § 42-1421.

Section 8 of S.L. 1996, ch. 186 declared and emergency. Approved March 12, 1996.

ANALYSIS

Burden of proof.
Constitutionality.
In general.
Intervention.

Burden of Proof.

The language of subsection (2)(a) of this section envisions that the party aggrieved by the director's recommendation, whether that be the party claiming an accomplished transfer or the party claiming injury, has the burden of proof. *Fremont-Madison Irrigation Dist. & Mitigation Group v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 926 P.2d 1301 (1996).

Constitutionality.

The "amnesty" statutes, this section and §§ 42-1426 and 42-1427, are constitutional as written and must be given due deference and respect. *Fremont-Madison Irrigation Dist. & Mitigation Group v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 926 P.2d 1301 (1996).

Because this section's limitations protect other water users from injury to their rights resulting from a recognition of the transfers that are memorialized in the adjudication and

because under this section a water user cannot obtain a transfer that constitutes either an enlargement of the water right or otherwise injures water rights existing on the date of the change, this section is constitutional as written. *Fremont-Madison Irrigation Dist. & Mitigation Group v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 926 P.2d 1301 (1996).

In General.

The purpose of this section is to streamline the adjudication process by providing a substitute for the transfer process required by § 42-222 and to protect existing water uses which were the result of past transfers, regardless of compliance with statutory mandates. *Fremont-Madison Irrigation Dist. & Mitigation Group v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 926 P.2d 1301 (1996).

Intervention.

Where conservation groups petitioned for leave to intervene in the Snake River Basin Adjudication (SRBA) to represent the interests of the public through the public trust doctrine and through the local public interest, the assertion of local public interest, which was the basis upon which the conservation groups were granted limited intervention by the district court, was eliminated and the order granting the motion vacated, by the repeal of §§ 42-1416 and 42-1416A and the enactment of this section. *Idaho Conservation League, Inc. v. State*, 128 Idaho 155, 911 P.2d 748 (1995).

42-1426. Enlargements — Waiver of mandatory permit requirements. — (1) Legislative findings regarding enlargements:

(a) The legislature finds that prior to the commencement of the Snake River basin adjudication and subsequent to the mandatory permit system

provided in sections 42-201 and 42-229, Idaho Code, persons entitled to the use of water or owning any land to which water has been made appurtenant by decree, license or constitutional appropriation have, through water conservation and other means, enlarged the use of said water without increasing the rate of diversion and without complying with the mandatory permit system adopted by the legislature. Enlargements have been done with the knowledge of other water users, and water has been distributed based upon the right as enlarged. Junior water users made appropriations based upon a water system that reflected these enlarged uses. Thus, the legislature further finds and declares that it is in the public interest to waive the mandatory permit requirements for these enlargements in use prior to the commencement of a general adjudication, so long as such enlargements in use did not increase the rate of diversion of the original water right or exceed the rate of diversion for irrigation provided in section 42-202, Idaho Code, after the enlargement of use, and the enlargement of use did not reduce the quantity of water available to other water rights existing on the date of the enlargement in use.

(b) The legislature further finds that it is in the public interest to waive certain statutory provisions for the appropriation of water that has been diverted and applied to beneficial use to insure the economic and agricultural base in the state of Idaho as it existed on the date of the commencement of the Snake River basin adjudication and to maintain historic water use patterns existing on that date.

(2) The mandatory permit requirements of sections 42-201 and/or 42-229, Idaho Code, are waived, and a new water right may be decreed for the enlarged use of the original water right based upon the diversion and application to beneficial use, with a priority date as of the date of completion of the enlargement of use for any enlargement occurring on or before November 19, 1987; provided however, that the rate of diversion of the original water right and the separate water right for the enlarged use, combined, shall not exceed the rate of diversion authorized for the original water right; and further provided, that the enlargement in use did not injure water rights existing on the date of the enlargement of use. An enlargement may be decreed if conditions directly related to the injury can be imposed on the original water right and the new water right that mitigate any injury to a water right existing on the date of enactment of this act. If injury to a water right later in time cannot be mitigated, then the new right for the enlarged use shall be advanced to a date one (1) day later than the priority date for the junior water right injured by the enlargement. It is further provided that any such enlargement of use allowed in a general adjudication shall not constitute an abandonment or forfeiture of the original water right to the extent of current use.

(3) The director shall publish a notice of enlargement of water right for all water rights recommended under this section. The notice shall contain a summary of the notice of claim and shall be published in the same manner as notices for applications to appropriate water in section 42-203A, Idaho Code. Any person who has filed an application for a water right prior to the enactment of this act or who has been issued a permit for a water right prior

to enactment of this act but who has not filed a claim in an adjudication shall have thirty (30) days from the date of last publication of the notice of enlargement of a water right under this section to file a petition with the department of water resources to assert any claimed injury from the enlargement. No appeal of the determination of the department shall be allowed. If the applicant or permittee is dissatisfied with the determination of the department on any claim of injury, the sole remedy is to intervene in the general adjudication and assert their claim of injury in an objection to the water right. [I.C., § 42-1426, as added by 1994, ch. 454, § 32, p. 1443; am. 2000, ch. 311, § 1, p. 1048.]

ANALYSIS

Burden of proof.
Constitutionality.
In general.

Burden of Proof.

Under the process established by this section, either party who objects to the director's determination may assert that objection in the general adjudication and either party who asserts injury, whether that be the applicant for enlargement or the person who claims injury by the enlargement, has the burden of establishing the claim in general adjudication. *Fremont-Madison Irrigation Dist. & Mitigation Group v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 926 P.2d 1301 (1996).

Constitutionality.

The "amnesty" statutes, this section and §§ 42-1425 and 42-1427, are constitutional as written and must be given due deference and respect. *Fremont-Madison Irrigation Dist. & Mitigation Group v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 926 P.2d 1301 (1996).

Because this section provides that only those enlargements which do not increase the

rate of diversion, do not injure other water rights existing on the date of enlargement, and which fully mitigate any potential injury to junior water rights existing as of the date of enactment are permitted, this section is constitutional as written; it provides that an enlargement cannot be allowed that would injure a junior appropriator. *Fremont-Madison Irrigation Dist. & Mitigation Group v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 926 P.2d 1301 (1996).

Because the legislature has the right to define the rights claimants have to water and may provide that a court shall decree those rights, the mitigation provision in subsection (2) of this section does not violate the doctrine of separation of powers. *Fremont-Madison Irrigation Dist. & Mitigation Group v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 926 P.2d 1301 (1996).

In General.

This section provides for a waiver of the mandatory permit requirements of §§ 42-201 and/or 42-229 and a decree of a new water right for an enlarged use of the original water right. *Fremont-Madison Irrigation Dist. & Mitigation Group v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 926 P.2d 1301 (1996).

42-1427. Descriptions of water rights — Reporting and decreeing elements of a decreed or licensed water right. — (1) Legislative findings:

(a) The legislature finds that existing water rights are not uniformly described. Many old water rights were simply defined by source, priority date and diversion rate. Over time, the legislature and courts have made this original description of a water right more specific by the addition of other elements. Because of the increasing demand for water, it is important that the elements of a water right be standardized to allow for fair and efficient administration of the limited water supply. One (1) purpose of chapter 14, title 42, Idaho Code, is to establish, through an adjudication a uniform description for surface water rights, ground water rights and water rights which include storage.

(b) Because of the passage of time it is not possible to establish with any degree of certainty the undefined elements of a decreed or licensed water

right as they existed on the date the right was established, because water delivery has occurred based upon the historic water use patterns and custom, and because attempts to define elements of a water right based upon unknown conditions in existence on the date of the establishment of the water right could result in significant impacts upon the claimant, the local economy and tax base, the legislature finds that it is in the public interest to provide a mechanism to decree previously undefined elements of existing water rights based upon conditions existing on the date of commencement of the adjudication provided the claimant is not exceeding any previously determined and recorded element of the decreed or licensed water right.

(2) If a licensed or decreed water right does not describe all of the elements of a water right required in section 42-1409, Idaho Code, the director shall include in his report recommendations for those elements not defined by the prior license or decree based upon the extent of beneficial use of the water right as of the date of the commencement of an adjudication. [I.C., § 42-1427, as added by 1994, ch. 454, § 33, p. 1443; am. 1994, ch. 455, § 6, p. 1478.]

Compiler's notes. Section 5 of S.L. 1994, ch. 455 is compiled as § 42-1414.

Section 35 of S.L. 1994, ch. 454 declared an emergency. Approved April 12, 1994.

Section 8 of S.L. 1994, ch. 455 declared an emergency. Approved April 12, 1994.

Constitutionality.

The "amnesty" statutes, §§ 42-1425, 42-1426 and this section, are constitutional as written and must be given due deference and respect. *Fremont-Madison Irrigation Dist. & Mitigation Group v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 926 P.2d 1301 (1996).

Because this section clearly sets forth that a claimant cannot attempt to exceed any previously determined and recorded element of the decreed or licensed water right merely because one or more elements of the water right are ambiguous, this section does not provide for an enlargement of an existing water right and does not contain any constitutional infirmities. *Fremont-Madison Irrigation Dist. & Mitigation Group v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 926 P.2d 1301 (1996).

42-1428. Severability. — The provisions of this act are hereby declared to be severable and if any provision of this act or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of remaining portions of this act. [I.C., § 42-1423, as added by 1986, ch. 220, § 23, p. 558; am. and redesign. 1994, ch. 454, § 29, p. 1443.]

Compiler's notes. This section was formerly compiled as § 42-1423.

Section 24 of S.L. 1986, ch. 220 is compiled as § 42-1777.

Sections 28 and 30 of S.L. 1994, ch. 454 are

compiled as §§ 42-1422 and 42-1423, respectively.

Cited in: *State ex rel. Higginson v. United States*, 128 Idaho 246, 912 P.2d 614 (1995).

CHAPTER 15

MINIMUM STREAM FLOW

SECTION.

- 42-1501. Legislative purpose — Minimum stream flow declared beneficial use.
- 42-1502. Definitions.
- 42-1503. Application to appropriate — Process — Judicial review.

SECTION.

- 42-1504. Request to file application.
- 42-1505. Priority date — Administration.
- 42-1506. Lemhi river — Minimum stream flow appropriation.

42-1501. Legislative purpose — Minimum stream flow declared beneficial use. — The legislature of the state of Idaho hereby declares that the public health, safety and welfare require that the streams of this state and their environments be protected against loss of water supply to preserve the minimum stream flows required for the protection of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation and navigation values, and water quality. The preservation of the water of the streams of this state for such purposes when made pursuant to this act is necessary and desirable for all the inhabitants of this state, is in the public interest and is hereby declared to be a beneficial use of such water. The legislature further declares that minimum stream flow is a beneficial use of water of the streams of this state for the purpose of protecting such waters from interstate diversion to other states or by the federal government for use outside the boundaries of the state of Idaho. Minimum stream flows as established hereunder shall be prior in right to any claims asserted by any other state, government agency, or person for out of state diversion. It is, therefore, necessary that authority be granted to receive, consider, approve or reject applications for permits to appropriate water of the streams of this state to such beneficial uses to preserve such water from subsequent appropriation to other beneficial uses under the provisions of chapter 2, title 42, Idaho Code. [I.C., § 42-1501, as added by 1978, ch. 345, § 11, p. 884.]

Compiler's notes. Former §§ 42-1501—42-1505, which comprised S.L. 1937, ch. 95, §§ 1, 4-6, 8, p. 132, were repealed by S.L. 1969, ch. 469, § 2.

The words "this act" refer to S.L. 1978, ch. 345 compiled as §§ 42-241 — 42-247, 42-1501 — 42-1505, 42-1736B, 42-1756.

Section 10 of S.L. 1978, ch. 345 is compiled as § 42-247.

Sec. to sec. ref. This chapter is referred to in §§ 42-1420, 42-1421 and 42-1734G.

Cited in: Shokal v. Dunn, 109 Idaho 330, 707 P.2d 441 (1985).

Public Interest Standing.

Where the Box Canyon area was designated by the Bureau of Land Management

(BLM) as an Area of Critical Environmental Concern (ACEC), and where the values justifying the ACEC designation included the identification of four candidate threatened and endangered aquatic species and the scenic and unique natural qualities of the area, the protection of this habitat fell within the local public interest as defined in Shokal v. Dunn, 109 Idaho 330, 770 P.2d 441 (1985); therefore, the protestants, although having no water rights within Box Canyon, sought to protect these locally important factors and thus their interests were properly considered by the Director of the Idaho Department of Water Resources. Hardy v. Higginson, 123 Idaho 485, 849 P.2d 946 (1993).

42-1502. Definitions. — Whenever used in this act, the terms:

(a) "Appropriate" or "appropriation" mean [means] the identification of a beneficial use and place of in-stream use of the waters of a stream. It shall

not be construed to require any kind of physical structure or physical diversion from the stream;

(b) "Board" means the Idaho water resource board;

(c) "Department" means the Idaho department of water resources;

(d) "Director" means the director of the Idaho department of water resources;

(e) "Stream" means any lake, spring, creek, stream, river or other natural body of standing or moving water which is subject to appropriation under the laws of the state of Idaho;

(f) "Minimum stream flow" means the minimum flow of water in cubic feet per second of time or minimum lake level in feet above mean sea level required to protect the fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, navigation, transportation, or water quality of a stream in the public interest;

(g) "Unappropriated water" means water which is not subject to diversion and use under any prior existing water right established by diversion and application to a beneficial use or by application, permit or license on file or issued by the director under the provisions of chapter 2, title 42, Idaho Code, with a priority of water right date earlier than an application for appropriation of minimum stream flow filed under the provisions of this act. [I.C., § 42-1502, as added by 1978, ch. 345, § 11, p. 884.]

Compiler's notes. A former § 42-1502 was repealed. See Compiler's notes to § 42-1501.

(a) was inserted by the compiler.

For words "this act" see Compiler's notes, § 42-1501.

The bracketed word "means" in paragraph

42-1503. Application to appropriate — Process — Judicial review. — Whenever the board desires to appropriate a minimum stream flow of the unappropriated waters of any stream, it shall submit an application to the director. Such application shall be made upon forms to be furnished by the director and shall include:

(a) The name of the stream and legal description of the point on the stream where the minimum stream flow is proposed to be appropriated and determined;

(b) The minimum stream flow proposed;

(c) The purpose for which the minimum stream flow appropriation is proposed to be made;

(d) The period of time or season of the year during which said appropriation is proposed; and

(e) Such other information as shall be required by the form furnished by the director.

Upon the receipt of an application filed under the provisions of this act, the director shall forward a copy thereof to the departments of fish and game, environmental quality, parks and recreation, and any other public entity likely to have an interest or knowledge in the matter. The director shall also prepare a notice describing the proposed appropriation of minimum stream flow and cause said notice to be published once each week in two (2) consecutive weekly issues of a newspaper published within the

county where the appropriation of minimum stream flow is proposed, if there is such newspaper, otherwise in a newspaper of general circulation within the county. The director may also give other notice of the proposed appropriation in such manner and to such persons or organizations as he may determine. Such notice shall specify the time and place for a public hearing to be held concerning the proposed appropriation of minimum stream flow. Such hearing shall be held in accordance with the provisions of section 42-1701A(1) and (2), Idaho Code. The director shall have power to administer oaths and to require the attendance of such witnesses and the production of such books, records, and papers as he may desire at the hearing and for that purpose the director may apply to the district court for a subpoena for any witnesses or a subpoena duces tecum to compel the production of any books, records, or papers which shall be served and returned in the same manner as a subpoena in a civil case. In case of any disobedience or neglect to obey a subpoena or subpoena duces tecum it shall be the duty of the district court in any county of this state in which such disobedience, neglect, or refusal occurs, or any judge thereof, on application by the director, to compel obedience by proceedings for contempt as in the case of a subpoena issued by a regularly constituted court. Upon the conclusion of the hearings and completion of any investigation conducted by the director, he shall enter his findings in writing approving the application in whole, or in part, or upon conditions or rejecting said application. Approval of any such application must be based upon a finding that such appropriation of minimum stream flow:

(a) will not interfere with any vested water right, permit, or water right application with priority of right date earlier than the date of receipt in the office of the director of a complete application for appropriation of minimum stream flow filed under the provisions of this act;

(b) is in the public, as opposed to private, interest;

(c) is necessary for the preservation of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, navigation, transportation, or water quality of the stream;

(d) is the minimum flow or lake level and not the ideal or most desirable flow or lake level; and

(e) is capable of being maintained as evidenced by records of stream flows and water levels and the existing or future establishment of necessary gauging stations and bench marks.

A copy of the director's findings shall be mailed to the board and to each person or organization who gave testimony in support of or in opposition to the proposed appropriation. The board or any person testifying at a hearing who is aggrieved by a decision of the director shall have the right to have that decision reviewed by the courts pursuant to section 42-1701A(4), Idaho Code. Approved applications shall be submitted to each legislature by the fifth legislative day of each regular session, and: (i) shall not become finally effective until affirmatively acted upon by concurrent resolution of the Idaho legislature; or (ii) except that if the legislature fails to act prior to the end of the regular session to which the application was submitted, the application shall be considered approved. [I.C., § 42-1503, as added by 1978, ch. 345, § 11, p. 884; am. 1980, ch. 238, § 14, p. 526; am. 2001, ch. 103, § 80, p. 253.]

Compiler's notes. A former § 42-1503 was repealed. See Compiler's notes to § 42-1501.

For words "this act" see Compiler's notes, § 42-1501.

Sections 13 and 15 of S.L. 1980, ch. 238 are compiled as §§ 42-407 and 42-1719, respectively.

Sections 79 and 81 of S.L. 2001, ch. 103 are compiled as §§ 42-227 and 42-1711, respectively.

Section 25 of S.L. 1980, ch. 238 read: "The provisions of this act are hereby declared to be severable and if any provision of this act or the application of such provision to any per-

son or circumstance is declared invalid for any reason, such declaration shall not affect the validity of remaining portions of this act."

Sec. to sec. ref. This section is referred to in § 42-1506.

Opinions of Attorney General. Despite the presumption in favor of a statute's constitutionality, the provision in this section that purports to authorize the legislature to reject, by concurrent resolution, a minimum stream flow approved by the Director of the state Department of Water Resources contravenes Const., art. 2, § 1, art. 3, §§ 1 and 15, and art. 4, § 10. OAG 87-6.

42-1504. Request to file application. — Any person, association, municipality, county, state or federal agency may, in writing, request that the board consider the appropriation of a minimum stream flow of the unappropriated waters of any stream. Said request shall be in writing and provide the same information required in the form provided for by section 42-1503, Idaho Code. The board shall consider said request within six (6) months after it is filed and may proceed to reject or accept the proposal. There shall be no right of review of any board decision rejecting a request under this section. If the board decides that the request has merit, the board shall proceed as provided in this act. The board may hold hearings in reaching its decision and shall notify the requesting party of its decision. [I.C., § 42-1504, as added by 1978, ch. 345, § 11, p. 884.]

Compiler's notes. A former § 42-1504 was repealed. See Compiler's notes to § 42-1501.

Exceptions to Diversion Requirement.

The limited public purpose exception to the diversion requirement did not apply to a

claim where the claimant had not requested that an application be filed by the water resource board for appropriating a minimum streamflow. *State v. United States*, 134 Idaho 106, 996 P.2d 806 (2000).

42-1505. Priority date — Administration. — In his direction and control of the distribution of water from the streams of this state under the provisions of chapter 6, title 42, Idaho Code, the director shall consider any approved application for appropriation of minimum stream flow filed under the provisions of this act as a water right with priority date as of the date of receipt in the office of the director of a complete application. Water shall not be deemed to be available to fill any water right of later priority date if diversion of such water would result in a decrease in the flow of the stream or level of the lake below the minimum stream flow or minimum lake level specified in said approved application for appropriation of minimum stream flow at the locations described in said approved application. [I.C., § 42-1505, as added by 1978, ch. 345, § 11, p. 884.]

Compiler's notes. A former § 42-1505 was repealed. See Compiler's notes to § 42-1501.

Section 12 of S.L. 1978, ch. 345 is compiled as § 42-1756.

Section 13 of S.L. 1978, ch. 345 read: "The provisions of this act are hereby declared to be severable and if any provision of this act or the application of such provision to any person or circumstance is declared invalid or

unconstitutional for any reason, such declaration shall not affect the validity of remaining portions of this act."

42-1506. Lemhi river — Minimum stream flow appropriation. —

(1) The water resource board is hereby authorized and directed to appropriate and hold in trust for the people of the state of Idaho a minimum stream flow water right in a designated reach of the Lemhi river in accordance with the provisions of this section. The minimum stream flow appropriation in the designated reach shall be in the amount of thirty-five (35) cfs from January 1 through December 31, provided that fifteen (15) cfs of the appropriation shall be subordinated to all diversions, including high waters or flood waters, authorized under the Lemhi river basin decree (Lemhi County Case No. 4948). The designated reach begins at water diversion L-6 located on the Lemhi river in the southeast quarter (1/4) of section twenty-four (24), township twenty-one (21) north, range twenty-two (22) east of the Boise meridian, and ends at the confluence of the Lemhi river with the Salmon river near the southwest corner of section thirty-two (32), township twenty-two (22) north, range twenty-two (22) east of the Boise meridian, Lemhi county.

(2) The water resource board shall appropriate the minimum stream flow water right authorized under this section in accordance with the provisions of section 42-1503, Idaho Code. In acting upon the application for permit, the director of the department of water resources need not determine that the appropriation is capable of being maintained based upon records of existing stream flows because it is anticipated that the water right will be maintained through operation of the water supply bank within the Lemhi river basin consistent with the provisions of section 42-1765A, Idaho Code.

(3) Upon the board's filing of an application for permit to appropriate water as directed by this section, the director of the department of water resources is authorized and directed, on an interim basis pending final action on the application for permit, to distribute water under the filing in accordance with the doctrine of prior appropriation using a priority date as of the filing of the application for permit. [I.C., § 42-1506, as added by S.L. 2001, ch. 373, § 1, p. 1309.]

Compiler's notes. Former section 42-1506, which comprised S.L. 1939, ch. 27, § 1, p. 58, was repealed by S.L. 1969, ch. 469, § 2.

Section 2 of S.L. 2001, ch. 373, is compiled as § 42-1765A.

Section 3 of S.L. 2001, ch. 373 declared an emergency. Approved April 10, 2001.

Sec. to sec. ref. This section is referred to in § 42-1765A.

CHAPTER 16

ARTESIAN WELLS

SECTION.

42-1601. Well not controlled a common nuisance — Approval of director — Reservoired water — Maintenance of artesian wells.

SECTION.

42-1602. Unnecessary flow unlawful — Use for domestic purposes.
42-1603. Application for approval of control device — Approval necessary.

SECTION.

42-1604. Artesian well defined.

42-1605. Enforcement procedure — Injunctive relief — Criminal penalties.

SECTION.

42-1606. [Reserved.]

42-1607. Inventory of artesian wells — Plugging wells.

42-1601. Well not controlled a common nuisance — Approval of director — Reservoired water — Maintenance of artesian wells. —

(1) Any person owning or controlling a flowing artesian well, which is not capped, equipped or furnished with such mechanical appliance as will readily control the flow of water from such well, shall be guilty of a misdemeanor and such well is hereby declared to be a common nuisance; and any person owning or controlling a flowing artesian well, which is capped, equipped or furnished with a mechanical appliance for arresting and preventing the flow of water therefrom, which cap, equipment or mechanical appliance is of a type that has not been approved by the director of the department of water resources, shall be guilty of a misdemeanor and such well is hereby declared to be a common nuisance: provided, however, that in cases where the waters of artesian wells are reservoired and controlled so that waste is not committed and a common nuisance created and where the pressure of water in a reservoir automatically causes wells to cease to flow, such mechanical contrivances may be dispensed with by obtaining the consent of the director of the department of water resources.

(2) Any person owning or controlling an artesian well shall maintain the well to prevent waste or contamination of ground waters through leaky casings, pipes, fittings, valves, pumps, seals or through leakage around the outside of the casings, whether the leakage is above or below the land surface.

(3) The owner of the land on which the well is located shall be deemed to own the well unless a deed, covenant, contract, easement, or other documentation acceptable to the director is available to demonstrate that the well is owned by another.

(4) If a ground water management district created pursuant to chapter 51, title 42, Idaho Code, has adopted and is implementing a plan for the repair of leaking artesian wells acceptable to the director of the department of water resources, then the director of the department of water resources will not take any administrative or judicial action to require repair of a well within the ground water management district if the person owning the well is an active participant in the ground water management district. [1921, ch. 196, § 1, p. 399; I.C.A., § 41-1401; am. 1987, ch. 347, § 10, p. 741; am. 1995, ch. 294, § 1, p. 1036.]

Compiler's notes. Section 9 of S.L. 1987, ch. 347 is compiled as § 42-238b (now repealed), and § 11 is compiled as § 42-1604.

Section 2 of S.L. 1995, ch. 294 is compiled as § 42-5112.

Collateral References. 78 Am. Jur. 2d, Waters, §§ 212-220.

93 C.J.S., Waters, § 198.

Right to conduct and use artesian water out of artesian basin. 31 A.L.R. 906.

Statutory regulations as to artesian wells. 55 A.L.R. 1451; 109 A.L.R. 395.

Injury to wells resulting from flooding of property under right of eminent domain. 106 A.L.R. 989.

42-1602. Unnecessary flow unlawful — Use for domestic purposes. — It shall be unlawful for the owner, tenant, or occupant of the land upon which such well is situated to cause, permit, or suffer, such common nuisance, or suffer or permit it to remain or continue; and it shall be unlawful for any person owning, possessing or occupying any land, upon which is situated an artesian well, to cause, suffer or permit the water to unnecessarily flow from such well or to go to waste: provided, however, that it shall be lawful for any such person to insert a stop and waste cock, not exceeding one (1) inch in diameter, in the piping of such well and to take and use water therefrom through such stop and waste cock at any time for household, stock or domestic purposes. [1921, ch. 196, § 2, p. 399; I.C.A., § 41-1402.]

Collateral References. Constitutionality of statute limiting or controlling exploitation or waste of subterranean water. 24 A.L.R. 312; 78 A.L.R. 842; 13 A.L.R.2d 1095.

Right to conduct and use artesian water out of artesian basin. 31 A.L.R. 906.

Waste of water from subterranean streams. 55 A.L.R. 1385; 109 A.L.R. 395.

42-1603. Application for approval of control device — Approval necessary. — Every person referred to in section 42-1602 shall apply to the director of the department of water resources for the approval of any installed or proposed mechanical device for controlling the flow of water from such artesian well; and in such application shall describe the cap, equipment or mechanical appliance, with which such well is equipped or with which it is proposed to equip any such well, and shall change, alter or install only such equipment as shall be approved by the director of the department of water resources. [1921, ch. 196, § 3, p. 399; I.C.A., § 41-1403.]

Compiler's notes. The name of the director of the department of water administration (formerly the commissioner of reclamation) has been changed to the director of the de-

partment of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 31 (§ 42-1804).

42-1604. Artesian well defined. — For the purposes of this chapter, an artesian well is defined as any well, as defined in subsection (b) of section 42-230, Idaho Code, which encounters pressurized ground water or low temperature geothermal resource under sufficient head to rise above the elevation at which it was first encountered whether or not the fluid flows at land surface. If the fluid level stands above land surface, the well is a flowing artesian well. [1921, ch. 196, § 4, p. 399; I.C.A., § 41-1404; am. 1987, ch. 347, § 11, p. 741.]

Compiler's notes. Section 10 of S.L. 1987, ch. 347 is compiled as § 42-1601.

subterranean and percolating waters; springs; wells. 55 A.L.R. 1385; 109 A.L.R. 395.

Collateral References. Annotation on

42-1605. Enforcement procedure — Injunctive relief — Criminal penalties. — (1) When the director of the department of water resources determines that any person is in substantial violation of any provision of this chapter or any rule, condition of approval or order issued or promul-

gated pursuant to this chapter, the director may commence an administrative enforcement action by issuing a written notice of violation in accordance with the provisions of section 42-1701B, Idaho Code. The director may petition the district court for injunctive relief in order to prevent damage pending the outcome of enforcement proceedings before the director.

(2) Criminal penalties. Any person who willfully or negligently violates any of the provisions of this chapter shall, for each offense, be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than three hundred dollars (\$300) and not more than one thousand dollars (\$1,000). Each day upon which such violation occurs shall constitute a separate violation. [1921, ch. 196, § 5, p. 399; I.C.A., § 41-1405; am. 1987, ch. 347, § 12, p. 741; am. 1993, ch. 216, § 34, p. 587; am. 1998, ch. 173, § 7, p. 595.]

Compiler's notes. Section 6 of S.L. 1921, ch. 196 repealed all laws and parts of laws in conflict therewith.

Section 13 of S.L. 1987, ch. 347 is compiled as § 42-1607.

Sections 33 and 35 of S.L. 1993, ch. 216 are

compiled as §§ 42-238 and 42-1607, respectively.

Sections 6 and 8 of S.L. 1998, ch. 173 are compiled as §§ 42-701 and 42-1701B, respectively.

42-1606. [Reserved.]

42-1607. Inventory of artesian wells — Plugging wells. — (1) The director of the department of water resources shall initiate a program to inventory and locate artesian wells throughout the state.

(2) The director of the department of water resources shall plug abandoned artesian wells or artesian wells where the owner cannot be ascertained.

(3) For artesian wells which are not in compliance with Idaho minimum well construction standards, the owner shall be required to have the well repaired in compliance with Idaho minimum well construction standards promulgated pursuant to section 42-238, Idaho Code, so as to preclude the wasting or commingling of water. The repairs shall be paid for by the owner of the well, and if repairs are not made within a maximum of one (1) year following notification, the director of the department of water resources may order the owner to plug the well. The director upon good cause shown may grant an additional time period not in excess of two (2) years for the owner to make repairs of the well. If the well is not plugged within thirty (30) days of the order, or other longer time period as provided in the order, the director may plug or cause the well to be plugged at the owner's expense. For the period of July 1, 1987, to June 30, 1992, the director of the department of water resources shall promulgate rules to implement a cost-sharing program to assist owners of wells which have been ordered repaired or plugged pursuant to this subsection. The rules shall provide that up to fifty percent (50%) of the cost of the repairs or plugging shall be paid by the department of water resources based on an applicant's ability to pay and moneys available for this purpose.

(4) Any person owning or controlling an artesian well which has been ordered repaired or plugged by the director of the department of water

resources pursuant to subsection (3) of this section shall be liable for the costs of the repair or plugging if it was undertaken by the department of water resources. All moneys owed under the provisions of this section shall be paid to the director. The director shall charge interest on the amount owed in an amount no greater than twelve percent (12%) per annum. The director shall deposit all moneys collected into the water administration account. Moneys owed pursuant to the provisions of this section shall be collected in a civil action brought in the district court in accordance with subsection (5) of this section.

(5) Any person aggrieved by a final order of the director entered pursuant to the provisions of this section may appeal to the district court within twenty-eight (28) days of the issuance of the order. The appeal shall be heard and determined in accordance with chapter 52, title 67, Idaho Code. The director through the attorney general may petition the district court for injunctive relief or a temporary restraining order to prevent irreparable damage pending the outcome of proceedings before the director pursuant to the provisions of this section. The director through the attorney general may commence a civil action in the district court to enforce the provisions of any final order of the director issued pursuant to the provisions of this section. [I.C., § 42-1607, as added by 1987, ch. 347, § 13, p. 741; am. 1993, ch. 216, § 35, p. 587.]

Compiler's notes. Section 12 of S.L. 1987, ch. 347 is compiled as § 42-1605, and § 14 is compiled as § 42-4002.

Sections 34 and 36 of S.L. 1993, ch. 216 are compiled as §§ 42-1605 and 42-1701A, respectively.

CHAPTER 17

DEPARTMENT OF WATER RESOURCES — WATER RESOURCE BOARD

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42-1701. Creation of department of water resources — Director — Qualifications — Duties. — (1) There is hereby created the department of water resources, which shall, for the purposes of section 20, article IV, of the constitution of the state of Idaho, be an executive department of the state government.

(2) The executive and administrative authority of the department, except such authority as is specifically assigned by law to the water resource board, shall be vested in a director of the department of water resources who shall be a licensed civil or hydraulic engineer, and shall have had not less than five (5) years' experience in the active practice of such profession, and shall be familiar with irrigation in Idaho.

(3) The director may delegate such duties as are imposed upon him by law to an employee of the department of water resources whenever in the opinion of the director, such delegation is necessary for the efficient administration of his duties.

(4) The director shall organize the department into such divisions and other administrative sub-units as may be necessary in order to efficiently administer the department. All employees of the department, except the director, shall be selected and appointed by the director in conformance with the provisions of chapter 53, title 67, Idaho Code.

(5) The director and/or employees of the department of water resources may make reasonable entry upon any lands in the state for the purpose of making investigations and surveys, or for other purposes necessary to carry out the duties imposed by law.

(6)(a) Any authorization or order of the Idaho public utilities commission, under the provisions of section 61-328, Idaho Code, approving the sale, assignment or transfer of hydropower water rights used in the generation of electric power shall be issued only upon such conditions as the director of the department of water resources shall require as necessary to prevent any change in use of water under the water rights held for hydropower purposes that would cause injury to any water rights existing on the date of the sale, assignment or transfer. Any such conditions shall ensure that the public interest, as it pertains to the use of water under the hydropower water rights, will not be adversely affected. Conditions, if any, imposed by the director shall be subject to review under section 42-1701A(4), Idaho Code.

(b) Subsection (6)(a) of this section may be satisfied by a written agreement between the holder of a water right held for hydropower purposes and the governor, which agreement has been ratified by the legislature of the state of Idaho. The agreement between the governor and the Idaho Power Company dated October 15, 1984, and ratified by the legislature of the state of Idaho pursuant to section 42-203B, Idaho Code, and the subordination provisions relating to the Idaho Power Company's water rights satisfy subsection (6)(a) of this section. [1895, p. 215, § 7; reen. 1899, p. 282, § 6; reen. R.C., § 154; reen. C.L. 126:7; C.S., § 2983; I.C.A., § 41-1501; am. 1974, ch. 20, § 4, p. 533; am. 2000, ch. 224, § 3, p. 619.]

Compiler's notes. Section 3 of S.L. 1974, ch. 20, has been repealed.

Section 3 of S.L. 2000, ch. 224, is compiled as § 61-328.

Section 4 of S.L. 2000, ch. 224 declared an emergency. Approved April 12, 2000.

Cross ref. Irrigation districts, § 43-101 et seq.

Penal provisions of the irrigation laws, §§ 18-4301 — 18-4310.

Reclamation of Carey Act lands, § 42-2002.
Sale of water rights, approval, § 42-2601 et seq.

Supervision of department of water resources, § 42-1902.

Supreme Court reports to be distributed to

director of department of water resources, § 1-505.

Water and canal corporations and water users' association, §§ 30-801 — 30-806.

Water rights and irrigation, § 42-101 et seq.

Cited in: Union Pac. R.R. v. Idaho, 654 F. Supp. 1236 (D. Idaho 1987).

DECISIONS UNDER PRIOR LAW

Mandamus.

Mandamus will lie to compel state engineer (department of water resources) to perform

ministerial duties. Idaho Power & Transp. Co. v. Stephenson, 16 Idaho 418, 101 P. 821 (1909).

42-1701A. Hearings before director — Appeals. — (1) All hearings required by law to be held before the director of the department of water resources shall be conducted in accordance with the provisions of chapter 52, title 67, Idaho Code, and rules of procedure promulgated by the director.

(2) The director, in his discretion, may direct that a hearing be conducted by a hearing officer appointed by the director. In such event, the hearing officer shall have the duty to make a complete record of the evidence presented and duly received at the hearing and to prepare a recommended or preliminary order in accordance with chapter 52, title 67, Idaho Code, and rules of procedure promulgated by the director.

(3) Unless the right to a hearing before the director or the water resource board is otherwise provided by statute, any person aggrieved by any action of the director, including any decision, determination, order or other action, including action upon any application for a permit, license, certificate, approval, registration, or similar form of permission required by law to be issued by the director, who is aggrieved by the action of the director, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action. The person shall file with the director, within fifteen (15) days after receipt of written notice of the action issued by the director, or receipt of actual notice, a written petition stating the grounds for contesting the action by the director and requesting a hearing. The director shall give such notice of the petition as is necessary to provide other affected persons an opportunity to participate in the proceeding. The hearing shall be held and conducted in accordance with the provisions of subsections (1) and (2) of this section. Judicial review of any final order of the director issued following the hearing shall be had pursuant to subsection (4) of this section.

(4) Any person who is aggrieved by a final decision or order of the director is entitled to judicial review. The judicial review shall be had in accordance with the provisions and standards set forth in chapter 52, title 67, Idaho Code. [I.C., § 42-1701A, as added by 1980, ch. 238, § 1, p. 526; am. 1993, ch. 216, § 36, p. 587; am. 1994, ch. 450, § 2, p. 1434; am. 2003, ch. 138, § 1, p. 402.]

Compiler's notes. Section 2 of S.L. 1980, ch. 238 is compiled as § 42-203A.

Sections 35 and 37 of S.L. 1993, ch. 216 are compiled as §§ 42-1607 and 42-1734D, respectively.

Sections 1 and 3 of S.L. 1994, ch. 450 are

compiled as §§ 42-602 and 42-237a, respectively.

Section 25 of S.L. 1980, ch. 238 read: "The provisions of this act are hereby declared to be severable and if any provision of this act or the application of such provision to any per-

son or circumstance is declared invalid for any reason, such declaration shall not affect the validity of remaining portions of this act.”

Section 6 of S.L. 1994, ch. 450 declared an emergency and provided that this act shall apply to all calls for distribution of water pending at the time of passage and approval. Approved April 11, 1994.

Sec. to sec. ref. This section is referred to in §§ 42-108B, 42-113, 42-203A, 42-203D, 42-204, 42-211, 42-219, 42-222, 42-222A, 42-237e, 42-240, 42-304, 42-311, 42-350, 42-407, 42-604, 42-605A, 42-706, 42-1308, 42-1416B, 42-1503, 42-1701, 42-1719, 42-1720, 42-1766, 42-2504, 42-2505, 42-3918.

Cited in: *Shokal v. Dunn*, 109 Idaho 330, 707 P.2d 441 (1985); *Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994).

ANALYSIS

Appeal.

Due process.

Jurisdiction.

Notice.

Appeal.

Where a challenger asserts that the director of the Department of Water Resources has made a clearly erroneous decision, in order to uphold the agency's decision the court must conclude that the record contains some reliable, probative, and substantial evidence in support of the director's decision. *Dovel v. Dobson*, 122 Idaho 59, 831 P.2d 527 (1992).

Due Process.

Where the company was provided with notice of its statutory opportunity to make exceptions and have a hearing before the proposed order became final, and after the order

did become final the company was given a hearing on the merits pursuant to their motion to modify the order, there was no lack of procedural due process where the Department of Water Resources considered matters outside the record in drafting a proposed decision granting a water permit. *Collins Bros. Corp. v. Dunn*, 114 Idaho 600, 759 P.2d 891 (1988).

Jurisdiction.

Where plaintiff sought judicial review of a decision of the Idaho Department of Water Resources (IDWR) in the district court of the seventh judicial district, the district court lacked jurisdiction to review the IDWR decision. The district court's decision was vacated and the case remanded to the Snake River Basin Adjudication district court. *Sagewillow, Inc. v. Idaho Dep't of Water Resources*, 135 Idaho 24, 13 P.3d 855 (2000).

Notice.

The fact that the proposed decision and order on the company's application for a water permit mentioned the posthearing creation of a ground water unit did not taint the opinion, because creation of the unit was a cognizable fact which the Department of Water Resources was entitled to take notice of under § 67-5210(4) (now 67-5251), and the proposed decision and order provided the company with notice that the existence of the unit was included in the department's deliberations, and the company made no objection or request for an additional hearing, pursuant to subsection (3) of this section, to meet the new information concerning the unit. *Collins Bros. Corp. v. Dunn*, 114 Idaho 600, 759 P.2d 891 (1988).

42-1701B. Enforcement procedure — Notice — Consent order — Civil action. — (1) Authority to commence actions. The director of the department of water resources is authorized and may commence and pursue enforcement actions to remedy the designated violations set out in title 42, Idaho Code.

(2) Notice. When the director commences an administrative enforcement action the notice of violation shall be served upon the alleged violator in person or by certified mail. The notice of violation shall identify the alleged violation and shall specify each provision of the designated chapter, rule, permit, condition of approval or order which has been violated. The notice of violation shall state the remedy, including any demand to cease and desist, restoration and mitigation measures, and the amount of any civil penalty the director seeks for redress of the violation. Factors the director may consider in seeking the appropriate remedy include the impact of the violation and whether the violation was willful, a repeat violation for which the violator had been given a prior written warning, or the violator has otherwise refused to comply with the department's lawful directives. The notice of violation shall inform the person to whom it is directed of an

opportunity to confer with the director or the director's designee in a compliance conference concerning the alleged violation.

(3) Response. A written response may be required within fourteen (14) days of the receipt of the notice of violation by the person to whom it is directed. If a recipient of a notice of violation contacts the department within fourteen (14) days of the receipt of the notice, the recipient shall be entitled to a compliance conference. The conference shall be held within twenty-one (21) days of the receipt of the notice unless a later date is agreed upon between the parties. If a compliance conference is not requested, the director may proceed with a civil enforcement action as provided in this section.

(4) Compliance conference and consent order. The compliance conference shall provide an opportunity for the recipient of a notice of violation to explain the circumstance of the alleged violation and, where appropriate, to present a proposal for remedying the damage caused by the violation and assuring future compliance. If the recipient and the director agree on a plan to remedy damage caused by the alleged violation and to assure future compliance, they may enter into a consent order formalizing their agreement. The consent order may include a provision providing for payment of any agreed civil penalty. The consent order shall be effective immediately upon signing by both parties and shall preclude a civil enforcement action for the same alleged violation. If a party does not comply with the terms of the consent order, the director may seek and obtain in any appropriate district court, specific performance of the consent order and other relief as authorized by law. If the parties cannot agree to a consent order within fifty-six (56) days after the receipt of the notice of violation, or if the recipient does not request a compliance conference, the director may commence and prosecute a civil enforcement action in the district court in accordance with this section.

(5) Civil enforcement actions.

(a) The director may initiate a civil enforcement action through the attorney general as provided in this section. Civil enforcement actions shall be commenced and prosecuted in the district court in and for the county in which the alleged violation occurred, and may be brought against any person who is alleged to have substantially violated any provision of title 42, Idaho Code, or any rule promulgated pursuant to that title. The action may be brought to compel compliance with provisions of title 42, Idaho Code, or rules promulgated pursuant to that title. The director shall not be required to prosecute an administrative enforcement action before initiating a civil enforcement action.

(b) Nothing in this section shall preclude employees of the department designated by the director from issuing Idaho uniform citations or written administrative orders directing persons to cease and desist as authorized by law.

(c) If the person who is the subject of the notice of violation fails to cease and desist the activity or activities constituting the alleged violation within the time limits set in the notice of violation, the director may seek, by and through the attorney general, injunctive relief in the district court pending the outcome of the administrative enforcement action.

(d) In an action brought against a person for diverting water without having obtained a valid water right to do so, the director need not allege or prove that irreparable injury to the state or to other water users will occur should the preliminary injunction not be issued or that the remedy at law is inadequate, and the preliminary injunction or permanent injunction shall issue without those allegations and without that proof.

(6) Penalties.

(a) Any person determined in a judicial civil enforcement action to have substantially violated any designated provision of title 42, Idaho Code, or any rule promulgated pursuant to that title, shall be liable for a civil penalty not to exceed ten thousand dollars (\$10,000) per violation or one hundred fifty dollars (\$150) per day for a continuing violation, whichever is greater; except that persons determined to be in violation of section 42-351, Idaho Code, shall be liable for a civil penalty not to exceed:

(i) For nonirrigation uses, fifty dollars (\$50.00) per one-tenth (0.1) cubic feet per second of water or part thereof diverted per calendar day, or fifty dollars (\$50.00) per two tenths (0.2) of an acre foot of water or part thereof diverted to storage, up to a maximum penalty of fifty thousand dollars (\$50,000) per year for water illegally used or diverted;

(ii) For irrigation uses, three hundred dollars (\$300) annually for each acre irrigated, in whole or in part, by the illegal use or diversion.

(b) Civil penalties shall not be assessed for violations that have occurred more than twelve (12) months prior to the issuance of the notice of violation. The court shall determine the amount of the penalty based upon the willfulness of the violation, the economic value obtained by the violator and the damage to public resources and other water right holders. A method of recovery of the penalty shall be a civil enforcement action in and for the county where the violation occurred.

(c) All civil penalties collected under this section shall be paid into the water right[s] enforcement account established pursuant to section 42-1778, Idaho Code.

(d) Parties to an administrative enforcement action may agree to a civil penalty as provided in this subsection.

(7) No action taken pursuant to this section shall relieve any person from any civil liability and damages that may exist for injury or damage resulting to others.

(8) Upon request of the director, it shall be the duty of the attorney general to institute and prosecute civil enforcement actions pursuant to this section. [I.C., § 42-1701B, as added by 1998, ch. 173, § 8, p. 595; am. 2003, ch. 165, § 2, p. 467.]

Compiler's notes. The bracketed letter "s" in subdivision (6)(c) was inserted by the compiler.

Sections 7 and 9 of S.L. 1998, ch. 173 are compiled as §§ 42-1605 and 42-1720, respectively.

Section 1 of S.L. 2003, ch. 165, is compiled as § 42-1701B.

Sec. to sec. ref. This section is referred to in §§ 42-235, 42-238, 42-351, 42-701, 42-1605, 42-1720, 42-3809, 42-3916, 42-4010, 42-5444.

42-1702. Duty to supply information. — The director shall, free of charge, give any information desired by any person as to the proper method

of measuring water, or of constructing an apparatus for such measurement, upon proper application being made; and shall give special instructions to all watermasters as to measurement of water so as to secure a just distribution of the same. [1895, p. 215, § 12; reen. 1899, p. 282, § 11; reen. R.C., § 157; reen. C.L. 126:8; C.S., § 2984; I.C.A., § 41-1502; am. 1974, ch. 20, § 5, p. 533.]

42-1703. Attorney general to advise director. — The director may require, and shall receive, from the attorney general of the state, advice upon any question of public interest arising in the performance of duties under this chapter, which advice shall be in writing when so desired. The director may employ counsel or may retain private counsel. [1895, p. 215, § 13; reen. 1899, p. 282, § 12; reen. R.C., § 158; reen. C.L. 126:9; C.S., § 2985; I.C.A., § 41-1503; am. 1974, ch. 20, § 6, p. 533.]

42-1704. Director to make report. — The director shall make and render to the governor, annually, or oftener, if required, full and true reports of the work performed by the department, which reports shall contain any recommendations he may have to make in reference to legislation affecting the department. [1895, p. 215, § 14; reen. 1899, p. 282, § 13; reen. R.C., § 159; reen. C.L. 126:10; C.S., § 2986; I.C.A., § 41-1504; am. 1974, ch. 20, § 7, p. 533.]

42-1705. Cooperation with United States geological survey. — The director of the department of water resources is hereby authorized to cooperate with the United States geological survey in the investigation of the water resources and gauging the flow of the streams of the state of Idaho so long as the federal government is engaged in making such measurements and surveys. To that end he is hereby authorized to make the necessary contract or contracts with the director of the United States geological survey whereby a part of the expenses incurred in the making of such surveys, gaugings and measurements may be paid by the state of Idaho, to an amount not to exceed the appropriation hereinafter made. Said contract or contracts shall provide among other things, that the United States geological survey shall furnish to the department of water resources complete and detailed reports of the results obtained by said survey, gaugings and measurements and copies of such original records, plats, notes and other data as shall be required by the department. Such reports, plats, notes, records and data shall be and become a part of the permanent records of the office of the department. All claims for expenses incurred or made hereunder shall be filed, examined, and when allowed, paid out of the state treasury in the same manner that other claims against the state are made, filed, examined and paid. [1919, ch. 173, § 1, p. 548; C.S., § 2987; I.C.A., § 41-1505; am. 1974, ch. 20, § 8, p. 533.]

42-1706. Additional duties of director. — The director of the department of water resources shall make or cause to be made careful measurements of the flow in cubic feet per second of the various streams in the state

whose waters are, or are likely to be, appropriated and used, through that part of the season which he may deem necessary or expedient, to afford information for irrigating purposes, commencing with those streams most used for irrigation. The director shall collect facts and make surveys to ascertain suitable locations for reservoirs upon streams where such reservoirs may be possible and beneficial, and shall, as far as possible, determine the cost of constructing such reservoirs, and all other facts possible in regard to quantity of water possible to be stored, the character and extent of land that may be reclaimed by the water from such reservoirs, together with all other information possible that may bear upon the subject. The director shall become familiar with the waterways and irrigable land in the state and the needs of the state as to irrigation matters, and all records of any such information shall be the property of the state and open to public inspection. The director shall keep full and complete records of all measurements of streams, surveys, examinations or other valuable information that may come into his possession concerning any of the duties of the department, and shall furnish reasonable information in regard to such measurements or surveys to the newspapers of the state upon proper request.

In addition to the duties prescribed in this chapter, the director shall perform such other professional duties as may be required of him by the governor, and shall give advice on any matters of a professional nature, when called upon by the governor to do so. [1895, p. 215, § 15; reen. 1899, p. 282, § 14; reen. R.C., § 160; reen. C.L. 126:11; C.S., § 2988; I.C.A., § 41-1506; am. 1974, ch. 20, § 9, p. 533.]

Compiler's notes. Section 10 of S.L. 1974, ch. 20, is compiled as § 42-1709.

42-1707, 47-1708. Examination of plans for dams — Inspection of dams. [Repealed.]

Compiler's notes. These sections, which comprised S.L. 1895, p. 215, §§ 8-10; reen. 1899, p. 282, §§ 7-9; am. 1901, p. 191, § 5; reen. R.C., §§ 154a, 155; C.L. 126:12, 126:13;

C.S., §§ 2989, 2990; I.C.A., §§ 41-1507, 41-1508; am. 1939, ch. 224, § 1, p. 496, were repealed by S.L. 1969, ch. 280, § 12.

42-1709. Inspection on complaint. — If any person or persons shall report in writing to the director that any dam or embankment, used for holding water, or mine tailings impoundment structure used for storing tailings slurry is unsafe and endangering life or property, then it shall be the duty of the director to inspect, or cause to be inspected, such dam, embankment or mine tailings impoundment structure as soon as possible, and, if he considers it unsafe, to proceed as provided in the following sections. [1895, p. 215, § 11; reen. 1899, p. 282, § 10; reen. R.C., § 156; reen. C.L. 126:14; C.S., § 2991; I.C.A., § 41-1509; am. 1974, ch. 20, § 10, p. 533; am. 1978, ch. 309, § 1, p. 785.]

Compiler's notes. Section 9 of S.L. 1974, ch. 20, is compiled as § 42-1706.

42-1710. Intent of legislature — Construction, maintenance and operation of dams and mine tailings impoundment structures. — It is the intent of the legislature by this act to provide for the regulation of construction, maintenance and operation of all dams, reservoirs and mine tailings impoundment structures exclusively by the state to the extent required for the protection of public safety. All dams, reservoirs and mine tailings impoundment structures in the state are under jurisdiction of the department of water resources. The department of water resources, under the police power of the state, shall supervise the construction, enlargement, alteration, repair, maintenance, operation and removal of dams, reservoirs and mine tailings impoundment structures for the protection of life and property. The department of water resources may enter into agreements with other state agencies having jurisdiction over water storage structures to limit duplication of inspection, review and regulation of such structures. [1969, ch. 280, § 1, p. 833; am. 1974, ch. 20, § 11, p. 533; am. 1978, ch. 309, § 2, p. 785; am. 2000, ch. 78, § 1, p. 163.]

Compiler's notes. The words "this act" refer to S.L. 1969, ch. 280, which is compiled as §§ 42-1710 — 42-1720.

Section 3 of S.L. 2000, ch. 78 provided that the act shall be in full force and effect on and after July 1, 2000.

Sec. to sec. ref. Sections 42-1710 — 42-1721 are referred to in §§ 42-1711, 42-1714.

Cited in: Union Pac. R.R. v. Idaho, 654 F.

Supp. 1236 (D. Idaho 1987).

Opinions of Attorney General. The water resources board is not shielded by the immunity provisions of this section or the "discretionary function" exception in § 6-904, of the Tort Claims Act if it exempts the Mud Lake embankment from the dam safety program; the board has no authority to contract away its statutory duty. OAG 88-2.

42-1711. Definitions. — Unless the context otherwise requires, the following definitions govern the construction of this chapter.

(a) "Department" means the department of water resources.

(b) "Dam" means any artificial barrier, together with appurtenant works, constructed for the purpose of storing water or that stores water, which is ten (10) feet or more in height from the natural bed of the stream or watercourse at the downstream toe of the barrier, as determined by the department, or from the lowest elevation of the outside limit of the barrier, if it is not across a stream channel or watercourse, to the maximum water storage elevation, or has or will have an impounding capacity at maximum storage elevation of fifty (50) acre-feet or more. The following are not included as regulated dams or are not considered dams for the purposes of sections 42-1710 through 42-1721, Idaho Code:

(1) Barriers constructed in low risk areas as determined by the director, which are six (6) feet or less in height, regardless of storage capacity.

(2) Barriers constructed in low risk areas as determined by the director, which impound ten (10) acre-feet or less at maximum water storage elevation, regardless of height.

(3) Barriers in a canal used to raise or lower water therein or divert water therefrom.

(4) Fills or structures determined by the director to be designed primarily for highway or railroad traffic.

(5) Fills, retaining dikes or structures less than twenty (20) feet in height, which are under jurisdiction of the department of environmental quality

or the department of agriculture, determined by the director of the department of water resources to be designed primarily for retention or treatment of municipal, livestock, or domestic wastes, or sediment and wastes from produce washing or food processing plants.

(6) Levees that store water regardless of storage capacity.

(c) "Levee" means a retaining structure alongside a natural lake which has a length that is two hundred (200) times or more greater than its greatest height measured from the lowest elevation of the toe to the maximum crest elevation of the retaining structure.

(d) "Reservoir" means any basin which contains or will contain the water impounded by a dam.

(e) "Owner" includes any of the following who own, control, operate, maintain, manage, or propose to construct a dam, reservoir or mine tailings impoundment structure:

(1) The state of Idaho and its departments, agencies, institutions and political subdivisions;

(2) The United States of America and any of its departments, bureaus, agencies and institutions; provided that the United States of America shall not be required to pay any of the fees required by section 42-1713, Idaho Code, and shall submit plans, drawings and specifications as required by section 42-1712, Idaho Code, for information purposes only;

(3) Every municipal or quasi-municipal corporation;

(4) Every public utility;

(5) Every person, firm, association, organization, partnership, business trust, corporation or company;

(6) The duly authorized agents, lessees, or trustees of any of the foregoing; or

(7) Receivers or trustees appointed by any court for any of the foregoing.

(f) "Alterations," "repairs," or either of them, mean only such alterations or repairs as may directly affect the safety of the dam, reservoir or mine tailings impoundment structure, as determined by the department.

(g) "Enlargement" means any change in or addition to an existing dam, reservoir or mine tailings impoundment structure, which raises or may raise the water storage elevation of the water impounded by the dam or mine tailings slurry impounded by the mine tailings impoundment structure.

(h) "Water storage elevation" means the maximum elevation of water surface which can be obtained by the dam or reservoir.

(i) "Storage capacity" means the total storage at the maximum storage elevation.

(j) "Days" used in establishing deadlines means calendar days including Sundays and holidays.

(k) "Certificate of approval" means a certificate issued by the director for all dams or mine tailings impoundment structures listing restrictions imposed by the director, and without which no new dams shall be allowed to impound water or mine tailings impoundment structures shall be allowed to impound mine tailings slurry.

(l) "Mine tailings impoundment structure" means any artificial embankment which is or will be more than thirty (30) feet in height measured from

the lowest elevation of the toe to the maximum crest elevation constructed for the purpose of storing mine tailings slurry.

(m) "Lift construction" means mine tailings impoundment structure enlargement by raising the elevation of the structure on a continuous or recurring basis. Such practice will be considered under construction until the structure reaches its final crest elevation.

(n) "Mine tailings impoundment elevation" means the maximum elevation of stored mine tailings which can be obtained by the impounding structure.

(o) "Mine tailings slurry" means all slurry wastes from a mineral processing or mining operation.

(p) "Mine tailings storage capacity" means the total storage volume of the impounding area when filled with tailings to the maximum designed storage elevation. [1969, ch. 280, § 2, p. 833; am. 1970, ch. 73, § 1, p. 187; am. 1974, ch. 20, § 12, p. 533; am. 1978, ch. 309, § 3, p. 785; am. 1987, ch. 98, § 1, p. 192; am. 1988, ch. 308, § 1, p. 963; am. 2000, ch. 78, § 2, p. 163; am. 2001, ch. 103, § 81, p. 253.]

Compiler's notes. For words "this act" see Compiler's note, § 42-1710.

Section 4 of S.L. 1978, ch. 309 is compiled as § 42-1713.

Sections 80 and 82 of S.L. 2001, ch. 103 are compiled as §§ 42-1503 and 42-1734, respectively.

Section 3 of S.L. 2000, ch. 78 provided that the act shall be in full force and effect on and after July 1, 2000.

Cited in: *Marty v. State*, 117 Idaho 133, 786 P.2d 524 (1989); *Stott ex rel. Dougall v. Finney*, 130 Idaho 894, 950 P.2d 709 (1997).

Opinions of Attorney General. The embankment surrounding the southern edge of Mud Lake is a dam as defined in this section because the embankment is an artificial embankment storing in excess of 50 acre feet of water; the board and department have the authority and duty to regulate it under this chapter. OAG 88-2.

The board does not have authority to adopt regulations that are inconsistent with the statutory definition of a dam contained in subsection (b); therefore, if the board adopted regulations that exempted the embankment surrounding Mud Lake from the definition of a dam, the board's action would be in violation of its strict statutory duty. OAG 88-2.

None of the exemptions enumerated in this section is intended to absolve the water resources board from liability in the event that the board affirmatively announced its intention to exempt particular dams from regulation. OAG 88-2.

The water resources board is not shielded by the immunity provisions of this section or the "discretionary function" exception in § 6-904, of the Tort Claims Act if it exempts the Mud Lake embankment from the dam safety program; the board has no authority to contract away its statutory duty. OAG 88-2.

42-1712. Construction, enlargement, alteration or repair of dams — Submission of duplicate plans, drawings and specifications. — Owners who shall desire to construct, or enlarge, or alter or repair, meaning only such alterations or repairs as may affect the safety of the dam or reservoir, any dam, for the purpose of storing or appropriating or diverting any of the waters of this state, when the same is to be more than twenty (20) feet in height or to have a storage capacity of one hundred (100) acre-feet or more, except as otherwise in this chapter provided, shall submit duplicate plans, drawings and specifications of the proposed work to the director, and construction of a new dam or enlargement, or alteration or repairs shall not be commenced until the owner has applied for and obtained written approval of the plans, drawings and specifications.

Owners of dams under construction on the effective date [May 26, 1969] of this legislation and for which plans, drawings and specifications are

required but have not been approved on or before the effective date of this legislation shall submit such plans, drawings and specifications for approval, with the fee established hereinafter. The director shall give notice to owners to submit plans, drawings and specifications, and failure to submit plans, drawings and specifications for approval within thirty (30) days of the date of mailing the notice shall be punishable as provided in this act, and construction shall be stopped upon issuance of an order by the director unless for good cause shown as determined by the director (unless) further time is allowed. The notice and/or order provided for in this paragraph may be given by certified mail and a return receipt signed by the owner or responsible company shall constitute prima facie evidence of service.

Upon receipt of the plans, drawings and specifications, the director shall give consideration thereto and shall approve or disapprove the same within the time provided in this section, and if he approves them, the director shall affix his approval thereto and return one (1) copy of each such plans, drawings and specifications, with his approval, to the party or parties proposing to construct the works.

Plans, drawings and specifications submitted to the director complete with fees shall be approved or disapproved in no more than sixty (60) days and in no less than fourteen (14) days after receipt. Defective plans, drawings and specifications made in a bona fide attempt to conform to the law and rules and regulations of the water resource board shall not be rejected but notice of defect shall be sent to the owner by certified mail. If within thirty (30) days of the date of mailing the notice the owner does not file amended and perfected plans, drawings and specifications, the plans, drawings and specifications shall be rejected and canceled unless for good cause shown the director allows the owner further time.

The construction of all dams under plans, drawings and specifications approved by the director shall be pursued with reasonable diligence to completion. In the event that an owner fails to commence actual construction and maintain reasonable construction progress of the dam under the plans, drawings and specifications approved by the director prior to or after the effective date of this act, such approval may be voided by the director one (1) year after such approval. Notice of the intent to void any such approval shall be sent by the director to the owner by certified mail and said owner shall be allowed thirty (30) days within which to show cause why such approval should not be voided. The director may grant additional time within which to commence the construction under plans, drawings and specifications approved by the director upon a showing of reasonable cause. Plans, drawings and specifications for which approval has become void must be resubmitted for approval, with the fee therefor as hereafter provided, prior to commencing construction of any such dam.

The plans, drawings and specifications shall include the following information:

- (a) The name and address of the owner.
- (b) The location, type, size and height of the proposed dam or reservoir and appurtenant works.
- (c) The storage capacity of the reservoir.

(d) Such other pertinent information as the director may require including the following:

- (1) Data concerning subsoil and foundation conditions and materials entering into construction of the dam or reservoir.
- (2) Investigations of, and reports on subsurface conditions involving such matters as exploratory pits, trenches, and adits, drilling, coring, geophysical surveys, tests to determine leakage rates, and physical tests to measure in place the properties and behavior of foundation materials at the dam or reservoir site.
- (3) Investigation of and reports on the geology of the dam or reservoir site and its vicinity, possible geological hazards, availability and quality of construction materials, and other pertinent factors.

The plans, drawings and specifications shall be of such character and size setting forth such pertinent details and dimensions and in such form as the director requires. Plans, drawings and specifications which are submitted to the department shall be prepared by or under the direction of a registered professional engineer who is registered pursuant to Idaho law and authenticated by him as provided in section 54-1215, Idaho Code, or by such other person as provided in section 54-1223, Idaho Code.

Where said dam is, in the opinion of the director, not of sufficient importance to have the provisions of the section apply to such dam, then the director shall have power, upon written application, to suspend the provisions of this section in regard to such dam.

The director shall prepare design and construction criteria for dams not requiring departmental approval of plans, drawings and specifications and shall supply such criteria upon request to any interested person to aid in constructing such dams. The use of such criteria shall in no way relieve the owner of responsibility for adequacy of design and construction procedures. [1969, ch. 280, § 3, p. 833; am. 1974, ch. 20, § 13, p. 533.]

Compiler's notes. The word "unless" in the second sentence, of paragraph 2 following "as determined by the director" was placed in

parentheses by the compiler as surplusage.

For words "this act" see Compiler's note, § 42-1710.

42-1713. Fees. — Fees provided for in this act shall be required of all enumerated in the definition of owner. Fees for an enlargement to an existing dam or mine tailings impoundment structure shall be based upon the increase in storage capacity or tailings storage capacity. Fees for alterations or repairs of an existing dam or mine tailings impoundment structure shall be based on an estimate, made by the director, of costs of inspections to be made, however, in no case shall such fees exceed that which would be required by the fee schedule for construction of the dam or mine tailings impoundment structure.

(a) For one thousand (1,000) acre-feet capacity or less, ten dollars (\$10.00) for each ten (10) acre-feet or part thereof.

(b) For over one thousand (1,000) acre-feet capacity but not exceeding ten thousand (10,000) acre-feet capacity, one thousand dollars (\$1,000) plus one dollar (\$1.00) for each ten (10) acre-feet or part thereof over the first one thousand (1,000) acre-feet capacity.

(c) For storage in excess of ten thousand (10,000) acre-feet, one thousand nine hundred dollars (\$1,900) plus twenty cents (20¢) for each ten (10) acre-feet or part thereof over the first ten thousand (10,000) acre-feet capacity. In no case, however, shall the fee be more than six thousand dollars (\$6,000).

All plans, drawings and specifications shall not be considered by the department until the filing fee is received. All moneys received by the department under the provisions of this chapter shall be deposited in the water administration fund created under section 42-238a, Idaho Code, and shall be available to the department in carrying out provisions of this act. Fees submitted shall not be refunded. [1969, ch. 280, § 4, p. 833; am. 1970, ch. 73, § 2, p. 187; am. 1974, ch. 20, § 14, p. 533; am. 1978, ch. 309, § 4, p. 785; am. 1980, ch. 195, § 1, p. 431.]

Compiler's notes. For words "this act" see Compiler's note, § 42-1710.

Sec. to sec. ref. This section is referred to in § 42-238a.

Section 3 of S.L. 1978, ch. 309 is compiled as § 42-1711.

42-1714. Rules. — The water resource board shall adopt and revise from time to time such rules as may be necessary for carrying out the provisions of sections 42-1710 through 42-1721, Idaho Code. The rules governing mine tailings and impoundment structures shall require the owner to provide an abandonment plan to assure that the site will be in a safe maintenance-free condition upon completion of the mining operation. The rules shall also require the owner to provide to the director a bond or other acceptable surety adequate to complete the abandonment plan if the owner abandons the site without conforming to the plan. The amount of the bond shall be determined by the director and shall be established to avoid duplication with sureties deposited with other governmental agencies. In lieu of any surety required hereunder, the owner may deposit cash and governmental securities with the director in an amount equal to that of the required surety on conditions as prescribed in the rules. [1969, ch. 280, § 5, p. 833; am. 1974, ch. 20, § 15, p. 533; am. 1978, ch. 309, § 5, p. 785; am. 2000, ch. 298, § 1, p. 1029.]

Opinions of Attorney General. The board does not have authority to adopt regulations that are inconsistent with the statutory definition of a dam contained in § 42-1711(b); therefore, if the board adopted

regulations that exempted the embankment surrounding Mud Lake from the definition of a dam, the board's action would be in violation of its strict statutory duty. OAG 88-2.

42-1715. Inspection during construction, enlargement, alteration, repair or removal of dams and mine tailings impoundment structures — Effect of noncompliance. — During the construction, enlargement, repair, alteration, or removal of any dam, reservoir or mine tailings impoundment structure, the director shall make or cause to have made continuous or periodical inspections at state expense for the purpose of securing conformity with the approved plans and specifications, but shall require the owner to perform at his expense such work or tests as necessary to disclose information sufficient to enable him to determine that conformity

with the approved plans and specifications is being secured, which shall include adequate inspection, at owner's expense to verify compliance with approved plans, drawings and specifications.

The work of construction, enlargement, repair, alteration or removal of a dam, reservoir or mine tailings impoundment structure, for which approved plans, drawings and specifications are required, shall be under the responsible charge of a registered professional engineer who is registered according to Idaho law or by such other person as provided in section 54-1223, Idaho Code, and who shall certify that such construction, enlargement, repair, alteration or removal was done in accordance with approved plans, drawings and specifications. If, after any inspections, investigations or examinations, or at any time as the work progresses, or at any time prior to issuance of a certificate of approval, it is found by the director that amendment [amendments], modifications or changes are necessary to insure safety, the director may order the owner to revise the plans and specifications. If conditions are revealed which will not permit the construction of a safe dam, reservoir or mine tailings impoundment structure, the approval may be revoked. In the event that conditions imposed may be waived or made less burdensome without sacrificing a proper margin of safety, the director may authorize an owner to revise the plans and specifications accordingly. If at any time during construction, enlargement, repair or alterations [alteration] of any dam, reservoir or mine tailings impoundment structure the director finds that the work is not being done in accordance with the provision of the approval and the approved plans and specifications, he shall give a written notice and order by certified mail or by personal service to the owner. The notice and order shall state the particulars in which the approval and approved plans and specifications or the approval and approved plans and specifications as revised are not being or have not been complied with and shall order the immediate compliance with the approval and approved revised plans and specifications as the case may be. The director may order that no further work be done until such compliance has been effected and approved by him. A failure to comply with the approval and approved plans and specifications as originally approved or as revised shall render the approval subject to revocation by the director, if compliance is not made in accordance therewith after notice and order from him as provided in this chapter. [1969, ch. 280, § 6, p. 833; am. 1974, ch. 20, § 16, p. 533; am. 1978, ch. 309, § 6, p. 785.]

Compiler's notes. The bracketed word "alteration" in the fifth sentence of the second paragraph were inserted by the compiler.

42-1716. Notice of completion — Filing of supplementary drawings or descriptive matter. — Immediately upon completion of a new dam, reservoir or mine tailings impoundment structure or enlargement or repair of a dam, reservoir or mine tailings impoundment structure the owner shall give notice of completion to the director, and as soon thereafter as possible file with the director supplementary drawings or descriptive matter showing or describing the dam, reservoir or mine tailings impound-

ment structure as actually constructed, including the following:

- (a) A record of all grout holes and grouting.
- (b) A record of permanent location points and bench marks.
- (c) A record of tests of concrete or other material used in the construction of the dam, reservoir or mine tailings impoundment structure.
- (d) Any other items which may be of permanent value and have a bearing on the safety and performances of the dam, reservoir or mine tailings impoundment structure.

In connection with the enlargement or repair of a dam, reservoir or mine tailings impoundment structure, the supplementary drawings and descriptive matter need apply only to the new work. [1969, ch. 280, § 7, p. 833; am. 1974, ch. 20, § 17, p. 533; am. 1978, ch. 309, § 7, p. 785.]

42-1717. Jurisdiction over supervision of maintenance, operation and inspection of dams and mine tailings impoundment structures. — Supervision over the maintenance and operation of dams, reservoirs and mine tailings impoundment structures insofar as necessary to safeguard life and property from injury by reason of the failure thereof is vested in the director of the department of water resources. The director shall at state expense inspect or cause to be inspected, as often as he thinks advisable, every dam used for holding water and mine tailings impoundment structure used for holding tailings slurry in this state; however, all dams twenty (20) feet or more in height or mine tailings impoundment structures more than thirty (30) feet in height shall be inspected at least once every two (2) years, and if after any such inspection such dam or mine tailings impoundment structure, in the opinion of the director, is unsafe, and life or property liable to be endangered by reason thereof, the director shall give written notice and order by certified mail or by personal service upon the owner or owners to remove or repair the same so as to make it safe. If such owner or owners shall neglect or refuse to remove or repair the same after notice to that effect has been given in writing by the director, the director may draw off all or part of such water from behind such dam, embankment or mine tailings slurry from behind mine tailings impoundment structure and keep said water or mine tailings slurry drawn off until such time as the orders shall be complied with. In determining whether or not a dam, reservoir or mine tailings impoundment structure or proposed dam, reservoir or mine tailings impoundment structure constitutes or would constitute a danger to life or property, the director shall take into consideration the possibility that the dam, reservoir or mine tailings impoundment structure might be endangered by overtopping, seepage, settlement, erosion, cracking, earth movement or other conditions which exist or might occur in any area in the vicinity of the dam, reservoir or mine tailings impoundment structure.

No action shall be brought against the state, the water resource board, the director, or the department of water resources or their respective agents or employees for the recovery of damages caused by the partial or total failure of any dam, reservoir or mine tailings impoundment structure or through the operation of any dam, reservoir or mine tailings impoundment structure

upon the ground that such defendant is liable by virtue of any of the following:

(a) The approval of the dam, reservoir or mine tailings impoundment structure.

(b) The issuance or enforcement of orders relative to maintenance or operation of the dam, reservoir or mine tailings impoundment structure.

(c) Control and regulation of the dam, reservoir or mine tailings impoundment structure.

(d) Measures taken to protect against failure during an emergency.

(e) The use of design and construction criteria prepared by the department.

(f) The failure to issue or enforce orders, to control or regulate dams, or to take measures to protect against dam failure.

No action shall be brought by the state against the owner for pollution which may occur in the event that the director orders emergency dumping or bypassing.

Nothing in this part shall be construed to relieve an owner or operator of a dam, reservoir or mine tailings impoundment structure of the legal duties, obligations or liabilities incident to the ownership or operation of the dam, reservoir or mine tailings impoundment structure.

The findings and orders of the director and the certificate of approval of any dam, reservoir or mine tailings impoundment structure issued by the director are final and conclusive and binding upon all state agencies, regulatory or otherwise, as to the safety of design, construction, maintenance and operation of any dam, reservoir or mine tailings impoundment structure.

The director may require owners to keep records of, and to report on, maintenance, operation, staffing and engineering and geologic investigations, and the water resource board shall issue such rules and regulations as necessary to secure maintenance and operation and to require staffing and engineering and geologic investigations which will safeguard life and property. In addition, the owner of a dam, reservoir or mine tailings impoundment structure or his agent shall fully and promptly advise the department of any sudden or unprecedented flood or unusual or alarming circumstance or occurrence affecting the safety of the dam, reservoir or mine tailings impoundment structure. The director, from time to time, shall make inspections of dams, reservoirs and mine tailings impoundment structures at state expense for the purpose of determining their safety, but shall require owners to perform at their expense such work as necessary to disclose information sufficient to enable the director to determine conditions of dams, reservoirs, and mine tailings impoundment structures in regard to their safety and to perform at their expense other work necessary to secure maintenance and operation which will safeguard life and property. [1969, ch. 280, § 8, p. 833; am. 1974, ch. 20, § 18, p. 533; am. 1978, ch. 309, § 8, p. 785; am. 1987, ch. 225, § 1, p. 477.]

Sec. to sec. ref. This section is referred to in § 42-1714.

ANALYSIS

Existing and new dams distinguished.
Immunity.

Existing and New Dams Distinguished.

This section does not require existing dams to comply with the rules for new dams. It requires inspection of dams by the director of Idaho Department of Water Resources or at his direction, and specifies that if the director concludes that a dam is unsafe, the director may order the dam removed or repaired. If the owner of the dam does not remove or repair it, the director may draw off the water from behind the dam. *Marty v. State*, 117 Idaho 133, 786 P.2d 524 (1989).

Immunity.

This section appears to grant absolute immunity to the state, the Director of the Department, and the department itself for any claim for damages arising out of the supervision, maintenance, operation and inspection of dams and reservoirs. *Union Pac. R.R. v. Idaho*, 654 F. Supp. 1236 (D. Idaho 1987) *Union Pac. R.R. v. Idaho*, 663 F. Supp. 75 (D. Idaho 1987).

In a suit brought by owners of flooded farmland, the state was immune from liability for any decision of the director of the Department of Water Resources in taking

measures to protect against failure of a dike; this immunity extended to the flood control district and the chairman, and also to the water district and its watermaster and chairman since there was no evidence they owned, controlled, operated or maintained or managed the dike. *Marty v. State*, 117 Idaho 133, 786 P.2d 524 (1989).

By the terms of this section the State of Idaho, and the Idaho Department of Water Resources and their agents or employees are given immunity from damages caused through measures taken to control and regulate a dam or to protect against failure of any dam during an emergency. *Marty v. State*, 117 Idaho 133, 786 P.2d 524 (1989).

Opinions of Attorney General. None of the exemptions enumerated in this section is intended to absolve the water resources board from liability in the event that the board affirmatively announced its intention to exempt particular dams from regulation. OAG 88-2.

The water resources board is not shielded by the immunity provisions of this section or the "discretionary function" exception in § 6-904, of the Tort Claims Act if it exempts the Mud Lake embankment from the dam safety program; the board has no authority to contract away its statutory duty. OAG 88-2.

42-1718. Remedial means for protection of life and property. —

The director shall immediately employ any remedial means necessary to protect life and property if either:

(a) The condition of any dam, reservoir or mine tailings impoundment structure is so dangerous to the safety of life or property as not to permit time for the issuance and enforcement of an order relative to maintenance or operation.

(b) Passing or imminent floods threaten the safety of any dam, reservoir or mine tailings impoundment structure.

In applying the remedial means provided for in this act, the department may in emergency do any of the following:

(a) Lower the water level by releasing water from the reservoir or lower mine tailings slurry level by releasing slurry from the mine tailings impoundment structure.

(b) Completely empty the reservoir.

(c) Take such other steps as may be essential to safeguard life and property.

The director shall continue in full charge and control of such dam or reservoir, or both, or mine tailings impoundment structure, or all, and its appurtenances, until they are rendered safe or the emergency occasioning the action has ceased.

If the cost of the emergency remedial action by the director for the protection of life and property exceeds the amount of money appropriated from the general fund specifically for that purpose, the additional costs may

be defrayed by the issuance of deficiency warrants as may be authorized by the board of examiners. When so authorized, the state controller shall draw deficiency warrants against the general fund.

The cost and expenses of the remedial means provided in this act, including cost of any work done to render a dam, reservoir or mine tailings impoundment structure or its appurtenances safe, shall be recoverable by the state from the owner. If not paid within sixty (60) days of invoice, action may be brought by the director in the district court of the district wherein the dam, reservoir or mine tailings impoundment structure or any part thereof is situated. The funds recovered shall be returned to the general fund to offset the amount of the deficiency warrant.

No action shall be brought by the state against the owner for pollution which may occur in the event that the director orders emergency dumping or bypassing. [1969, ch. 280, § 9, p. 833; am. 1974, ch. 20, § 19, p. 533; am. 1978, ch. 309, § 9, p. 785; am. 1995, ch. 283, § 1, p. 944; am. 2003, ch. 32, § 23, p. 93.]

Compiler's notes. For words "this act" see Compiler's note, § 42-1710.

Sections 22 and 24 of S.L. 2003, ch. 32, are compiled as §§ 40-715 and 42-2807, respectively.

Sec. to sec. ref. This section is referred to in § 42-1714.

42-1719. Issuance of certificates of approval — Revocation — Appeal. — A certificate of approval shall be issued for all dams and mine tailings impoundment structures, new or existing, upon a finding that the dam or reservoir is safe to impound water or the mine tailings impoundment structure is safe to impound mine tailings slurry within the limitations prescribed in the certificate. Upon written request by an owner for a certificate of approval, the director shall within fourteen (14) days inspect or cause to be inspected and issue a certificate if he finds that the dam, reservoir or mine tailings impoundment structure is safe to impound water or tailings slurry within the limitations prescribed in the certificate. Pending the issuance of a certificate of approval, the owner of a new dam, reservoir or mine tailings impoundment structure shall not, through action or inaction, cause the dam or reservoir to impound water or mine tailings impoundment structure to impound mine tailings slurry.

Each certificate of approval issued may contain such terms and conditions as the director may prescribe. The director may revoke any certificate of approval whenever he determines that the dam, reservoir or mine tailings impoundment structure constitutes a danger to life and property. Whenever he deems such action necessary to safeguard life and property, the director may also amend the terms and conditions of any such certificate by issuing a new certificate containing the revised terms and conditions. The owner of a dam, reservoir or mine tailings impoundment structure for which a certificate of approval has been issued shall not, through action or inaction, cause the dam or reservoir to impound water or mine tailings impoundment structure to impound mine tailings slurry after the certificate terminates unless a new certificate is issued for the dam, reservoir or mine tailings impoundment structure. Those inflows that cannot be diverted may still be

allowed to enter the structure, but the lowest possible level must be maintained until safety of the structure is assured. A new certificate shall be issued upon a finding by the director that the dam or reservoir is safe to impound water or mine tailings impoundment structure is safe to impound tailings slurry within the limits prescribed in the certificate.

No action shall be brought by the state against the owner for pollution which may occur in the event that the director orders emergency dumping or bypassing.

With respect to written consent for use of a dam which has been issued and which is in effect prior to the effective date of this act or mine tailings impoundment structure which has been issued and which is in effect prior to the effective date of amendment, the director shall issue a new certificate of approval, which shall supersede the previous written consent for use, or shall contain such terms and conditions as the director may prescribe or shall revoke the existing written consent for use if he finds that the dam or reservoir is not safe to impound water or that the mine tailings impoundment structure is not safe to impound mine tailings slurry.

Before any certificate of approval is revoked, the director shall hold a hearing. Written notice of the time and place of the hearing shall be mailed, at least twenty (20) days prior to the date set for the hearing, to the holder of the certificate. Any interested persons may appear at the hearing and present their views and objections to the proposed action. The hearing shall be conducted in accordance with section 42-1701A(1) and (2), Idaho Code. Any party aggrieved by the final order of the director may seek judicial review thereof pursuant to section 42-1701A(4), Idaho Code. [1969, ch. 280, § 10, p. 833; am. 1974, ch. 20, § 20, p. 533; am. 1978, ch. 309, § 10, p. 785; am. 1980, ch. 238, § 15, p. 526.]

Compiler's notes. Section 14 of S.L. 1980, ch. 238 is compiled as § 42-1503.

42-1720. Violations of chapter — Penalties. — (1) Every person who violates any of the provisions of this chapter, or of any order of the director or of any rule of the water resource board where a copy of the order or rule has been served upon said person by certified mail as herein provided, and said person fails to comply therewith within the time herein provided, or within ten (10) days of such service if not otherwise provided, shall be guilty of a misdemeanor. In the event of a continuing violation, each day that the violation continues constitutes a separate and distinct offense.

(2) Any person who willfully obstructs, hinders, or prevents the director, the department or its agents or employees from performing the duties imposed by this chapter or who willfully resists the exercise of the control and supervision conferred by this chapter upon the director, the department or its agents or employees is guilty of a misdemeanor.

(3) Any owner or any person acting as a director, officer, agent or employee of an owner, or any contractor or agent or employee of a contractor who engages in the construction, enlargement, repair, alteration, maintenance or removal of any dam, reservoir or mine tailings impoundment structure, who knowingly does work or permits work to be executed on the

dam, reservoir or mine tailings impoundment structure without an approval or in violation of or contrary to any approval as provided for in this chapter, or any inspector, agent or employee of the department who has knowledge of such work being done and who fails to immediately notify the director thereof, is guilty of a misdemeanor.

(4) Whenever any party or parties feel themselves aggrieved by the determination of the director in refusing to approve any plan or specification as mentioned in this chapter, or by any order of the director, such party or parties may seek a hearing before the director in accordance with section 42-1701A(3), Idaho Code, if a hearing has not already been held, and may seek judicial review in accordance with section 42-1701A(4), Idaho Code, of any final order of the director issued following a hearing.

(5) When the director of the department of water resources determines that any person is in substantial violation of any provision of this chapter or any rule, certificate, condition of approval or order issued or promulgated pursuant to this chapter, the director may commence an administrative enforcement action by issuing a written notice of violation in accordance with the provisions of section 42-1701B, Idaho Code. [1969, ch. 280, § 11, p. 833; am. 1974, ch. 20, § 21, p. 533; am. 1978, ch. 309, § 11, p. 785; am. 1980, ch. 238, § 16, p. 526; am. 1998, ch. 173, § 9, p. 595.]

Compiler's notes. Section 12 of S.L. 1969, ch. 280 repealed §§ 42-1707, 42-1708.

Section 22 of S.L. 1974, ch. 20, is compiled as § 42-1732.

Section 17 of S.L. 1980, ch. 238 is compiled as § 42-1737.

Sections 8 and 10 of S.L. 1998, ch. 173 are compiled as §§ 42-1701B and 42-3809, respectively.

42-1721. Initial construction, lift construction, enlargement, or alteration of tailings impoundment structures — Submission of duplicate plans, drawings and specifications. — Owners who shall desire to construct, or enlarge, or alter or repair, meaning only such alterations or repairs as may affect the safety of the structure, any mine tailings impoundment structure for the purpose of storing mine tailings slurry when the same is to be more than thirty (30) feet in height shall submit duplicate plans, drawings and specifications of the proposed work to the director, and construction of the new mine tailings impoundment structure, alteration or repair shall not be commenced until the owner has applied for and obtained written approval of the plans, drawings and specifications.

Owners of mine tailings impoundment structures upon which construction, lift construction, enlargement or alteration is under way on July 1, 1978, and for which plans, drawings and specifications would be required if such work had commenced subsequent to July 1, 1978, shall submit plans, drawings and specifications with respect to that portion of the work to be performed subsequent to July 1, 1978, as are required, together with the fee established hereinafter. In the event that the owner fails to submit such plans, drawings and specifications contemplated by this paragraph within sixty (60) days, the director shall give notice to owners to submit plans, drawings and specifications, and failure to submit plans, drawings and

specifications within thirty (30) days of the date of mailing the notice shall be punishable as provided in this chapter. Construction, lift construction, enlargement, or alteration which is under way on July 1, 1978 may be stopped upon issuance of an order by the director for good cause shown, as determined by the director. The notice and/or order provided for in this paragraph shall state the good cause for stoppage determined by the director and shall be given by personal service or certified mail and a return receipt signed by the owner or responsible company shall constitute prima facie evidence of service.

Upon receipt of the plans, drawings and specifications, the director shall give consideration thereto and shall approve or disapprove the same within the time provided in this section, and if approved, the director shall affix his approval thereto and return one (1) copy of such plans, drawings and specifications, with his approval, to the party or parties proposing to construct the works.

Plans, drawings and specifications submitted to the director complete with fees shall be approved or disapproved in no more than sixty (60) days and in no less than fourteen (14) days after receipt. Defective plans, drawings and specifications made in a bona fide attempt to conform to the law and rules and regulations of the water resource board shall not be rejected but notice of defect stating in detail the defect or defects found in the plans, drawings or specifications shall be sent to the owner by certified mail. If within thirty (30) days of the date of mailing the notice the owner does not file amended plans, drawings and specifications, the plans, drawings and specifications shall be rejected and cancelled unless, for good cause shown, the director allows the owner further time.

The construction of all mine tailings impoundment structures under plans, drawings and specifications approved by the director shall be pursued with reasonable diligence to completion, taking into consideration the nature of and purpose for which said construction, lift construction, enlargement or alteration is made.

The plans, drawings and specifications shall include the following information:

- (a) The name and address of the owner.
- (b) The location, type, size and height of the proposed mine tailings impoundment structure and appurtenant works.
- (c) The storage capacity of the impoundment area.
- (d) Such other pertinent information as the director may require consistent with good engineering practice including the following:
 - (1) Data concerning subsoil and foundation conditions and materials entering into construction of the mine tailings impoundment structure.
 - (2) Investigations of, and reports on subsurface conditions involving such matters as exploratory pits, trenches, and adits, drilling, coring, geophysical surveys, tests to determine leakage rates, and physical tests to measure in place the property and behavior of foundation materials at the impoundment structure site.
 - (3) Investigation of and reports on the geology of the impoundment structure site and its vicinity, possible geological hazards, availability and quality of construction materials, and other pertinent factors.

The plans, drawings and specifications shall be of such character and size setting forth such pertinent details and dimensions and in such form as the director requires consistent with good engineering practice. Plans, drawings and specifications which are submitted to the department shall be prepared by or under the direction of a professional engineer who is entitled to practice the profession of engineering pursuant to chapter 12, title 54, Idaho Code.

Where said mine tailings impoundment structure is, in the opinion of the director, not of sufficient importance to have the provisions of the section apply to such structure, then the director shall have power, upon written application, to suspend the provisions of this section in regard to such structure. [I.C., § 42-1721, as added by 1978, ch. 309, § 12, p. 785.]

42-1722 — 42-1729. [Reserved.]

42-1730. Statement of purpose. — The legislature finds and declares that:

(1) The water resources and waterways of Idaho constitute a valuable renewable resource;

(2) The welfare of the people of Idaho is dependent upon conservation, development and optimum use of our water resources and waterways;

(3) State regulation of development and use of our water resources and waterways is necessary to ensure water is available to meet the present and future needs of the people of Idaho;

(4) The development of Idaho's water resources for hydropower, irrigation, domestic, commercial, municipal, industrial and other uses in a manner that considers competing uses and values provides important benefits to the people of Idaho;

(5) Comprehensive planning is necessary to minimize conflicts between competing uses and to ensure optimal protection of all beneficial uses of water;

(6) A single state agency should formulate a comprehensive state water plan;

(7) Selected rivers possessing outstanding fish and wildlife, recreational, aesthetic, historic, cultural, natural or geologic values should be protected for the public benefit and enjoyment;

(8) Section 401 of the federal clean water act [33 U.S.C., § 1341] gives the state certification authority to regulate activities licensed or permitted by federal agencies to insure the protection of the quality of state water; and

(9) The comprehensive state water plan required by this chapter shall not alter any existing responsibilities, jurisdiction or planning functions of state agencies established by state or federal law. [I.C., § 42-1730, as added by 1988, ch. 370, § 3, p. 1090.]

Legislative Intent. Section 1 of S.L. 1988, ch. 370 read: "The legislature finds and declares that a central component of state sovereignty is the inherent right of the state to regulate and to control the natural resources of this state. In a state such as Idaho, it is

essential that the state exercise its full authority to manage its water. To that end, it is the purpose of this act to provide for the full exercise of all the state's rights and responsibilities to manage its water resource.

"The legislature is aware of the proposed

protected areas program being considered by the pacific northwest electric power and conservation planning council regarding Idaho's rivers and streams. The legislature believes that water resource planning is a state function and therefore requests the Idaho representatives to the pacific northwest electric power and conservation planning council seek to limit the scope of the council's protected

areas program in a manner not to conflict with, preempt or limit the efforts of the state of Idaho in water resource or land use planning."

Compiler's notes. The Federal Clean Water Act, referred to in this section, is compiled as 33 U.S.C. § 1251 et seq.

Section 2 of S.L. 1988, ch. 370 contained a repeal.

42-1731. Definitions. — For the purpose of this chapter:

(1) "Alteration" means any activity using mechanized equipment that moves or overturns gravel or earth.

(2) "Board" means the Idaho water resource board.

(3) "Comprehensive state water plan" means the plan adopted by the board pursuant to section 42-1734A, Idaho Code, or a component of such plan developed for a particular water resource, waterway or waterways and approved by the legislature.

(4) "Dredge or placer mining" means any dredge or other placer mining operation to recover minerals with the use of a dredge boat or sluice washing plant whether fed by bucket line as a part of such dredge or by a separate dragline or any other method including, but not limited to, suction dredges which are capable of moving more than two (2) cubic yards per hour of earth material.

(5) "Hydropower project" means any development which uses a flow of water as a source of electrical or mechanical power, or which regulates the flow of water for the purpose of generating electrical or mechanical power. A hydropower project development includes all powerhouses, dams, water conduits, transmission lines, water impoundments, roads, and other appurtenant works and structures.

(6) "Interim protected river" means a waterway designated pursuant to section 42-1734D or 42-1734H, Idaho Code, as protected for up to two (2) years while a component of the comprehensive state water plan is prepared for that waterway.

(7) "Natural river" means a waterway which possesses outstanding fish and wildlife, recreation, geologic or aesthetic values, which are free of substantial existing man-made impoundments, dams or other structures, and of which the riparian areas are largely undeveloped, although accessible in places by trails and roads.

(8) "Protected river" means a waterway protected in the comprehensive state water plan by designation as either a natural river or a recreational river.

(9) "Recreational river" means a waterway which possesses outstanding fish and wildlife, recreation, geologic or aesthetic values, and which might include some man-made development within the waterway or within the riparian area of the waterway.

(10) "Riparian area" means that area within one hundred (100) feet of the mean highwater mark of a waterway.

(11) "State agency" means any board, commission, department or executive agency of the state of Idaho.

(12) "Stream bed" means a natural water course of perceptible extent with definite bed and banks, which confines and conducts the water of a waterway which lies below and between the ordinary high water mark on either side of that waterway.

(13) "Waterway" means a river, stream, creek, lake or spring, or a portion thereof, and shall not include any tributary thereof. [I.C., § 42-1731, as added by 1988, ch. 370, § 3, p. 1090.]

Compiler's notes. Former § 42-1731, which comprised 1965, ch. 320, § 1, p. 901, was repealed by S.L. 1988, ch. 370, § 2.

Cited in: Idaho Water Resource Bd. v. Kramer, 97 Idaho 535, 548 P.2d 35 (1976).

Opinions of Attorney General. It is statutorily authorized and constitutionally per-

missible for the state Water Resource Board to issue revenue bonds to a local water project sponsor to construct a hydroelectric power project which serves no other water development, usage, or conservation purpose. OAG 85-2.

42-1732. Idaho water resource board. — Pursuant to the provisions of article 15, section 7, of the constitution of the state of Idaho, there is hereby established as the constitutional water agency within the department of water resources the Idaho water resource board which shall consist of eight (8) appointed members. The eight (8) appointed members shall be qualified electors of the state, no more than four (4) of whom shall be members of the same political party. Appointment of board members shall be made solely upon consideration of their knowledge, interest and active participation in the field of reclamation, water use or conservation and no member shall be appointed a member of the board unless he shall be well informed upon, interested in, and engaged actively in the field of reclamation, water use or conservation of water. Four (4) of these members shall be appointed at large and no more than three (3) of the eight (8) members shall be residents of a single district. To insure representation of water users of all geographic locations of the state, one (1) member shall be appointed from each of the following districts:

District No. 1 which shall consist of the counties of Boundary, Bonner, Kootenai, Shoshone, Benewah, Latah, Clearwater, Nez Perce, Lewis and Idaho;

District No. 2 which shall consist of the counties of Adams, Valley, Washington, Payette, Gem, Boise, Canyon, Ada, Elmore and Owyhee;

District No. 3 which shall consist of the counties of Camas, Gooding, Jerome, Twin Falls, Cassia, Blaine, Lincoln, Minidoka, Lemhi, Custer and Butte;

District No. 4 which shall consist of the counties of Clark, Fremont, Jefferson, Madison, Teton, Bingham, Bonneville, Power, Bannock, Caribou, Oneida, Franklin and Bear Lake.

All appointments shall be made by the governor with the advice and consent of the senate. As soon as practicable after passage of this act, the governor shall appoint all eight (8) members; four (4) members shall be appointed to terms which will expire on January 1, 1967, four (4) members shall be appointed to terms which will expire on January 1, 1969, and thereafter all appointments shall be to four (4) year terms. Any vacancy caused by death, removal, disqualification, or resignation, shall be filled by

the governor for the unexpired term caused by the vacancy. The appointed members shall be compensated as provided by section 59-509(h), Idaho Code. [1965, ch. 320, § 2, p. 901; am. 1974, ch. 20, § 22, p. 533; am. 1980, ch. 247, § 42, p. 582.]

Compiler's notes. The words "this act" refer to S.L. 1965, ch. 320, which is compiled as §§ 42-1732 — 42-1734, 42-1735, 42-1737 and 42-1738.

Sections 21 and 23 of S.L. 1974, ch. 20, are compiled as §§ 42-1720 and 42-1734, respectively.

Sections 41 and 43 of S.L. 1980, ch. 247 are compiled as §§ 41-1042 (now repealed) and 42-3508, respectively.

Section 62 of S.L. 1974, ch. 20 read, "The appointive members of the water resource board serving on the effective date of this act shall continue in office for the terms to which they were originally appointed, subject to the provisions of section 42-1732, Idaho Code."

Palisades Dam Hydroelectric Projection on Snake River. S.L. 1979, ch. 324, p. 879:

"SECTION 1. The Idaho water resource board is authorized to plan, finance, acquire, construct, own, operate and maintain a water project known as the Palisades Dam Hydroelectric project on Snake River consisting of a power plant at the existing Palisades Dam as may be approved by the federal energy regulatory commission, and of related works and facilities for the generation and wholesale of hydroelectric energy and capacity at the site of production, together with all other necessary structures and equipment and all real and personal property necessary therefor.

"SECTION 2. The Idaho water resource board may make such plans and enter into such contracts with one or more privately owned electric utility companies or other entities, public or private, as are necessary or appropriate, providing, either:

"(a) Where all or any part of the water project authorized by section 1 of this act is to be owned and operated by the board, for the wholesale of hydroelectric energy and capacity at the site of production; or

"(b) Where all or any part of the water project is to be jointly owned by the board and another contracting party or parties, for a joint venture.

"Any power sales or joint venture contract entered into by the board pursuant to the provisions of this section 2 shall be submitted by the board to the committee on the state water plan and shall not become effective until approved by a majority of the members of that committee at a regular or special meeting of the committee held for that purpose.

"SECTION 3. A contract entered into by the

Idaho water resource board with respect to joint ownership of the water project authorized in section 1 of this act or for the wholesale of hydroelectric energy and capacity at the site of production of the water project shall contain those terms, conditions and provisions not inconsistent with this act as the board shall determine to be in the interests of the state. A contract may include provisions relating to, but not limited to, the following:

"(a) The purpose or purposes of the contract;

"(b) The duration of the contract;

"(c) The method of appointing or employing the personnel necessary in connection with the project;

"(d) The method of financing the project, including if necessary, the apportionment of costs of construction and costs of operation and maintenance;

"(e) The respective ownership interests of the parties in the project, whether joint, several or segregated (which ownership interests shall be in proportion to the funds or the value of property supplied by each party for the acquisition of the project) and in the property used or useful in connection therewith, and the procedures for disposition of that property when the contract expires or is terminated or when the project is abandoned, decommissioned or dismantled;

"(f) The prohibition or restriction of the alienation or partition of the board's undivided interest in the project, which provisions shall not be subject to a law restricting covenants against alienation or partitions;

"(g) The construction and repair of the project, which may include a determination by the board that a contracting party may construct or repair the project on behalf of the board;

"(h) The operation and maintenance of the project, which may include a determination by the board that a contracting party may operate and maintain the project on behalf of the board;

"(i) Payments to be made to the board by a contracting party pursuant to a power sales contract for the purchase of hydroelectric energy and capacity or, pursuant to a joint venture contract, for the use or operation of the interest of the board in the project, or a combination thereof;

"(j) Detailed project costs, or a method of determination of such costs;

"(k) The creation of a committee of repre-

sentatives of the parties to the contract, which committee shall have the powers regarding the construction and the operation and maintenance of the project as the contract, not inconsistent with this act, may provide;

"(l) If the board is to construct and own substantially all of the dam portion of the project, for the construction and installation by a contracting party in or adjacent to such dam of works and facilities not included in the dam portion of the project which are necessary to the generation of hydroelectric energy and capacity and for the transmission thereof;

"(m) Obtaining all necessary licenses and permits for the ownership and operation of the project, provided that the board, or the board and the other contracting parties, shall petition the Federal energy regulatory commission for insertion of the license condition subordinating the project power right to future upstream depletionary use;

"(n) For indemnification of construction and operation agents, if any, provided that the board shall be liable only for its own acts with regard to the financing, planning, acquisition, construction, ownership, operation or maintenance of the project;

"(o) That no moneys or other contributions to the project supplied by the board shall be credited or otherwise applied to the account of any other contracting party;

"(p) Methods for amending and terminating the contract; and

"(q) Any other matters deemed by the parties to the contract to be necessary and proper, not inconsistent with the provisions of this act.

"SECTION 4. The Idaho water resource board is authorized to issue and sell revenue bonds of the board pursuant to the provisions of sections 42-1739 through 42-1749, Idaho Code, as now or hereafter in force, for the purpose of paying all or any part of the costs of planning, financing, acquiring and constructing the water project authorized in section 1 of this act. The board shall pledge to the payment of those revenue bonds the revenues which the board shall derive from the ownership and operation of the project pursuant to the contract entered into as provided in section 2 of this act. In addition to the other things required by law, the resolution or indenture pursuant to which the revenue bonds are to be issued shall provide that all revenues derived by the board from the operation and ownership of the project, after the payment of any costs of operation and maintenance of the project for which the board is responsible, the establishment and maintenance of a fund for the payment of principal of and interest on the revenue bonds as the same shall come due, the establishment of

adequate debt service reserves, and such other contingency or other funds as the board deems desirable, shall in each year be deposited into the water management account created and established in section 42-1760, Idaho Code, and may be used for any purposes set forth in that act.

"SECTION 5. The development of the water project authorized in section 1 of this act is hereby declared not to be subject to the policy expressed in the last sentence of section 42-1738, Idaho Code.

"SECTION 6. The legislature finds and declares that the development of the Pali-sades Dam Hydroelectric Project by the Idaho water resource board of the water project authorized in section 1 of this act is in the public interest, does not conflict with the state water plan and that it is a public purpose for the Idaho water resource board to exercise the power and authority granted in this act to:

"(a) By contributing to the development of necessary electrical energy for use in the state of Idaho, achieve economies in the generation of electricity through the use of water resources thereby contributing to the meeting of the future power needs of the state of Idaho and its inhabitants.

"(b) Facilitate irrigation of the arid lands of the state of Idaho by providing means of utilizing the water resources of the state of Idaho;

"(c) Maximize the recreational potential, development of fish and wildlife habitat, and uses of the water resources of the state of Idaho; and

"(d) Maximize the utilization of the water resources of the state of Idaho for all beneficial uses subject to article XV, section 3, of the state constitution.

"SECTION 7. This act and the provisions hereof shall be construed liberally to effectuate purposes set out in section 6 of this act.

"SECTION 8. An emergency existing therefore, which emergency is hereby declared to exist, this act shall be in full force and effect on and after its passage and approval." Approved April 5, 1979.

Dworshak Hydroelectric Project on Snake River. S.L. 1990, ch. 363, p. 987:

"SECTION 1. The legislature finds and declares that the development of the Dworshak hydroelectric project by the Idaho water resource board in conjunction with the development of the water supply system for the existing Dworshak national fish hatchery and the proposed Clearwater fish hatchery as a part of the lower snake river fish and wildlife compensation plan is in the public interest and hereby authorizes the project.

"SECTION 2. The Idaho water resources board is authorized to take all actions necessary in accordance with existing law to plan, finance, construct, acquire, operate, own and

maintain the said Dworshak hydroelectric project, to provide access to water at the project site to the city of Orofino to be used for municipal and industrial purposes, to negotiate and enter into contracts for the wholesale of hydroelectric power at the site of production, or as an alternative to enter into a long term lease agreement with one or more public or privately owned electric utility companies or other entities, for the operation and management of the project and the purchase of the hydroelectric power produced by the project, to acquire all necessary real and personal property in connection with the project, and to issue and sell revenue bonds under the provisions of sections 42-1739 through 42-1749, Idaho Code, pledging thereto the revenues which the board shall derive from such project, in order to pay its costs of planning, financing, acquisition and construction, operation and maintenance of such water project. All moneys paid or property supplied by the Idaho water resource board for the purpose of carrying out the provisions of this section are hereby declared to be for a public purpose.

"SECTION 3. All surplus revenues of the Idaho water resource board derived from the facilities constituting the water project, after the payment of the costs of operation and maintenance expenses of the water project, the establishment and maintenance of a fund for the payment of the principal and interest on the revenue bonds, the establishment and maintenance of adequate reserves therefor, and the establishment and maintenance of such contingency or other funds as the board deems desirable, shall be paid by the board

into the Idaho water resource board revolving development account and the water management account established in sections 42-1752 and 42-1760, Idaho Code, in such proportion as the board in its discretion shall determine. Such moneys, together with moneys accruing to or earned thereon, shall be appropriated continuously, set aside, and made available until expended, to be used by the board in the administration of such accounts and in the funding of water projects in the state of Idaho in accordance with the statutes and regulations governing the operation of said accounts, provided that funds from said accounts shall not be used to finance the development of hydropower production projects by the board unless such power production is connected with another project purpose as authorized in section 42-1734(5), Idaho Code.

"SECTION 4. The provisions of this act shall be construed liberally to effectuate the stated purposes of the act."

Opinions of Attorney General. The Idaho Water Resource Board could issue revenue bonds to fund Idaho's share of a joint water project constructed by another entity without legislative approval. OAG 89-1.

The Idaho Water Resource Board has authority to issue revenue bonds, either separately or jointly with the other compacting states, to fund Idaho's share of a joint water project on the Bear River within Idaho, Utah, or Wyoming. However, the Idaho Legislature must authorize construction of the project before the Idaho Water Resource Board may issue the revenue bonds. OAG 89-1.

42-1733. Organization. — The business of the board shall be conducted as follows:

(a) The first meeting of the board shall be held in the city of Boise within thirty (30) days following its appointment and thereafter the board shall hold no less than four (4) regular meetings annually on dates and at places set by the board. The board shall maintain its principal office in Ada county. Special meetings of the board may be held by call of the chairman, four (4) of the members of the board, or the governor. A majority of board members at any meeting shall constitute a quorum for the transaction of any business. No notice shall be required for regular, special or adjourned meetings, providing the time and place of the meeting is fixed at a meeting at which all of the board members are in attendance. Otherwise, five (5) days written or telegraphic notice setting out the time, place and purpose of the meeting shall be required. Any meeting of the board at which all of the members are present shall be as valid as if held pursuant to notice. Members may waive notice in writing either before or at the time of the meeting.

(b) All meetings at which official action is taken by the board shall be open to the public; the board may hold executive sessions at which no official action is taken.

(c) At its first meeting the board shall elect one (1) of its members chairman and one (1) of its members vice chairman. Such officers shall hold their respective offices for a period of two (2) years and until their successors are elected and qualified. Should a vacancy occur in either office, the board shall elect a member to fill such vacancy for the remainder of the term.

(d) The chairman shall preside at all meetings of the board, perform the normal duties of that office and such other duties as may be required of him by the board.

(e) The vice chairman shall possess all of the powers and perform all of the duties of the chairman in the event of the death, absence, disability or refusal to act on the part of the chairman, and such authority shall extend until a new chairman has been elected and qualified. He shall also perform such other duties as may be required of him by the board.

(f) The board shall select a secretary who may be a member of the board. The secretary shall be responsible for full and accurate minutes of all meetings of the board, a record of its proceedings, and every ruling, order and decision made by it. He shall also perform such other duties as may be required of him.

(g) The board shall adopt a seal having upon it the words, "Idaho water resource board," which shall be placed in the care and custody of the director.

(h) Each member of the board shall, before entering upon the discharge of his official duties, file with the secretary of state the statutory oath of office to which, and as a part thereof, shall be added a declaration of the political party to which said board member belongs. [1965, ch. 320, § 3, p. 901; am. 2001, ch. 183, § 17, p. 613.]

Compiler's notes. Sections 16 and 18 of S.L. 2001, ch. 183 are compiled as §§ 41-1046 (now repealed) and 42-2011, respectively.

Open Meetings.

The deliberations of the administrative committee of the water resource board are not

subject to the open hearing requirements of this section because it is not the governing body of the board. Idaho Water Resource Bd. v. Kramer, 97 Idaho 535, 548 P.2d 35 (1976).

42-1734. Powers and duties. — The board shall, subject to the provisions of chapter 52, title 67, Idaho Code, have the following powers and duties:

(1) To have and exercise all of the rights, powers, duties and privileges vested by article XV, section 7, of the constitution of this state in the water resource agency, and the water resource board, herein created, is hereby constituted the water resource agency;

(2) To institute judicial proceedings to have water rights established by court decree on any stream, lake or underground water basin; in such proceedings court costs of the action, including the survey and determination of water uses by the director of the department of water resources, shall be borne by the state;

(3) To appear, when requested by the governor, on behalf of and represent the state in matters related to its duties in any proceeding, negotiation, or hearing involving the federal government or other state; provided, however,

that compact commissions now established by law shall continue to act but in so doing shall report to it;

(4) To accept, receive, initiate, investigate, consider and promote such water projects as it deems to be in the public interest;

(5) To generate and wholesale hydroelectric power at the site of production if such power production is connected with another purpose for such project;

(6) To file applications and obtain permits in the name of the board, to appropriate, store, or use the unappropriated waters of any body, stream, or other surface or underground source of water for specific water projects. Such filings and appropriations by the board, or any water rights owned or claimed by the board, shall be made in the same manner and subject to all of the state laws relating to appropriation of water, with the exception that the board will not be required to pay any fees required by the laws of this state for its appropriations. The filings and appropriations by the board shall be subject to contest or legal action the same as any other filing and appropriation, and such filings and appropriations shall not have priority over or affect existing prior water rights of any kind or nature; provided that the board shall have the right to file for water rights with appropriate officials of other states as trustee for project users, and to do all things necessary in connection therewith;

(7) To finance said projects with revenue bonds or such moneys as may be available;

(8) To acquire, purchase, lease, or exchange land, rights, water rights, easements, franchises and other property deemed necessary or proper for the construction, operation and maintenance of water projects;

(9) To exercise, in accordance with the provisions of title 7, chapter 7, Idaho Code, the right of eminent domain to acquire property necessary for the construction of projects, both land and water;

(10) To cooperate in all water studies, planning, research, or activities with any state or local agency in this state, or any other state or any federal agency and to enter into contracts with federal, state and local governmental agencies to effect this purpose;

(11) To present to the governor for presentation to the legislature not later than the 30th of November prior to the convening of a regular legislative session the final report containing the complete plans, costs and feasibility estimates for any water project which the board recommends that the state construct in accordance with the comprehensive state water plan; and to construct any water project specifically authorized by the legislature;

(12) To enter into contracts with political subdivisions, municipal entities, individuals and others for the rehabilitation and repair of existing irrigation projects and irrigation facilities, the sale and/or lease of water, use of water, water storage, electric power, or other service, to turn over projects to water users after pay-out and to lease facilities, sell, lease or dispose of surplus facilities subject to the provisions of applicable law;

(13) To enter into contracts to effect the purposes of this chapter;

(14) To sue and be sued;

(15) To study and examine pollution of rivers, streams, lakes and ground water, and to advise, cooperate and counsel with the state board of

environmental quality in a manner designed to avoid inhibition of economic development and at the same time insure the right of the people to comfortably enjoy our water resources and accomplish the establishment of water quality criteria;

(16) To call upon any other state agency for cooperation, assistance or use of information available to such agency; provided, however, if such agency is required to make substantial expenditures in responding to such request, appropriate arrangements for compensation may be accomplished;

(17) To issue revenue bonds for the rehabilitation and repair of existing irrigation projects and irrigation facilities, and for water projects, pledge any revenues available to the board to secure said bonds, exclusive of any revenues derived from legislative appropriations, provided that any amounts received from loan repayments regardless of the source of funds for the loan may be pledged, and pool revenues from one (1) or more projects constructed, financed or operated by the board, or existing irrigation project or facilities rehabilitated or repaired by the board;

(18) To formulate and recommend, prior to each session of the legislature, proposed legislation that may be necessary to assist it in effecting a proper plan for conservation, development and utilization of water resources and waterways and to report to each session of the legislature on the public business entrusted to its care and the financial affairs of the board. In the period between legislative sessions, the board shall deposit with the legislative council statements describing all actions taken and projects undertaken by it;

(19) To issue procedural and operative rules as may be necessary for the conduct of its business;

(20) To appoint advisory boards when deemed desirable to aid in the execution of its powers;

(21) To take such other action as may be necessary to carry out its duties and powers under this chapter and the constitution of the state of Idaho;

(22) To loan without prior legislative approval, the proceeds of the sale of revenue bonds to the local water project sponsor or sponsors; to enter into lease, sale or loan agreement; and to purchase all or a portion of, or participate in, loans, originated by private lending institutions. [1965, ch. 320, § 4, p. 901; am. 1974, ch. 20, § 23, p. 533; am. 1977, ch. 172, § 1, p. 441; am. 1981, ch. 90, § 1, p. 125; am. 1988, ch. 370, § 4, p. 1090; am. 2001, ch. 103, § 82, p. 253; am. 2003, ch. 80, § 1, p. 254.]

Compiler's notes. For words "this act" see Compiler's notes, § 42-1732.

Section 22 of S.L. 1974, ch. 20, is compiled as § 42-1732.

Section 2 of S.L. 1981, ch. 90 is compiled as § 42-1740.

Sections 81 and 83 of S.L. 2001, ch. 103 are compiled as §§ 42-1711 and 42-1805, respectively.

Section 2 of S.L. 2003, ch. 80, is compiled as § 42-1742.

Sec. to sec. ref. This section is referred to in §§ 42-1736, 42-1736B, 42-1776 and 42-2042.

ANALYSIS

Hearings on projects.
In general.

Hearings on Projects.

Public hearings on project proposals submitted for possible incorporation into the

state water plan need only be conducted in those areas which will be most immediately and directly affected by the project. *Idaho Water Resource Bd. v. Kramer*, 97 Idaho 535, 548 P.2d 35 (1976).

In General.

A comprehensive state water plan does not need to have been officially adopted prior to the submission of a water project. *Idaho Water Resource Bd. v. Kramer*, 97 Idaho 535, 548 P.2d 35 (1976).

An administrative agency like the Department of Water Resources has only such powers as the statute or ordinance confers. *Beker Indus., Inc. v. Georgetown Irrigation Dist.*, 101 Idaho 187, 610 P.2d 546 (1980).

Opinions of Attorney General. It is statutorily authorized and constitutionally permissible for the state Water Resource Board

to issue revenue bonds to a local water project sponsor to construct a hydroelectric power project which serves no other water development, usage, or conservation purpose. OAG 85-2.

The Idaho Water Resource Board could issue revenue bonds to fund Idaho's share of a joint water project constructed by another entity without legislative approval. OAG 89-1.

The Idaho Water Resource Board has authority to issue revenue bonds, either separately or jointly with the other compacting states, to fund Idaho's share of a joint water project on the Bear River within Idaho, Utah, or Wyoming. However, the Idaho Legislature must authorize construction of the project before the Idaho Water Resource Board may issue the revenue bonds. OAG 89-1.

42-1734A. Comprehensive state water plan. — (1) The board shall, subject to legislative approval, progressively formulate, adopt and implement a comprehensive state water plan for conservation, development, management and optimum use of all unappropriated water resources and waterways of this state in the public interest. The comprehensive state water plan shall consist of: Part A — statewide policies, goals and objectives; and Part B — component water plans for individual waterways, river basins, drainage areas, river reaches, ground water aquifers or other geographic designations. As part of Part B of the comprehensive state water plan, the board may designate selected waterways as protected rivers as provided in this chapter. The comprehensive state water plan shall be based upon studies and public hearings in affected areas at which all interested parties shall be given the opportunity to appear, or to present written testimony in response to published proposals for such policy programs and proposed designations. A minimum of sixty (60) days shall be allowed between publication of a proposal and the date on which no further testimony on the proposal will be accepted. All comments in writing shall be preserved as a part of the record of the board. In adopting a comprehensive state water plan the board shall be guided by these criteria:

- (a) Existing rights, established duties, and the relative priorities of water established in article XV, section 3, of the constitution of the state of Idaho, shall be protected and preserved;
- (b) Optimum economic development in the interest of and for the benefit of the state as a whole shall be achieved by integration and coordination of the use of water and the augmentation of existing supplies and by protection of designated waterways for all beneficial purposes;
- (c) Adequate and safe water supplies for human consumption and maximum supplies for other beneficial uses shall be preserved and protected;
- (d) Subject to prior existing water rights for the beneficial uses now or hereafter prescribed by law, minimum stream flow for aquatic life, recreation and aesthetics and the minimization of pollution and the protection and preservation of waterways in the manner hereafter pro-

vided shall be fostered and encouraged and consideration shall be given to the development and protection of water recreation facilities;

(e) Watershed conservation practices consistent with sound engineering and economic principles shall be encouraged.

(2) The board may develop a comprehensive state water plan in stages based upon waterways, river basins, drainage areas, river reaches, ground-water aquifers, or other geographic considerations. The component of the comprehensive state water plan prepared for particular water resources and waterways shall contain, among other things, the following:

(a) A description of the water resources and waterway or waterways that are the subject of the plan, including pertinent maps detailing the geographic area of the plan;

(b) A description of the significant resources of the water resources and waterway or waterways;

(c) A description of the various existing and planned uses for these resources including currently undeveloped areas of the waterway and future plans for those areas, with a discussion of the advantages and disadvantages associated with each planned use; and

(d) A discussion of goals, objectives, and recommendations for improving, developing, or conserving the water resources and waterway or waterways in relation to these resources, including an examination of how different uses will promote the overall public interest, a statement as to the goals the plan expects to achieve, and an analysis of how any specific recommendations further those goals. A description of the methodology used in developing the plan shall be included.

(3) The description of the resources and uses in subsections (2)(b) and (2)(c) of this section shall contain, among other things:

(a) navigation;

(b) power development;

(c) energy conservation;

(d) fish and wildlife;

(e) recreational opportunities;

(f) irrigation;

(g) flood control;

(h) water supply;

(i) timber;

(j) mining;

(k) livestock watering;

(l) scenic values;

(m) natural or cultural features;

(n) domestic, municipal, commercial and industrial uses; and

(o) other aspects of environmental quality and economic development.

(4) The comprehensive state water plan may designate protected rivers. Designations shall be based upon a determination by the board that the value of preserving a waterway for particular uses outweighs that of developing the waterway for other beneficial uses and shall specify whether a protected river is designated as a natural or recreational river. The plan may also describe those water resources and waterways which are not designated as protected rivers.

(5) In designating a natural river, the board shall prohibit the following activities:

- (a) construction or expansion of dams or impoundments;
- (b) construction of hydropower projects;
- (c) construction of water diversion works;
- (d) dredge or placer mining;
- (e) alterations of the stream bed; and
- (f) mineral or sand and gravel extraction within the stream bed.

(6) In designating a recreational river, the board shall determine which of the activities listed in subsection (5) of this section shall be prohibited and may specify the terms and conditions under which activities that are not prohibited may go forward.

(7) Any prohibition or terms and conditions imposed pursuant to subsections (5) and (6) of this section shall remain in effect until the legislature acts upon the recommendation of the board as provided in section 42-1734B, Idaho Code, or until the legislature revokes its earlier approval of a protected river by law. [I.C., § 42-1734A, as added by 1988, ch. 370, § 5, p. 1090; am. 1998, ch. 63, § 1, p. 220.]

South Fork Boise River Sub-basin Comprehensive State Water Plan. Section 1 of S.L. 1991, ch. 24 read: "That pursuant to section 42-1734B(6), Idaho Code, the comprehensive state water plan for the South Fork Boise River sub-basin, adopted by resolution of the Idaho water resource board on June 29, 1990, be, and the same is hereby ratified and approved. In accordance with section 42-1734A, Idaho Code, the sub-basin plan includes protected river reach designations summarized as follows:

"(1) The South Fork Boise River from Anderson Ranch Dam downstream to Black Canyon Creek as a recreational river;

"(2) The South Fork Boise River from the mouth of Black Canyon Creek downstream to a point 250 yards upstream of Neal Bridge as a natural river;

"(3) Lime Creek from its mouth to its headwaters and all tributaries on the north side of Lime Creek, including the north and middle forks and all their tributaries from their mouth to their headwaters, as natural rivers; and all remaining tributaries of Lime Creek from their mouth to their headwaters as recreational rivers; and

"(4) Big Smoky Creek from its confluence with Calf Creek to its headwaters and all tributaries of Big Smoky Creek above and including Calf Creek from their mouth to their headwaters as natural rivers."

Section 2 of S.L. 1991, ch. 24 declared an emergency. Approved March 4, 1991.

Payette River Reaches Comprehensive State Water Plan. Section 1 of S.L. 1991, ch. 221 read: "That pursuant to Section 42-1734B(6), Idaho Code, the Comprehensive State Water Plan for the Payette River

Reaches, adopted by resolution of the Idaho Water Resource Board on February 1, 1991, be, and the same is hereby ratified and approved. In accordance with Section 42-1734A, Idaho Code, the basin plan includes protected river reach designations summarized as follows:

"(1) The South Fork of the Payette River from the boundary of the Sawtooth National Recreation Area to its confluence with the Middle Fork Payette River as a recreational river;

"(2) The North Fork of the Payette River from Cabarton Bridge to its confluence with the Payette River as a recreational river; and

"(3) The Payette River from the confluence of the Middle and South Forks of the Payette River to Beehive Bend (a point approximately two and one-half miles upstream of Gardena) as a recreational river."

Compiler's notes. Sections 1 and 2 of S.L. 1992, ch. 340 read: "Notwithstanding any other provisions of law to the contrary, the Water Resource Board shall designate the following stretches or reaches in the Henrys Fork Basin as an interim protected river pursuant to Section 42-1734D, Idaho Code. The Water Resource Board shall determine which of the activities listed in subsection (5) of Section 42-1734A, Idaho Code, are prohibited. The aforementioned stretches or reaches are summarized as follows:

"(1) Henrys Fork of the Snake River from its point of origin at Henrys Lake to the point of its confluence with the backwaters of Ashton Reservoir.

"(2) Warm River: Partridge Creek to Warm River Campground.

"(3) Falls River: Idaho border to Kirkham bridge.

"(4) Bitch Creek: Idaho border to mouth.

"(5) Teton River: Trail Creek to the backwaters of Teton Dam.

"Interim protected river status provided by this act shall be terminated not later than ten (10) days following the end of the regular legislative session in 1994.

"An emergency existing therefor, which emergency is hereby declared to exist, this act shall be in full force and effect on and after its passage and approval." Approved April 14, 1992.

North Fork Clearwater Basin Comprehensive State Water Plan. Section 1 of S.L. 1996, ch. 296 read: "That pursuant to Section 42-1734B(6), Idaho Code, the Comprehensive State Water Plan for the North Fork Clearwater Basin, adopted by resolution of the Idaho Water Resource Board on January 12, 1996, be, and the same is hereby ratified and approved. In accordance with Section 42-1734A, Idaho Code, the basin plan includes protected river reach designations summarized as follows:

"(1) Cayuse Creek, headwaters to mouth, as a natural river;

"(2) Isabella Creek, headwaters to Black Creek, as a natural river;

"(3) Kelly Creek, headwaters to Moose Creek, as a natural river;

"(4) Little North Fork Clearwater River, Meadow Creek to Cedar Creek, as a natural river;

"(5) North Fork Clearwater River, headwaters to Wrangle Creek, as a natural river;

"(6) North Fork Clearwater River, Isabella Creek to Dworshak Reservoir backwaters, as a natural river;

"(7) Weitas Creek, headwaters to mouth, as a natural river;

"(8) Beaver Creek, Charlie Creek to mouth, as a recreational river;

"(9) Elk Creek, headwaters to Deep Creek, as a recreational river;

"(10) Isabella Creek, Black Creek to mouth, as a recreational river;

"(11) Kelly Creek, Moose Creek to mouth, as a recreational river;

"(12) Little North Fork Clearwater River, Cedar Creek to Dworshak Reservoir backwaters, as a recreational river;

"(13) Little North Fork Clearwater River, headwaters to Meadow Creek, as a recreational river;

"(14) North Fork Clearwater River, Wrangle Creek to Isabella Creek, as a recreational river; and

"(15) Reeds Creek, Calhoun Creek to mouth, as a recreational river."

Section 2 of S.L. 1996, ch. 296 read: "An emergency existing therefor, which emergency is hereby declared to exist, this act shall be in full force and effect on and after its passage and approval." Approved March 18, 1996.

Sec. to sec. ref. This section is referred to in §§ 42-1731, 42-1734B, 42-1734D and 42-1734H.

Opinions of Attorney General. Idaho Const., Art. 15, § 7 did not prohibit legislative action on the Payette River Plan during the 1991 legislative session; while § 42-1734B(6) provides for one method of legislative review of such river plans, it does not preclude the legislature from enacting a specific law approving, amending or rejecting the Comprehensive State Plan. OAG 91-5.

The term "change" in Idaho Const., Article 15, § 7 only refers to deletions or revisions to the existing State Water Plan and since the Comprehensive State Plan by the Idaho Water Resource Board was an addition of a new component to the existing State Water Plan, it was not a change under § 7, Article 15, of the Idaho Constitution. OAG 91-5.

42-1734B. Board procedures for adopting a comprehensive state water plan. — (1) Prior to the adoption of the comprehensive state water plan or any component of the comprehensive plan, the board shall conduct hearings in the manner provided in section 42-1734A, Idaho Code.

(2) In the preparation, adoption, and implementation of the comprehensive state water plan, the board shall encourage the cooperation, participation, and assistance of state agencies. The board also shall solicit economic, energy, environmental, and other technical studies and recommendations from state agencies with particular expertise. All agencies of the state of Idaho shall cooperate with the board by providing requested existing information and studies pertaining in any manner to any matters which are the subject of this act. The board shall have discretion to balance all factors relevant to the formulation, adoption and implementation of the compre-

hensive state water plan and implementation and the designation of protected rivers.

(3) Any state agency may petition the board to amend the comprehensive state water plan. The board shall review any petition filed pursuant to this section within six (6) months after it is filed and shall either commence action to amend the comprehensive plan or set forth its reasons for denying the request in writing.

(4) All state agencies shall exercise their duties in a manner consistent with the comprehensive state water plan. These duties include but are not limited to the issuance of permits, licenses, and certifications; provided, however, that nothing in this chapter shall be construed to affect the authority of any state agency with respect to activities not prohibited by the comprehensive state water plan. The designation of a waterway as a natural or recreation river shall not preclude the department of health and welfare from establishing water quality standards for such waterway.

(5) When a comprehensive state water plan is adopted, copies thereof shall be filed in the office of the governor and director of the department of water resources, and published and distributed generally.

(6) The comprehensive state water plan and any component thereof developed for a particular waterway or waterways is subject to review and amendment by the legislature of the state of Idaho by law at the regular session immediately following the board's adoption of the comprehensive state water plan or component thereof. The board shall submit all subsequent modifications to the legislature in the same manner as provided in this subsection.

(7) The board shall review and reevaluate Part A of the comprehensive state water plan, or any one (1) or more of the component water plans comprising Part B of the comprehensive state water plan, upon the adoption of a concurrent resolution of the legislature directing the review or requesting a specific amendment to the plan. The board also may undertake the review in response to a petition for amendment filed pursuant to subsection (3) of this section, or upon the board's own initiative, as determined necessary by the board. Amendments to Part A or Part B of the comprehensive state water plan shall be adopted in the same manner as the original plan.

(8) A protected river designated by the board shall not become a final part of the comprehensive state water plan until approved by law. If the legislature does not approve a protected river by law at the regular session immediately following the board's designation of such protected river, then the designation of such protected river shall terminate and any prohibition or terms and conditions imposed on such protected river pursuant to subsection (5) or (6) of section 42-1734A, Idaho Code, shall be terminated ten (10) days following the end of the session. The failure to approve a protected river shall not operate to invalidate a comprehensive plan or component thereof. Nothing in this subsection shall prevent the legislature, however, from approving such protected river and reinstituting or modifying such prohibitions or terms and conditions in a subsequent session.

(9) After adoption of a comprehensive plan or component thereof, the board shall administer the implementation of the plan. [I.C., § 42-1734B, as added by 1988, ch. 370, § 5, p. 1090; am. 1998, ch. 63, § 2, p. 220.]

Compiler's notes. The words "this act" refer to S.L. 1988, ch. 370, § 5 compiled as §§ 42-1734A — 42-1734I.

Henrys Fork Basin Comprehensive State Water Plan. Section 1 of S.L. 1993, ch. 66 read: "That pursuant to Section 42-1734B(6), Idaho Code, the Comprehensive State Water Plan for the Henrys Fork Basin, adopted by resolution of the Idaho Water Resource Board on December 3, 1992, be, and the same is hereby approved."

Section 2 of S.L. 1993, ch. 66 read: "The following stream reaches of the Henrys Fork of the Snake River and its tributaries are designated as protected rivers with the associated prohibited activities as set forth in the plan:

"1. Targhee Creek, including West and East Forks: from source to National Forest boundary (12.5 miles) — Natural

"Targhee Creek, including West and East Forks, from sources to the Targhee National Forest boundary (Forest Route 057 bridge) is designated a state natural river. Pursuant to Idaho Code 42-1734A(5), the following activities are prohibited: construction or expansion of dams or impoundments; construction of hydropower projects; construction of water diversion works; dredge or placer mining; alterations of the streambed; and mineral or sand and gravel extraction within the streambed. *

"2. Henrys Fork: Big Springs to Island Park Reservoir (11 miles) and the lower two miles of Henrys Lake Outlet — Recreational

"The Henrys Fork from Big Springs to Island Park Reservoir (McCrae Bridge) is designated a state recreational river. Also designated a state recreational river is the last two miles of Henrys Lake Outlet (also known as the Henrys Fork) starting at the beginning of the Forest Service land between Sections 29 and 30 near the Forest Boundary and ending at the mouth in Section 32, all in T. 14 N., R. 44 E. Pursuant to Idaho Code 42-1734A(6), the following activities are prohibited: construction or expansion of dams or impoundments; construction of hydropower projects; dredge or placer mining; and mineral or sand and gravel extraction within the streambed.

"Stream channel alterations shall be prohibited except those necessary to maintain and improve existing utilities, roadways, diversion works, fishery enhancement facilities and managed stream access facilities; for the maintenance of private property; for new diversion works; and for public agencies to construct public access facilities and fishery enhancement facilities. In addition, new pri-

vate stream access facilities may be allowed with Idaho Water Resource Board approval.

"New diversion works shall be limited to pump installations which do not create an obstruction in the river; are visually blended with the surroundings so as to be less noticeable from the river; are provided with fish screens if appropriate; are to supply water for livestock, domestic, commercial or municipal uses; are sized to supply water at a rate not to exceed 0.5 cubic feet per second; and which receive the aesthetic and fish screen design approval of the Idaho Department of Water Resources.

"3. Henrys Fork: Island Park Dam to Riverside Campground (16 miles) — Recreational

"The Henrys Fork from the downstream right-of-way line of the U.S. Bureau of Reclamation Island Park Dam to the section line between Sections 24 and 25, T. 11 N., R. 42 E., located approximately one-fourth mile below Riverside Campground, is designated a state recreation river. Pursuant to Idaho Code 42-1734A(6), the following activities are prohibited: construction or expansion of dams or impoundment; construction of hydropower projects; dredge or placer mining; and mineral or sand and gravel extraction within the streambed.

"Stream channel alterations shall be prohibited except those necessary to maintain and improve existing utilities, roadways, diversion works, fishery enhancement facilities and managed stream access facilities; for the maintenance of private property; for new diversion works; and for public agencies to construct fishery enhancement facilities and public access facilities. In addition, new private stream access facilities may be allowed with Idaho Water Resource Board approval.

"New diversion works shall be limited to pump installations which do not create an obstruction in the river; are visually blended with the surroundings so as to be less noticeable from the river; are provided with fish screens if appropriate; are to supply water for livestock, domestic, commercial or municipal uses; are sized to supply water at a rate not to exceed 0.5 cubic feet per second; and which receive the aesthetic and fish screen design approval of the Idaho Department of Water Resources.

"4. Golden Lake, Silver Lake and Thurman Creek from Golden Lake to mouth (4 miles) — Recreational.

"Golden Lake, Silver Lake and Thurman Creek from Golden Lake to its confluence with the Henrys Fork, all mostly within

Harriman State Park, are designated state recreational rivers (waterways). Waterways can include lakes. Pursuant to Idaho Code 42-1734A(6), the following activities are prohibited: construction of hydropower projects; construction of water diversion works; dredge or placer mining; and mineral or sand and gravel extraction within the streambed.

"Stream channel alterations shall be prohibited except those necessary to maintain and improve existing utilities, roadways, diversion works, impoundments, fish and wildlife enhancement facilities and public stream access facilities and for public agencies to construct public access facilities, and fish and wildlife enhancement facilities.

"5. Henrys Fork: Riverside Campground to Hatchery Ford (4 miles) — Natural

"The Henrys Fork from the section line between Section 24 and 25, T. 11 N., R. 42 E., located approximately one-fourth mile below Riverside Campground to a point 100 feet upstream of the Forest Service boat ramp at Hatchery Ford is designated a state natural river. Pursuant to Idaho Code 42-1734A(5), the following activities are prohibited: construction or expansion of dams or impoundments; construction of hydropower projects; construction of water diversion works; dredge or placer mining; alterations of the streambed; and mineral or sand and gravel extraction within the streambed.

"6. Henrys Fork: 100 feet upstream of the Hatchery Ford boat ramp to a point 300 feet downstream of the ramp (approximately 400 feet) — Recreational

"The Henrys Fork from a point 100 feet upstream of the Forest Service boat ramp to a point approximately 300 feet downstream of the ramp, is designated a state recreational river. Pursuant to Idaho Code 42-1734A(6), the following activities are prohibited: construction or expansion of dams or impoundments; construction of hydropower projects; construction of water diversion works; dredge or placer mining; and mineral or sand and gravel extraction within the streambed.

"7. Henrys Fork: Hatchery Ford boat ramp to National Forest Boundary near Warm River (13 miles) — Natural

"The Henrys Fork from a point 300 feet downstream of the Hatchery Ford boat ramp to the southern boundary of the Targhee National Forest near the mouth of Warm River is designated a state natural river. Pursuant to Idaho Code 42-1734A(5), the following activities are prohibited: construction or expansion of dams or impoundments; construction of hydropower projects; construction of water diversion works; dredge or placer mining; alterations of the streambed; and mineral or sand and gravel extraction within the streambed.

"8. Henrys Fork: Forest Boundary near

Warm River to Ashton Reservoir (8 miles) — Recreational

"The Henrys Fork from the southern boundary of the Targhee National Forest near Warm River to the U.S. Highway 20 bridge near the upstream limit of Ashton Reservoir is designated a state recreational river. Pursuant to Idaho Code 42-1734A(6), the following activities are prohibited: construction of expansion of dams or impoundments; construction of hydropower projects; dredge or placer mining; and mineral or sand and gravel extraction within the streambed.

"Stream channel alterations are prohibited except those necessary to maintain and improve existing utilities, roadways, diversion works, fishery enhancement facilities and managed stream access facilities; for the maintenance of private property; for new water diversion works; and for public agencies to construct public access facilities and fishery enhancement facilities. In addition, new private stream access facilities may be allowed with Idaho Water Resource Board approval.

"New diversion works shall be limited to installations which have the main riverbed structure located below the water level and blended with the riverbed or to pumping installations which do not create an obstruction in the river, and are visually blended with the surroundings so as to be less noticeable from the river; are provided with fish screens if appropriate; and which receive the aesthetic and fish screen design approval of the Idaho Department of Water Resources.

"9. Henrys Fork: Ashton Dam to Falls River (6 miles) — Recreational

"The Henrys Fork from the south property line of the Utah Power and Light Co. Ashton Dam property to the confluence with the Falls River is designated a state recreational river. Pursuant to Idaho Code 42-1734A(6), the following activities are prohibited: construction or expansion of dams or impoundments; construction of hydropower projects; dredge or placer mining; and mineral or sand and gravel extraction within the streambed.

"Stream channel alteration is prohibited except those necessary to maintain and improve existing utilities, roadways diversion works, fishery enhancement facilities and managed stream access facilities; for the maintenance of private property; for new water diversion works; and for public agencies to construct public access facilities and fishery enhancement facilities. In addition, new private stream access facilities may be allowed with Idaho Water Resource Board approval.

"New diversion works shall be limited to pump installations which do not create an obstruction in the river; are visually blended with the surroundings so as to be less noticeable from the river; are provided with fish screens if appropriate; are to supply water for

livestock, domestic, commercial or municipal uses; are sized to supply water at a rate not to exceed 0.5 cubic feet per second; and which receive the aesthetic and fish screen design approval of the Idaho Department of Water Resources.

"10. Buffalo River (8 miles) and Elk Creek (1 mile) — Recreational

"The Buffalo River from the springs (in the SW $\frac{1}{4}$ of Sec. 21, T. 13 N., R. 44 E.) to its confluence with the Henrys Fork and Elk Creek from below the right-of-way line of Elk Creek Dam to its confluence with the Buffalo River are designated state recreational rivers. Pursuant to Idaho Code 42-1734A(6), the following activities are prohibited: dredge or placer mining; and mineral or sand and gravel extraction within the streambed.

"The construction of hydropower projects is prohibited except for the rebuilding of the Ponds Lodge hydropower facility.

"Stream channel alteration is prohibited except those necessary to maintain and improve existing utilities, roadways diversion works, fishery enhancement facilities and managed stream access facilities; for the maintenance of private property; for new water diversion works; and for public agencies to construct public access facilities and fishery enhancement facilities; and for new diversion works including those associated with the rebuilding and upgrading of the Ponds Lodge hydroelectric project providing the conditions of the stream channel permit process are met.

"Construction or expansion of dams or impoundments are prohibited unless associated with the rebuilding and upgrading, including a raise in the water level, of the Ponds Lodge project.

"New diversion works shall be limited to pump installations which do not create an obstruction in the river; are visually blended with the surroundings so as to be less noticeable from the river; are provided with fish screens if appropriate; are to supply water for livestock, domestic, commercial or municipal uses; are sized to supply water at a rate not to exceed 0.5 cubic feet per second; and which receive the aesthetic and fish screen design approval of the Idaho Department of Water Resources.

"11. Warm river: Partridge Creek to the Forest Route 153 bridge (approximately $\frac{1}{4}$ mile) — Natural

"The Warm River from its confluence with Partridge Creek downstream to a point 100 feet upstream of the Forest Route 153 bridge is designated a state natural river. Pursuant to Idaho Code 42-1734A(6), the following activities are prohibited: construction or expansion of dams or impoundments; construction of hydropower projects; construction of water diversion works; dredge or placer mining; alterations of the streambed; and mineral or

sand and gravel extraction within the streambed.

"12. Warm River: Forest Route 153 bridge area (approximately 200 feet) — Recreational

"The Warm River from a point 100 feet upstream of the Forest Route 153 bridge (in the NW $\frac{1}{4}$ of Sec. 20, T. 44 E., R. 11 N., B.M.) to a point 100 feet downstream of the bridge is designated a state recreational river. Pursuant to Idaho Code 42-1734A(6), the following activities are prohibited: construction or expansion of dams or impoundments; construction of hydropower projects; construction of water diversion works; dredge or placer mining; and mineral or sand and gravel extraction within the streambed.

"Stream channel alterations are prohibited except those necessary to maintain, improve, or replace the bridge.

"13. Warm River: Forest Route 153 bridge to Forest Route 154 bridge (7 miles) — Natural.

"The Warm River from a point 100 feet downstream of the Forest Route 153 bridge to a point 100 feet upstream of the Forest Route 154 bridge is designated a state natural river. Pursuant to Idaho Code 42-1734A(5), the following activities are prohibited: construction or expansion of dams or impoundments; construction of hydropower projects; construction of water diversion works; dredge or placer mining; alterations of the streambed; and mineral or sand and gravel extraction within the streambed.

"14. Warm River: Forest Route 154 bridge area (approximately 200 feet) — Recreational

"The Warm River from a point 100 feet upstream of the Forest Route 154 bridge (in the SW $\frac{1}{4}$ of Sec. 10, T. 44 E., R. 44 E., B.M.) to a point 100 feet downstream of the bridge is designated a state recreational river. Pursuant to Idaho Code 42-1734A(6), the following activities are prohibited: construction or expansion of dams or impoundments; construction of hydropower projects; construction of water diversion works; dredge or placer mining; and mineral or sand and gravel extraction within the streambed.

"Stream channel alterations are prohibited except those necessary to maintain, improve, or replace the bridge.

"15. Warm River: Forest Route 154 bridge to Warm River Campground (7 miles) — Natural

"The Warm River from a point 100 feet downstream of the Forest Route 154 bridge to a point 100 feet upstream of the bridge near the upstream edge of Warm River Campground (in the SW $\frac{1}{4}$ of Sec. 7, T. 9 N., R. 44 E., B.M.) is designated a state natural river. Pursuant to Idaho Code 42-1734A(5), the following activities are prohibited: construction or expansion of dams or impoundments; construction of hydropower projects; con-

struction of water diversion works; dredge or placer mining; alterations of the streambed; and mineral or sand and gravel extraction within the streambed.

"16. Robinson Creek: from Yellowstone Park boundary to Forest Route 241 bridge (10 miles) — Natural

"Robinson Creek from the Yellowstone National Park boundary to a point 100 feet upstream of the Forest Route 241 bridge is designated a state natural river. Pursuant to Idaho Code 42-1734A(5), the following activities are prohibited: construction or expansion of dams or impoundments; construction of hydropower projects; construction of water diversion works; dredge or placer mining; alterations of the streambed; and mineral or sand and gravel extraction within the streambed.

"17. Robinson Creek: Forest Route 241 bridge to mouth (4 miles) — Recreational

"Robinson Creek from a point 100 feet upstream of Forest Route 241 bridge to its confluence with Warm River is designated a state recreational river. Pursuant to Idaho Code 42-1734A(6), the following activities are prohibited: construction or expansion of dams or impoundments; construction of hydropower projects; construction of water diversion works; dredge or placer mining; and mineral or sand and gravel extraction within the streambed.

"Stream channel alterations are prohibited except those necessary to repair or replace existing bridges.

"18. Rock Creek: from Yellowstone Park boundary to mouth (9 miles) — Recreational

"Rock Creek from the Yellowstone National Park boundary to its confluence with Robinson Creek is designated a state recreational river. Pursuant to Idaho Code 42-1734A(6), the following activities are prohibited: construction or expansion of dams or impoundments; construction of hydropower projects; construction of water diversion works; dredge or placer mining; and mineral or sand and gravel extraction within the streambed.

"Stream channel alterations are prohibited except those necessary to repair or replace existing bridges.

"19. Falls River: Idaho border to a point 100 feet upstream of the Yellowstone Diversion Dam (7 miles) — Natural

"The Falls River from the Idaho border to a point 100 feet upstream of the upstream right-of-way boundary of the Yellowstone Diversion Dam, is designated a state natural river. Pursuant to Idaho Code 42-1734A(5), the following activities are prohibited: construction or expansion of dams or impoundments; construction of hydropower projects; construction of water diversion works; dredge or placer mining; alterations of the

streambed; and mineral or sand and gravel extraction within the streambed.

"20. Falls River: from 100 feet upstream of the Yellowstone Diversion Dam to Kirkham Bridge (11 miles) — Recreational

"The Falls River from a point 100 feet upstream of the upstream right-of-way boundary of Yellowstone Diversion Dam to the Kirkham Bridge, located in Sections 2 and 3 along the northern boundary of T. 8 N., R. 43 E., is designated a state recreational river. Pursuant to Idaho Code 42-1734A(6), the following activities are prohibited: construction or expansion of dams or impoundments; construction of hydropower projects; construction of water diversion works; dredge or placer mining; and mineral or sand and gravel extraction within the streambed.

"The construction of water diversion works is prohibited except for those associated with off-stream storage projects. The Water Resource Board cannot support any project at this time since feasibility studies are not available for consideration. The existing water-right process provides opportunity for the public and the Water Resource Board to be involved in the approval of any potential project.

"Stream channel alterations are prohibited except those necessary to maintain, improve, or relocate existing utilities, roadways, diversion works, fishery enhancement facilities and, managed stream access facilities; for the maintenance of private property; for new off-stream storage projects; and for public agencies to construct public access facilities and fishery enhancement facilities.

"The Falls River (FERC #9885) hydropower project will use the existing Marysville Canal diversion. This project has received a FERC license, and is such is considered a vested right by the Water Resource Board. The prohibitions associated with this state protected river designation, therefore, do not apply to this project.

"21. Boone Creek: Idaho border to mouth (4 miles) — Natural

"Boone Creek from the Idaho border to its confluence with Falls River is designated a state natural river. Pursuant to Idaho Code 42-1734A(5), the following activities are prohibited: construction or expansion of dams or impoundments; construction of hydropower projects; construction of water diversion works; dredge or placer mining; alterations of the streambed; and mineral or sand and gravel extraction within the streambed.

"22. Conant Creek: Idaho border to National Forest boundary (6 miles) — Natural

"Conant Creek from the Idaho border to the Targhee National Forest boundary is designated a state natural river. Pursuant to Idaho Code 42-1734A(5), the following activities are

prohibited: construction or expansion of dams or impoundments; construction of hydropower projects; construction of water diversion works; dredge or placer mining; alterations of the streambed; and mineral or sand and gravel extraction within the streambed.

"23. Conant Creek: National Forest boundary to Conant Creek diversion structure (3 miles) — Recreational

"Conant Creek from the Idaho border to the Targhee National Forest boundary is designated a state recreational river. Pursuant to Idaho Code 42-1734A(6), the following activities are prohibited: construction or expansion of dams or impoundments; construction of hydropower projects; dredge or placer mining; and mineral or sand and gravel extraction within the streambed.

"Stream channel alterations are prohibited except those necessary to maintain diversion works; fishery enhancement facilities and managed stream access facilities; for the maintenance of private property; for new diversion works; and for public agencies to construct public access facilities and fishery enhancement facilities. New private stream access facilities may be allowed with Idaho Water Resource Board approval.

"New diversion works shall be limited to pump installations which do not create an obstruction in the river; are visually blended with the surroundings so as to be less noticeable from the river; are provided with fish screens if appropriate; are to supply water for livestock, domestic, commercial or municipal uses; are sized to supply water at a rate not to exceed 0.5 cubic feet per second; and which receive the aesthetic and fish screen design approval of the Idaho Department of Water Resources.

"24. Teton River: Trail Creek to Highway 33 (14 miles) — Recreational

"The Teton River from its confluence with Trail Creek to the Highway 33 bridge is designated a state recreational river. Pursuant to Idaho Code 42-1734A(6), the following activities are prohibited: construction or expansion of dams or impoundments; construction of hydropower projects; construction of water diversion works; dredge or placer mining; and mineral or sand and gravel extraction within the streambed.

"Stream channel alterations shall be prohibited except those necessary to maintain and improve existing utilities, roadways, diversion works, impoundments, fish and wildlife enhancement facilities and public stream access facilities, and for public agencies to construct public access facilities and fish and wildlife enhancement facilities.

"25. Teton River: Highway 33 to Felt Dam (11 miles) — Recreational

"The Teton River from the Highway 33

bridge to Felt Dam is designated a state recreational river. Pursuant to Idaho Code 42-1734A(6), the following activities are prohibited: construction or expansion of dams or impoundments; construction of hydropower projects; construction of water diversion works; dredge or placer mining; and mineral or sand and gravel extraction within the streambed.

"The construction of hydropower projects is prohibited except for the Upper Teton Project (FERC #10613), located in Sec. 3, T. 6 N., R. 44 E. The Water Resource Board has reviewed this proposed project and feels that the minimum streamflow that exists will provide sufficient protection to the river in the project area.

"The construction of water diversion works is prohibited except for those associated with off-stream storage projects. The Water Resource Board cannot support any project at this time since feasibility studies are not available for consideration. The existing water-right process provides opportunity for the public and the Water Resource Board to be involved in the approval of any potential project.

"Stream channel alterations are prohibited except those necessary to maintain and improve existing utilities, roadways, diversion works, fishery enhancement facilities and managed stream access facilities; for the maintenance of private property; for new off-stream storage projects; and for public agencies to construct public access facilities and fishery enhancement facilities.

"26. Teton Creek: from the springs near Highway 33 to mouth (3 miles) — Recreational

"Teton Creek from the springs near Highway 33 to its confluence with the Teton River is designated a state recreational river. Pursuant to Idaho Code 42-1734A(6), the following activities are prohibited: construction or expansion of dams or impoundments; construction of hydropower projects; construction of water diversion works; dredge or placer mining; and mineral or sand and gravel extraction within the streambed.

"Stream channel alterations are prohibited except those necessary to maintain diversion works, fishery enhancement facilities and managed stream access facilities; for the maintenance of private property; for new diversion works; and for public agencies to construct public access facilities and fishery enhancement facilities. New private stream access facilities may be allowed with Idaho Water Resource Board approval.

"New diversion works shall be limited to pump installations which do not create an obstruction in the river; are visually blended with the surroundings so as to be less noticeable from the river; are provided with fish

screens if appropriate; are to supply water for livestock, domestic, commercial or municipal uses; are sized to supply water at a rate not to exceed 0.5 cubic feet per second; and which receive the aesthetic and fish screen design approval of the Idaho Department of Water Resources.

"27. Fox Creek: from the springs to mouth (2.5 miles) — Recreational

"Fox Creek from the springs for approximately 2.5 miles to its confluence with the Teton River is designated a state recreational river. Pursuant to Idaho Code 42-1734A(6), the following activities are prohibited: construction or expansion of dams or impoundments; construction of hydropower projects; dredge or placer mining; and mineral or sand and gravel extraction within the streambed.

"Stream channel alterations are prohibited except those necessary to maintain diversion works; fishery enhancement facilities and managed stream access facilities; for the maintenance of private property; for new diversion works; and for public agencies to construct public access facilities and fishery enhancement facilities. New private stream access facilities may be allowed with Idaho Water Resource Board approval.

"New diversion works shall be limited to pump installations which do not create an obstruction in the river; are visually blended with the surroundings so as to be less noticeable from the river; are provided with fish screens if appropriate; are to supply water for livestock, domestic, commercial or municipal uses; are sized to supply water at a rate not to exceed 0.5 cubic feet per second; and which receive the aesthetic and fish screen design approval of the Idaho Department of Water Resources.

"28. Badger Creek: from the springs to mouth (3 miles) — Recreational

"Badger Creek from the springs in the canyon for approximately three miles to its confluence with the Teton River is designated a state recreational river. Pursuant to Idaho Code 42-1734A(6), the following activities are prohibited: construction or expansion of dams or impoundments; construction of hydropower projects; construction of water diversion works; dredge or placer mining; alterations of the streambed; and mineral or sand and gravel extraction within the streambed.

"29. Bitch Creek: Idaho Border to the railroad trestle (5 miles) — Natural

"Bitch Creek from the Idaho border to the railroad trestle in the NW $\frac{1}{4}$ of Sec. 9, T. 7 N., R. 45 E. is designated a state natural river. Pursuant to Idaho Code 42-1734A(5), the following activities are prohibited: construction or expansion of dams or impoundments; construction of hydropower projects; dredge or placer mining; alterations of the streambed;

and mineral or sand and gravel extraction within the streambed.

"30. Bitch Creek: Railroad trestle to Highway 32 (2 miles) — Recreational

"Bitch Creek from the railroad trestle in the NW $\frac{1}{4}$ of Sec. 9, T. 7 N., R. 45 E. to the Highway 32 bridge, located in the NW $\frac{1}{4}$ of Sec. 17, T. 7 N., R. 45 E., is designated a state recreational river. Pursuant to Idaho Code 42-1734A(6), the following activities are prohibited: construction or expansion of dams or impoundments; construction of hydropower projects; construction of water diversion works; dredge or placer mining; and mineral or sand and gravel extraction within the streambed.

"31. Bitch Creek: Highway 32 to mouth (7.5 miles) — Natural

"Bitch Creek from the Highway 32 bridge to its confluence with the Teton River is designated a state natural river. If Teton Dam is rebuilt to its original height, this designation shall terminate at the backwaters of the reservoir. Pursuant to Idaho Code 42-1734A(5), the following activities are prohibited: construction or expansion of dams or impoundments; construction of hydropower projects; construction of water diversion works; dredge or placer mining; alterations of the streambed; and mineral or sand and gravel extraction within the streambed.

"Upper Boise River Basin Comprehensive State Water Plan. Sections 1 and 2 of S.L. 1993, ch. 415 read: "Section 1. That pursuant to Section 42-1734B(6), Idaho Code, the Comprehensive State Water Plan for the Upper Boise River Basin, adopted by resolution of the Idaho Water Resource Board on December 3, 1992, is herein approved."

"Section 2. The following stream reaches of the Boise River and tributaries above Lucky Peak Dam are designated protected rivers as set forth in the plan adopted by the Water Resource Board;

"(1) Boise River (13.2 miles) — The main Boise River from the backwaters of Arrowrock Reservoir to the confluence of the North and Middle Forks of the Boise River is designated as a state Recreational River, and is conditioned to allow alteration of the streambed for construction and maintenance of bridges and culverts. The Board shall prohibit the following activities on the aforementioned reach:

- Construction or expansion of dams or impoundments
- Construction of hydropower projects
- Construction of water diversion works
- Dredge or placer mining
- Mineral or sand and gravel extraction within the streambed

"(2) Sheep Creek and tributaries (17.8 miles) — Sheep Creek, mouth to terminus of perennial water, and the following tributaries are designated as state Natural Rivers:

- South Fork Sheep Creek to terminus of perennial flow
- Devils Creek to terminus of perennial flow
- East Fork Sheep Creek to terminus of perennial flow

“(3) Middle Fork Boise River (14.5 miles)

— The Middle Fork Boise River from its confluence with the North Fork Boise River to the mouth of Roaring River is designated as a state Recreational River, and is conditioned to allow alteration of the streambed for construction and maintenance of bridges and culverts. The Board shall prohibit the following activities on the aforementioned reach:

- Construction or expansion of dams or impoundments
- Construction of hydropower projects
- Construction of water diversion works
- Dredge or placer mining
- Mineral or sand and gravel extraction within the streambed

“(4) Roaring River (5.6 miles) — The Roaring River from its confluence with the Middle Fork Boise River to the point where Forest Service Road 255 crosses Roaring River is designated as a state Recreational River, and is conditioned to allow alteration of the streambed for construction and maintenance of bridges and culverts. The Board shall prohibit the following activities on the aforementioned reach:

- Construction or expansion of dams or impoundments
- Construction of hydropower projects
- Construction of water diversion works
- Dredge or placer mining
- Mineral or sand and gravel extraction within the streambed

“(5) Roaring River and tributaries (17.0 miles) — The Roaring River and tributaries from the point where Forest Service Road 255 crosses Roaring River to its headwaters and the following forks are designated as state Natural Rivers.

- East Fork Roaring River to Little Roaring River Lake
- Middle Fork Roaring River to Twin Sisters Lake

“(6) North Fork Boise River (9.1 miles) — The North Fork Boise River from its confluence with the Middle Fork Boise River to the mouth of Rabbit Creek is designated as a state Natural River.

“(7) North Fork Boise River (9.1 miles) — The North Fork Boise River from the mouth of Rabbit Creek to the mouth of Crooked River is designated as a state Recreational River, and is conditioned to allow alterations of the streambed for construction and maintenance of bridges and culverts. The Board shall prohibit the following activities on the aforementioned reach:

- Construction or expansion of dams or impoundments
- Construction of hydropower projects
- Construction of water diversion works
- Dredge or placer mining
- Mineral or sand and gravel extraction within the streambed

“(8) North Fork Boise River and tributaries (28.6 miles) — The North Fork Boise River from the mouth of Hunter Creek to the mouth of Johnson Creek and the following tributaries are designated as state Natural Rivers.

- McNutt Creek to terminus of perennial flow
- Taylor Creek to terminus of perennial flow
- McDonald Creek to terminus of perennial flow
- Horsefly Creek to terminus of perennial flow
- Bluejay Creek to terminus of perennial flow
- Lodgepole Creek to terminus of perennial flow
- Bow Creek to terminus of perennial flow

“(9) North Fork Boise River and tributaries (8.4 miles) — The North Fork Boise River from the mouth of Johnson Creek to the boundary of the Sawtooth Wilderness Area and Big Silver Creek, mouth to headwaters, are designated as state Recreational Rivers, and are conditioned to allow alterations of the streambed for the construction and maintenance of bridges and culverts. The Board shall prohibit the following activities on the aforementioned reach:

- Construction or expansion of dams or impoundments
- Construction of hydropower projects
- Construction of water diversion works
- Dredge or placer mining
- Mineral or sand and gravel extraction within the streambed

“(10) Crooked River (10.1 miles) — The Crooked River from its mouth to the mouth of Edna Creek, is designated as a state Recreational River, and is conditioned to allow alterations of the streambed for the construction and maintenance of bridges and culverts; and dredge or placer mining and recreational dredge mining. The Board shall prohibit the following activities on the aforementioned reach:

- Construction or expansion of dams or impoundments
- Construction of hydropower projects
- Construction of water diversion works
- Mineral or sand and gravel extraction within the streambed

“(11) Bear River and tributaries (30.0 miles) — The Bear River from its mouth to terminus of perennial flow and the following tributaries are designated as state Recreational Rivers, and are conditioned to allow

alterations of the streambed for the construction and maintenance of bridges and culverts; and dredge or placer mining and recreational dredge mining.

- Bear Creek to terminus of perennial flow
- Rocky Creek to terminus of perennial flow
- Cub Creek to terminus of perennial flow
- South Fork Cub Creek to terminus of perennial flow
- Louise Creek to terminus of perennial flow
- Steamboat Creek to terminus of perennial flow

"The Board shall prohibit the following activities on the aforementioned reaches:

- Construction or expansion of dams or impoundments
- Construction of hydropower projects
- Construction of water diversion works
- Mineral or sand and gravel extraction within the streambed

"(12) Johnson Creek and tributaries (7.9 miles) — Johnson Creek from its mouth to the Sawtooth Wilderness Area boundary and the following tributaries are designated as state Natural Rivers.

- Robin Creek to terminus of perennial flow
- Grouse Creek to terminus of perennial flow."

Snake River, Milner Dam to King Hill, Comprehensive State Water Plan. Section 1 of S.L. 1994, ch. 108 read: "That pursuant to section 42-1734B(6), Idaho Code, the Comprehensive State Water Plan for the Snake River, Milner Dam to King Hill, Idaho, adopted by resolution of the Idaho Water Resource Board on December 10, 1993, is herein approved."

Section 2 of S.L. 1994, ch. 108 read: "The following stream reaches of the Snake River are designated protected rivers as set forth in the plan adopted by the Water Resource Board:

"1. Snake River from the downstream project boundary of the Milner Hydroelectric Project, (approximately 700 feet downstream from the Idaho Power Company main Milner powerhouse), River Mile 637, to a point 100 feet downstream of the Murtaugh Bridge 'Recreational' (7 miles). Within the segment the Board prohibits construction or expansion of dams or impoundments; construction of hydropower projects; and mineral or sand and gravel extraction. Within the stream channel, alterations would be prohibited except those necessary (1) to maintain and improve existing utilities, roadways, diversion works, fishery enhancement structures, and stream access facilities; (2) for the maintenance of private property; (3) for new diversion works; and (4) for construction of new public access facilities and fishery enhancement structures.

Construction of private river access facilities (i.e., boat docks) may be allowed with Idaho Water Resource Board and other regulatory agencies' approval. New diversion works are limited to pump installations which do not create an obstruction in the river; are to supply water for domestic, commercial, or municipal uses; are visually blended with the surroundings so as to be less noticeable from the river; and are constructed to minimize harm to fish and wildlife.

"2. Snake River 100 feet downstream of the Murtaugh Bridge to a point 100 feet upstream of the Hansen Bridge as 'Natural' (9.5 miles). Within the segment the Board prohibits construction or expansion of dams or impoundments; construction of hydropower projects; construction of water diversion works; dredge or placer mining; alterations of the stream bed; and mineral or sand and gravel extraction within the stream bed.

"3. Snake River 100 feet upstream of Hansen Bridge to the upstream project boundary of Twin Falls Hydroelectric Project [River Mile 619.5, the east boundary of Lot 5, Section 10, T10S, R18E, B.M.] 'Recreational' (2 miles). Within the segment, the Board prohibits construction or expansion of dams or impoundments; construction of hydropower projects; and mineral or sand and gravel extraction. Within the stream channel, alterations would be prohibited except those necessary (1) to maintain and improve existing utilities, roadways, diversion works, fishery enhancement structures, and stream access facilities; (2) for the maintenance of private property; (3) for new diversion works; and (4) for construction of new public access facilities and fishery enhancement structures. Construction of private river access facilities (i.e., boat docks) may be allowed with Idaho Water Resource Board and other regulatory agencies' approval. New diversion works are limited to pump installations that do not create an obstruction in the river; are to supply water for domestic, commercial, or municipal uses; are visually blended with the surroundings so as to be less noticeable from the river; and are constructed to minimize harm to fish and wildlife.

"4. Snake River from the downstream project boundary of the Twin Falls Hydroelectric Project [River Mile 617] to the confluence of the westerly spring flow from the Devil's Corral spring area [River Mile 616] 'Recreational' (1 mile). State protection of this segment shall in no way impede relicensing of the Shoshone Falls Hydroelectric Project, or an expansion of the Shoshone Falls Hydroelectric Project boundary that would not result in any change in the size of the impoundment or in reservoir elevation. Within the segment the Board prohibits construction or

expansion of dams or impoundments; construction of hydropower projects; and mineral or sand and gravel extraction. Within the stream channel, alterations would be prohibited except those necessary (1) to maintain and improve existing utilities, roadways, diversion works, fishery enhancement structures, and stream access facilities; (2) for the maintenance of private property; (3) for new diversion works; and (4) for construction of new public access facilities and fishery enhancement structures. Construction of private river access facilities (i.e., boat docks) may be allowed with Idaho Water Resource Board and other regulatory agencies' approval. New diversion works are limited to pump installations which do not create an obstruction in the river; are to supply water for domestic, commercial, or municipal uses; are visually blended with the surroundings so as to be less noticeable from the river; and are constructed to minimize harm to fish and wildlife.

"5. Snake River from River Mile 614.4 (approximately 800 feet downstream from the Shoshone Falls powerhouse) to the Highway 30 Bridge 'Recreational' (32 miles). The licensed Auger Falls Hydroelectric Project, FERC #4797, is exempt from the prohibitions of this designation. A permit to appropriate water for the Boulder Rapids Hydroelectric Project, FERC #10772, was approved in May, 1984, with extensions for proof of beneficial use authorized in 1989 and 1993. A public hearing, held in response to a request for exemption from interim protection designation prohibitions, identified significant public concern that the Boulder Rapids development would preclude or jeopardize existing beneficial uses. However, Idaho Code 42-1734F(1) states that prohibitions promulgated pursuant to State designation of protected rivers shall not limit, restrict, or conflict with approved applications for the appropriation of water.

"Within the segment the Board prohibits construction or expansion of dams or impoundments; construction of hydropower projects; and mineral or sand and gravel extraction. Within the stream channel, alterations would be prohibited except those necessary (1) to maintain and improve existing utilities, roadways, diversion works, fishery enhancement structures, and stream access facilities; (2) for the maintenance of private property; (3) for new diversion works; and (4) for construction of new public access facilities and fishery enhancement structures. Construction of private river access facilities (i.e., boat docks) may be allowed with Idaho Water Resource Board and other regulatory agencies' approval. New diversion works are limited to pump installations that do not create an obstruction in the river; are to supply

water for domestic, commercial, or municipal uses; are visually blended with the surroundings so as to be less noticeable from the river; and are constructed to minimize harm to fish and wildlife.

"6. Snake River from the downstream project boundary of the Lower Salmon Falls Hydroelectric Project [River Mile 573] to the upstream project boundary of the Bliss Hydroelectric Project [River Mile 565.5] 'Recreational' (8 miles). Within the segment the Board prohibits construction or expansion of dams or impoundments; construction of hydropower projects; and mineral or sand and gravel extraction. Within the stream channel, alterations would be prohibited except those necessary (1) to maintain and improve existing utilities, roadways, diversion works, fishery enhancement structures, and stream access facilities; (2) for the maintenance of private property; (3) for new diversion works; and (4) for construction of new public access facilities and fishery enhancement structures. Construction of private river access facilities (i.e., boat docks) may be allowed with Idaho Water Resource Board and other regulatory agencies' approval. New diversion works are limited to pump installations that do not create an obstruction in the river; are to supply water for domestic, commercial, or municipal uses; are visually blended with the surroundings so as to be less noticeable from the river; and are constructed to minimize harm to fish and wildlife.

"7. Snake River from the downstream project boundary of the Bliss Hydroelectric Project [River Mile 560] to the confluence of Clover Creek 'Recreational' (12 miles). Within the segment the Board prohibits construction or expansion of dams or impoundments; construction of hydropower projects; and mineral or sand and gravel extraction. Within the stream channel, alterations would be prohibited except those necessary (1) to maintain and improve existing utilities, roadways, diversion works, fishery enhancement structures, and stream access facilities; (2) for the maintenance of private property; (3) for new diversion works; and (4) for construction of new public access facilities and fishery enhancement structures. Construction of private river access facilities (i.e., boat docks) may be allowed with Idaho Water Resource Board and other regulatory agencies' approval. New diversion works are limited to pump installations that do not create an obstruction in the river; are to supply water for domestic, commercial, or municipal uses; are visually blended with the surroundings so as to be less noticeable from the river; and are constructed to minimize harm to fish and wildlife."

Priest River Basin Comprehensive State Water Plan Amendment. Section 1 of

S.L. 1996, ch. 299 read: "That pursuant to Section 42-1734B(6), Idaho Code, the amended Comprehensive State Water Plan for the Priest River Basin, adopted by resolution of the Idaho Water Resource Board on November 9, 1995, be, and the same is hereby ratified and approved. In accordance with Section 42-1734A, Idaho Code, the amended basin plan includes additional protected river reach designations summarized as follows:

- "(1) Lion Creek, headwaters to mouth, as a recreational river;
- "(2) Two-mouth Creek, headwaters to mouth, as a recreational river; and
- "(3) Indian Creek, headwaters to mouth, as a recreational river."

Section 2 of S.L. 1996, ch. 299 read: "An emergency existing therefor, which emergency is hereby declared to exist, this act shall be in full force and effect on and after its passage and approval." Approved March 18, 1996.

Sec. to sec. ref. This section is referred to in § 42-1734A.

Opinions of Attorney General. Section 7, Art. 15, of the Idaho Constitution did not prohibit legislative action on the Payette River Plan during the 1991 legislative session; while subsection (6) of this section provides for one method of legislative review of such river plans, it does not preclude the legislature from enacting a specific law approving, amending or rejecting the Comprehensive State Plan. OAG 91-5.

The term "change" in § 7, Article 15, of the Idaho Constitution only refers to deletions or revisions to the existing State Water Plan and since the Comprehensive State Plan by the Idaho Water Resource Board was an addition of a new component to the existing State Water Plan, it was not a change under § 7, Article 15, of the Idaho Constitution. OAG 91-5.

42-1734C. Status of comprehensive state water plan before federal agencies. — The comprehensive state water plan required by this chapter shall be submitted to the federal energy regulatory commission, and the pacific northwest electric power and conservation planning council, and any other federal agencies as the state water plan for the conservation, development, management and optimum use of the state of Idaho's water resource. [I.C., § 42-1734C, as added by 1988, ch. 370, § 5, p. 1090.]

42-1734D. Designation of interim protected rivers. — (1) Prior to the adoption of a comprehensive plan for a waterway, the board may designate a waterway as an interim protected river. Any state agency may petition the board to designate a waterway as an interim protected river. The board shall promulgate procedural rules for designation of interim protected rivers. The rules shall provide adequate notice to interested parties of any petitions filed or actions contemplated pursuant to this act.

(2) The board shall determine whether the nominated waterway merits designation as an interim protected river. The board shall accept or reject a nomination within six (6) months after it is filed. There shall be no review of any board decision rejecting or accepting a nomination for an interim protected river. Designation of a waterway as an interim protected river shall be based upon a determination that:

- (a) It is probable that the waterway would be designated a protected river in the comprehensive state water plan; and
- (b) Interim protected river status is necessary to protect the values that would support such waterway's designation as a protected river in a comprehensive state water plan.

(3) In designating a waterway for interim protected river status, the board shall indicate which of the activities listed in subsection 42-1734A(5), Idaho Code, shall be prohibited.

(4) Interim protected river status shall remain in effect until the earliest of:

- (a) The adoption of a comprehensive state water plan for the waterway designated as an interim protected river;
 - (b) Two (2) years following the designation of an interim protected river unless extended by law;
 - (c) The revocation of a waterway's interim protected river status by law.
- (5) Any person may petition the board for a determination that a particular proposed action or project will not significantly impair the values supporting a waterway's designation as an interim protected river. The board shall consider among other things environmental impact statements, technical studies and any other relevant comments or recommendations prepared by the petitioner for use before other state or federal agencies. The board may also consider any other relevant information. If the board determines that the proposed action or project will not significantly impair the values supporting a waterway's designation as a protected river, then this section shall not apply to such action or project, except that the board, after consultation with relevant state agencies, may impose appropriate conditions on such action or project. An aggrieved party may seek judicial review of the board's decision pursuant to chapter 52, title 67, Idaho Code.
- (6) If a waterway is designated as an interim protected river, then the board shall proceed to prepare a comprehensive state water plan for the waterway. The board shall in preparing the state comprehensive water plan for the waterway consider, after review of all relevant factors contained in section 42-1734A, Idaho Code, whether the designation should continue or whether modification of the designation is warranted.
- (7) If the designation of a waterway as an interim protected river is either revoked by law, or terminated as provided in this section, then the waterway shall not be eligible for designation as an interim protected river for a period of two (2) years following the revocation or termination of its interim protected river status. [I.C., § 42-1734D, as added by 1988, ch. 370, § 5, p. 1090; am. 1993, ch. 216, § 37, p. 587.]

Compiler's notes. The words "this act" refer to S.L. 1988, ch. 370, § 5 compiled as §§ 42-1734A — 42-1734I.

Section 1 of S.L. 1991, ch. 13 provided that "Notwithstanding any other provision of law of the contrary, the Water Resource Board shall designate the Snake River from Section 5, Township 11 South, Range 20 East, B.M. to King Hill as an interim protected river pursuant to Section 42-1734D, Idaho Code. The water resource board shall determine which of the activities listed in subsection (5) of Section 42-1734A, Idaho Code, shall be prohibited."

Sections 1 and 2 of S.L. 1992, ch. 340 read: "Notwithstanding any other provisions of law to the contrary, the Water Resource Board shall designate the following stretches or reaches in the Henrys Fork Basin as an interim protected river pursuant to Section 42-1734D, Idaho Code. The Water Resource Board shall determine which of the activities listed in subsection (5) of Section 42-1734A,

Idaho Code, are prohibited. The aforementioned stretches or reaches are summarized as follows:

- "(1) Henrys Fork of the Snake River from its point of origin at Henrys Lake to the point of its confluence with the backwaters of Ashton Reservoir.
- "(2) Warm River: Partridge Creek to Warm River Campground.
- "(3) Falls River: Idaho border to Kirkham bridge.
- "(4) Bitch Creek: Idaho border to mouth.
- "(5) Teton River: Trail Creek to the backwaters of Teton Dam.

"Interim protected river status provided by this act shall be terminated not later than ten (10) days following the end of the regular legislative session in 1994.

"An emergency existing therefor, which emergency is hereby declared to exist, this act shall be in full force and effect on and after its passage and approval." Approved April 14, 1992.

Sections 36 and 38 of S.L. 1993, ch. 216 are compiled as §§ 42-1701A and 42-1737, respectively.

Section 2 of S.L. 1991, ch. 13 declared an

emergency. Approved February 22, 1991.

Sec. to sec. ref. This section is referred to in §§ 42-1731, 42-1734H.

42-1734E. Remedies. — (1) The attorney general, at the request of the board, shall commence a civil action to enjoin any person violating any provision of this chapter and to recover actual damages in that amount required to restore a protected river and its riparian area to a condition reasonably comparable to that existing prior to the violation.

(2) It shall be the duty of the attorney general to institute and prosecute all enforcement actions provided for in this chapter. [I.C., § 42-1734E, as added by 1988, ch. 370, § 5, p. 1090.]

42-1734F. Rights not affected. — (1) No provision of this chapter, or any rules or regulations promulgated pursuant to this chapter, shall in any way limit, restrict, or conflict with approved applications for the appropriation of water or with vested property rights existing on the date a waterway is designated for protected river status or interim protected river status. For the purpose of this chapter, nonvested rights shall include, but not be limited to, pending applications for state mining permits or mineral leases, and pending applications for the appropriation of water.

(2) No provision of this chapter, or any rules or regulations promulgated pursuant to this chapter shall bar a water user or his agent from cleaning, maintaining or replacing a water diversion structure existing on or before the date a river is designated as protected. A water user or his agent may remove any obstructions from the stream channel, if such obstruction interferes with the delivery of, or use of, water under any existing water right. The provisions of this section do not relieve a person from complying with any other applicable laws.

(3) Nothing in this act shall prevent or restrict the relicensing of existing hydropower projects that have been previously licensed by the federal energy regulatory commission and which have generated electricity. Any designation of waterways as interim protected rivers or protected rivers shall not affect the operation or relicensing, including but not limited to the expansion of capacity which does not enlarge existing boundaries or project impoundments of any hydropower project existing and that has been previously licensed by the federal energy regulatory commission and which have generated electricity as of the date of the designation. [I.C., § 42-1734F, as added by 1988, ch. 370, § 5, p. 1090.]

Compiler's notes. The words "this act" refer to S.L. 1988, ch. 370, § 5 compiled as §§ 42-1734A — 42-1734I.

42-1734G. Water rights. — No provisions of this chapter, or any rules or regulations promulgated pursuant to this chapter, shall be construed to establish a water right. Any water rights necessary to fulfill the purposes of this chapter shall be obtained pursuant to the provision of chapter 2 or chapter 15, title 42, Idaho Code. [I.C., § 42-1734G, as added by 1988, ch. 370, § 5, p. 1090.]

42-1734H. Designation of particular rivers as interim protected rivers. — (1) The board shall designate the following waterways as interim protected rivers pursuant to section 42-1734D, Idaho Code:

(a) Priest River, from the Canadian Border to the confluence of Priest Lake;

(b) South Fork of the Boise River, from Anderson Ranch Dam to Neal Bridge;

(c) Snake River, from Section 5, Township 11 South, Range 20 East, B.M. to King Hill;

(d) The following waterways within the Payette River Basin:

1. North Fork of the Payette River, from Cabarton Bridge to Banks;

2. South Fork of the Payette River, from the Sawtooth Wilderness Boundary to Banks;

3. Main Payette River, from Banks to Black Canyon Dam; and

(e) Henry's Fork of the Snake River from its point of origin at Henry's Lake to the point of its confluence with the backwaters of Ashton Reservoir.

(2) The board shall determine which of the activities listed in subsection (5) of section 42-1734A, Idaho Code, shall be prohibited. [I.C., § 42-1734H, as added by 1988, ch. 370, § 5, p. 1090.]

Sec. to sec. ref. This section is referred to in § 42-1731.

42-1734I. Designation under federal law. — Designation of a waterway as a protected river pursuant to this chapter shall not be a basis for seeking inclusion of such waterway in the national wild and scenic rivers system pursuant to 16, United States Code section 1273(a)(ii) unless the act designating the waterway as a protected river specifically requests the governor to seek inclusion of the waterway in the national wild and scenic rivers system. [I.C., § 42-1734I, as added by 1988, ch. 370, § 5, p. 1090.]

42-1735. Appointment of counsel — Hearing officers. — The board may appoint legal counsel or may retain private counsel independent of the counsel appointed by the director of the department.

The board may utilize hearing officers during any hearing processes which are assigned to the board by law. [1965, ch. 320, § 5, p. 901; am. 1974, ch. 20, § 24, p. 533.]

Compiler's notes. Section 25 of S.L. 1974, ch. 20 repealed section 6 of S.L. 1965, ch. 320, formerly compiled as § 42-1736. Section 26 of S.L. 1974, ch. 20, is compiled as § 42-1737.

42-1736. Legislative review. — The state water plan adopted by the Idaho water resource board pursuant to authority of section 42-1734, Idaho Code, shall not become effective until it has been submitted to the legislature of the state of Idaho and has been affirmatively acted upon in the form of a concurrent resolution which may adopt, reject, amend or modify the same. Thereafter, any change in the state water plan shall be submitted in

the same manner to the legislature prior to becoming effective. [I.C., § 42-1736, as added by 1977, ch. 117, § 1, p. 252.]

Compiler's notes. A former § 42-1736, which comprised S.L. 1965, ch. 320, § 6, p. 901, was repealed by S.L. 1974, ch. 20, § 25.

Chapter 117 of S.L. 1977 became law without the governor's signature.

ANALYSIS

Board's exclusive authority.

Constitutionality.

Powers of department.

Board's Exclusive Authority.

The Idaho water resources board has the exclusive authority to formulate the state water plan; the board is the state "water resource agency" contemplated by Const., Art. 15, § 7, and in that constitutional provision the agency is specifically empowered to "formulate and implement a state water plan." *Idaho Power Co. v. State*, 104 Idaho 570, 661 P.2d 736 (1983).

Constitutionality.

This section requiring legislative approval of the state water plan is unconstitutional since it purports to authorize the legislature to perform functions constitutionally assigned to the water resources board, but even if this section had authorized legislative action which was not in conflict with Const., Art. 15,

§ 7, it could still have no legal effect because it provides for legislative action on the state water plan by means of a concurrent resolution. To the extent that Const., Art. 15, § 7 authorizes the legislature to influence the operation of the water resources board, it does so only as to "such laws as may be prescribed by the legislature"; legislative action by resolution is not a "law" in that context. *Idaho Power Co. v. State*, 104 Idaho 570, 661 P.2d 736 (1983).

There is no basis for drawing a distinction between the word "formulate," as used in Const., Art. 15, § 7, and the word "adopt" as both are used interchangeably; accordingly, interpretation that use of words "formulation and implementation" in such provision impliedly authorized the legislature to either amend and adopt, or reject, a water plan formulated by the water resource board was incorrect. *Idaho Power Co. v. State*, 104 Idaho 570, 661 P.2d 736 (1983).

Powers of Department.

An administrative agency like the Department of Water Resources has only such powers as the statute or ordinance confers. *Beker Indus., Inc. v. Georgetown Irrigation Dist.*, 101 Idaho 187, 610 P.2d 546 (1980).

42-1736A. Water resource policy. [Repealed.]

Compiler's notes. This section, which comprised I.C., § 42-1736A, as added by 1978, ch. 345, § 1, p. 884, was repealed by S.L. 1985, ch. 204, § 2.

42-1736B. Water resource policy actions. — (1) All future filings, permits and decrees on the unappropriated waters of this state shall be determined with respect to the effect such filings, permits and decrees will have on the minimum daily flow of the affected stream or river, or on the maintenance level of the affected lake or reservoir.

(2) All water plans and development projects proposed by the water resource board shall be subject to review and approval of the legislature, except that those projects funded from the water resource board revolving development account of less than five hundred thousand dollars (\$500,000) need not have prior legislative approval.

(3) In further recognition of the authority granted by law to the water resource board by the provisions of section 42-1734, Idaho Code, and in further recognition of the right of the legislature to review and approve the actions of the water resource board, the water resource board is specifically directed:

- (a) To inventory all of the unappropriated waters of this state;
- (b) To recommend to the legislature appropriations in trust for the people of Idaho for specific purposes;

- (c) To develop a list of specific proposals for storage of any unappropriated waters of this state, which proposals shall show location, costs, and proposed uses and benefits;
- (d) To take all necessary actions to assure that Idaho citizens shall not be denied the right to divert and appropriate to beneficial uses, under the provisions of article XV of the constitution of the state of Idaho, the unappropriated waters of this state. [I.C., § 42-1736B, as added by 1978, ch. 345, § 2, p. 884.]

Compiler's notes. Section 13 of S.L. 1978, ch. 345 read: "The provisions of this act are hereby declared to be severable and if any provision of this act or the application of such provision to any person or circumstance is declared invalid or unconstitutional for any reason, such declaration shall not affect the validity of remaining portions of this act."

Section 3 of S.L. 1978, ch. 345 contained a repeal and § 4 is compiled as § 42-241.

House Concurrent Resolution No. 48 (H.C.R. No. 48, S.L. 1978, p. 1003) reads as follows:

"Be It Resolved by the Legislature of the State of Idaho:

"WHEREAS, Section 7 of Article XV, of the Constitution of the State of Idaho empowers the Idaho Water Resource Board to formulate and implement a State Water Plan for optimum development of water resources in the public interest; and

"WHEREAS, Section 42-1731 [42-1730], Idaho Code, provides that the optimum use of the water resources of Idaho, requires the formulation of a coordinated, integrated, multiple use water resource policy and the development of a plan to activate this policy as rapidly as possible; and

"WHEREAS, the Idaho Water Resource Board, by the authority of Section 42-1734, Idaho Code, shall formulate a program for use of all unappropriated water resources of this State, based upon studies and after public hearings, in affected areas at which all interested parties shall be given the opportunity to appear; and

"WHEREAS, the State Water Plan was adopted by the Idaho Water Resource Board pursuant to Section 42-1734, Idaho Code; and

"WHEREAS, Section 42-1736, Idaho Code, provides that the State Water Plan shall not become effective until approved by the Legislature; and

"WHEREAS, it is the finding of the Legislature that the State Water Plan as amended by this resolution complies with the intent of the Legislature.

"NOW, THEREFORE, BE IT RESOLVED by the members of the Second Regular Session of the Forty-fourth Idaho Legislature, the House of Representatives and the Senate

concurring therein, that the State Water Plan as adopted by the Idaho Water Resource Board and submitted to the Legislature is hereby approved by the Legislature pursuant to Section 42-1736, Idaho Code, with the following changes:

POLICY NO. 1: PROTECTION OF EXISTING WATER RIGHTS

The State Water Plan shall be a guide concerning the uses of water within the State of Idaho. Water rights and the administration of water rights shall be governed by statute. Section 42-203, Idaho Code, should be amended to provide the following: (1) protection for all existing water. Nothing in this plan shall adversely affect water rights established and vested under the Constitution and laws of Idaho; (2) all new water uses, both consumptive and non-consumptive such as irrigation, municipal, industrial, power, mining, fish and wildlife, recreation, aquatic life, and water quality will be judged beneficial uses subject to Article XV, Section 3, of the state Constitution; (3) if conflicts occur between meeting new water uses, the approval or denial of the application shall consider the local public interest as defined by statute.

POLICY NO. 2: NATURE OF USE OF WATER RIGHTS

Water users should be allowed to change the nature of use of their own water rights for use within the State of Idaho provided other water rights are not injured thereby. Section 42-222 should be amended to allow existing water right holders to make such changes provided the change is not in conflict with the state water plan adopted by the Idaho Water Resource Board as approved by the legislature.

POLICY NO. 3: CONSOLIDATE STATE WATER QUANTITY AND QUALITY PLANNING AND ADMINISTRATION

The state programs of water quantity and water quality planning and administration should be consolidated in the Department of Water Resources. The Idaho Code should be amended to implement this policy.

POLICY NO. 4: UNRECORDED WATER RIGHTS

Claims except for domestic uses should be submitted on all existing unrecorded water rights within the State of Idaho by June 20, 1983. Legislation implementing this policy should provide that failure to file such a claim by the prescribed filing date shall be grounds for instituting an action for forfeiture of the claimed right.

POLICY NO. 5: FLOOD PRONE AREA IDENTIFICATION

The Department of Water Resources should identify flood prone areas throughout the state. The department shall utilize all previous and current flood prone area studies and shall make the information available for public use. The flood prone area identified shall be based on flooding from the 100 year flood history.

POLICY NO. 6: INSTREAM FLOWS

Water rights should be granted for instream flow purposes. The legislation authorizing this policy should recognize and protect existing water rights and priorities of all established rights and delegate responsibilities for determining flows and administrative authority to the Department of Water Resources. The legislation should also direct that the Idaho Water Resource Board shall be the only applicant for instream flow. All applications by the Water Resource Board shall be subject to the approval of the legislature.

POLICY NO. 7: STATE NATURAL AND RECREATIONAL SYSTEM

A State Natural and Recreational River System should be established and designed to fit the desires of the citizens of Idaho. Legislation implementing this policy should permit the protection of the unique features that exist on each of the various rivers bordered by public lands within the state and should provide the necessary authorization and adequate funding to state and local government to protect such rivers and related lands for recreational, scenic and natural values while still allowing the widest possible opportunity for use by private interests. Funds would be provided from the Water Management Fund created under Policy 31 for this purpose.

POLICY NO. 10: PROTECTION OF LAKE AND RESERVOIR SHORELANDS

Local units of government should prepare comprehensive plans and adopt zoning standards for the management of lake and reservoir shorelands to protect the water resources and its uses. Funds would be provided from the Water Management Fund created under

Policy 31 for this purpose.

POLICY NO. 11: WATER SUPPLY BANK

A water supply bank should be established for the purpose of acquiring water rights or water entitlements, provided other water rights are not injured, from willing sellers for reallocation by sale or lease to other new or existing uses within the State of Idaho. Legislation authorizing the water supply bank should also provide for the bank to be self-financing in the long run with initial funding to be provided by creation of a Water Management Fund as provided for in Policy 31.

POLICY NO. 12: CONSERVANCY DISTRICTS

Water Conservancy Districts should be established where needed. Legislation implementing this policy should provide for an equitable funding procedure to spread costs among all beneficiaries.

POLICY NO. 13: ENERGY PLAN

A State energy plan should be prepared. The Department of Water Resources should contribute the water related components to such a plan. Legislation authorizing this policy should also provide funding through the Energy Development and Study Fund for this purpose as provided in Policy 31.

POLICY NO. 14: WATER CLAIMS BY INDIAN TRIBES

Claims to water by Idaho Indian tribes should be identified by June 30, 1983.

POLICY NO. 15: FEDERAL WATER CLAIMS

Claims to water by the federal government should be identified by June 30, 1983.

POLICY NO. 16: FEDERAL RESERVOIRS WATER ALLOCATION

An agreement should be established with federal agencies to allow review by the Idaho Water Resource Board of any proposed allocation of water in excess of 500 acre-feet annually from federal reservoirs.

POLICY NO. 17: STATE ADMINISTRATION OF FEDERAL PROGRAMS

Federal programs dealing with water should be administered by the State when in the state's interest to do so.

POLICY NO. 18: COMBINE APPLICATIONS FOR WATER RESOURCES

Existing state statutes should be reviewed and amended so that applicants may complete a single application form to request

approval from necessary state authorities to develop or utilize the state's water and related land resources.

POLICY NO. 19: LEGISLATIVE COMMITTEE

A Legislative Committee on Water Resources should continue to work with the Idaho Water Resource Board in implementing the State Water Plan.

POLICY NO. 20: LAND DEVELOPMENT POLICY

Where the supply of water from a particular water source is limited, it is preferable to develop new lands in Idaho of higher agricultural productivity over those of a lower productivity providing existing rights are protected and water is not transferred between water basins within the state.

POLICY NO. 21: PROTECTION OF POTENTIAL RESERVOIR SITES

Potential reservoir sites should be protected against significant land use change. The legislation implementing this policy should recognize rights of existing land owners and should direct the state to acquire lands for reservoir sites as they become available for sale. Reservoir sites given this protection should be re-evaluated on ten-year intervals. Funds would be provided from the Water Management Fund created under Policy 31 for this purpose.

Potential Reservoir	Stream
Snake River Basin	
Upper Snake	
Palisades	Snake River
Lynn Crandall	Snake River
American Falls	
(Exist.)	Snake River
Clear Lakes	Snake River
Thousand Springs	Snake River
Shoestring	Snake River
Warm River	Henrys Fork
Driggs	Teton River
Medicine Lodge	Medicine Lodge Creek
Birch Creek	Birch Creek
Boulder Flats	Big Wood River
Bliss	Big Wood River
Southwest Idaho	
Grindstone Butte	Snake River (off-stream)
Sailor Creek	Snake River (off-stream)

Potential Reservoir	Stream
Guffey (High Alternative)	Snake River
Gold Fork	Gold Fork
Twin Springs	Payette River
Lost Valley (Exist.)	Boise River
Tamarack	Lost Valley Creek
Goodrich	Weiser River
Monday Gulch	Weiser River
Lucky Peak (Exist.)	Little Weiser River
Lower Snake	Boise River
Challis	Challis Creek
Panhandle Basins	
Low Katka	Kootenai River
Bear River Basin	
Caribou	Bear River
Oneida Narrows	Bear River
Plymouth	Malad River
Thomas Fork	Thomas Fork

POLICY NO. 22: EVALUATE FLOOD CONTROL LEVEES

The Department of Water Resources should be directed to inventory, identify, and evaluate the adequacy of existing flood control levees. Idaho Code, Section 42-1708 (repealed), should be amended to implement this policy.

POLICY NO. 23: ASSIST INDIAN TRIBES IN WATER RESOURCES IDENTIFICATION

The Idaho Water Resource Board offers to assist Indian tribal representatives in the identification, evaluation and tabulation of water resources on Indian lands.

POLICY NO. 25: REHABILITATION PROGRAM

A program should be established to identify and evaluate rehabilitation of abandoned mineral extraction and by-product storage areas and other abandoned projects which currently or potentially affect the yield or quality of the state's watersheds, streams and stream channels.

POLICY NO. 26: MONITOR RADIOACTIVE WASTE DISPOSAL

A program should be established by the State of Idaho to monitor and regulate radioactive waste disposal at the U.S. Energy Research and Development Administration's Idaho National Engineering Laboratory, and other areas as may be designated.

POLICY NO. 27: FISH AND GAME PLAN

A program should be established within the

Idaho Department of Fish and Game to prepare and adopt objectives and management criteria for fish, wildlife and all other aquatic resources for all principal streams and wetlands in the state.

POLICY NO. 28: TAILING PONDS

Encourage the mining industry to work with federal and state agencies to achieve uniform safety standards for the construction of tailing ponds and other similar mine waste storage facilities. If agreement cannot be reached under existing laws and policies then legislation should be adopted placing tailing ponds and other similar mine waste storage facilities under jurisdiction of the Dam Safety Act. (I.C. 42-1714 et seq.).

POLICY NO. 29: PLANNING PROGRAM

A Water Resource Project Feasibility Planning Program should be established to conduct studies required to implement the State Water Plan. Funds would be provided from the Water Management Fund as provided in Policy 31.

POLICY NO. 30: WATER RESOURCES RESEARCH PROGRAM

Research should be conducted on important water resource topics to augment the State Water Plan.

POLICY NO. 31: FUNDING PROGRAMS

The State of Idaho should establish a major water resource funding program to supplement private and federal monies to develop, preserve, conserve and restore the water and related land resources of Idaho and to implement the State Water Plan. The recommended funds are Water Management Fund, Rehabilitation Fund and Energy Development and Study Fund as approved by the legislature.

POLICY NO. 32: SNAKE RIVER BASIN

The available and unappropriated waters of the Snake River Basin are allocated to satisfy existing uses, meet needs for future growth and development, and protect the environment. The allocations recognize and protect existing water uses and rights. The water allocations are made by large regions to allow the widest possible discretion in application and it is the policy of the State of Idaho to augment, maintain, enhance and increase available, usable water by additional upstream, off stream and aquifer storage.

It is legislative intent that main stem Snake River flows will be protected against further depletions and preserved to provide the following average daily flows at the following

U.S. Geological Survey stream gaging stations.

<u>Gaging Station</u>	<u>Protected Flow</u> (Average Daily)
Milner	0 cfs
Murphy	3,300 cfs
Weiser	4,750 cfs

Studies indicate that sufficient water exists in excess of those flows to provide for additional uses if water conserving and storage facilities are constructed.

Water is allocated for electric energy. Additional hydro-electric power sites remain on streams within the Snake River Basin. Wherever feasible these should be developed as part of multi-purpose projects. Future electric energy requirements will be largely supplied from thermal plants. The plan provides for 170,000 acre-feet beyond August 1975 levels for consumptive use in cooling thermal power plants. The depletion is distributed as follows: Upper Snake --75,000 acre-feet; Southwest Idaho --30,000 acre-feet. In addition, flows in the Snake River will be stabilized for the hydro-power generating capability of the river.

S.L. 1985, ch. 2, § 1 read "That the amendments to Policy 32 of the Idaho State Water Plan, which amendments were adopted by Resolution of the Idaho Water Resource Board on March 1, 1985, be, and the same are hereby ratified and approved."

POLICY NO. 33: PANHANDLE BASINS

The available and unappropriated waters of the Spokane, Pend Oreille-Clark Fork and Kootenai river basins are allocated to satisfy existing and potential needs for economic development and environmental quality. This allocation recognizes and protects all existing and potential water uses and private and public rights.

Water is allocated for electric energy. Additional hydro-electric power sites remain on streams within the Panhandle River Basins. Wherever feasible these should be developed as part of multi-purpose projects. Future electrical energy requirements will be largely supplied from thermal plants. The plan provides for 18,000 acre-feet of depletion from the Pend Oreille-Clark Fork River system in the Panhandle Basins for evaporative cooling of thermal power plants.

POLICY NO. 34: BEAR RIVER BASIN

Management of the water resources in the Bear River Basin will continue to be directed by state statute and the Bear River Compact.

POLICY NO. 35: RIVER MANAGEMENT CRITERIA

The following rivers are recognized for their

many uses. The Idaho Water Resource Board will cooperate with and assist local people in preparing management criteria for rivers to achieve maximum benefits for all who use them.

1. St. Joe
2. Priest
3. Moyie
4. Salmon
5. Bruneau
6. Owyhee
7. Snake

POLICY NO. 37: SOUTH FORK COEUR D'ALENE RIVER REHABILITATION

The state of Idaho should sponsor a joint federal-state-private stream channel stabilization and revegetation project(s) in the South Fork Coeur d'Alene River drainage.

Funds should be provided from the Rehabilitation Fund, discussed in Policy 31 for this project(s).

"BE IT FURTHER RESOLVED that the Legislature directs the Idaho Water Resource Board to revise the State Water Plan to conform in all respects with the policies hereby approved and to publish the plan and distribute it generally throughout the state."

Adopted by the House February 23, 1978.

Adopted by the Senate March 13, 1978.

Constitutionality.

The provision, in subsection (2) of this section, requiring legislative approval of water plans unconstitutionally infringes on the water resource board's authority to determine the state water plan, and is therefore invalid. *Idaho Power Co. v. State*, 104 Idaho 570, 661 P.2d 736 (1983).

42-1737. Board approval — Criteria — Hearings — Appeals — Defining a misdemeanor — Injunctions. — (a) All project proposals involving the impoundment of water in a reservoir with an active storage capacity in excess of ten thousand (10,000) acre-feet shall be submitted to the board for its approval or disapproval. No construction shall be commenced on any such project nor shall any diversion be permitted prior to receipt of board approval as herein provided and the board may institute injunctive proceedings to halt such construction or diversion. In the event a project is disapproved, this fact shall be certified by the board to the director of the department and such certification shall constitute the petition for cancelation of permit required by section 42-302, Idaho Code, and, pursuant to such certification, the procedure for cancelation of permit issued for such project shall be carried forward by said director.

(b) In determining whether a project proposal shall be approved, or disapproved, the board shall be guided by the following criteria:

1. Conserving the highest use of the water for all purposes.
2. The maximum economic development of the waters involved.
3. The control of the waters of this state for all beneficial purposes, including drainage, sanitation and flood control.
4. That sufficient water is available for appropriation for beneficial use.
5. The prevention of wasteful, uneconomic, impracticable or unreasonable use of the waters involved.
6. That all vested and inchoate rights to the waters of this state or to the use thereof have been protected by the issuance of a permit for the project by the director of the department.
7. The state water policy formulated under other laws of this state.

(c) The board shall by regulation, establish procedures for notice and hearing on those project proposals which must be submitted to the board and may authorize hearings by hearing officers. The board or its hearing officer shall have power to administer oaths and to require the attendance of such witnesses and the production of such books, records and papers as it may desire at any hearing and for that purpose the board may issue a subpoena for any witnesses or a subpoena duces tecum to compel the

production of any books, records or papers which shall be served and returned in the same manner as a subpoena in a civil case. In case of any disobedience or neglect to obey a subpoena or subpoena duces tecum it shall be the duty of the district court in any county of this state in which such disobedience, neglect or refusal occurs, or any judge thereof, on application by the board, to compel obedience by proceedings for contempt as in the case of a subpoena issued by a regularly constituted court. The sponsor of a project who appears before the board shall have similar powers and shall have the right to be represented by counsel. If the sponsor does not appear at the appointed time, and his absence is without sufficient cause, the board shall have the right to proceed in his absence or may consider absence to constitute an admission of facts contrary to the position of the sponsor. The board shall make findings of fact and conclusions of law leading to its approval or disapproval.

(d) Any sponsor of a project which has been disapproved shall have the right to have the proceedings of the board reviewed by the district court in the county of his residence. With the exception that judicial review may be had by the district court of the county of the residence of the sponsor, such judicial review shall be accomplished in accordance with the provisions of chapter 52, title 67, Idaho Code. [1965, ch. 320, § 7, p. 901; am. 1969, ch. 469, § 3, p. 1346; am. 1974, ch. 20, § 26, p. 533; am. 1980, ch. 238, § 17, p. 526; am. 1993, ch. 216, § 38, p. 587.]

Compiler's notes. Section 4 of S.L. 1969, ch. 469 is compiled as § 42-1805.

Section 27 of S.L. 1974, ch. 20, is compiled as § 42-1801.

Sections 16 and 18 of S.L. 1980, ch. 238 are

compiled as §§ 42-1720 and 42-1766, respectively.

Sections 37 and 39 of S.L. 1993, ch. 216 are compiled as §§ 42-1734D and 42-3805, respectively.

42-1738. Vested water rights protected — Policy of project operation after pay-out defined. — The board shall have no power or authority to do, and shall be and is prohibited from doing, any thing or act which would modify, set aside or alter any existing right or rights to the use of water or the priority of such use as established under existing laws except where the board acquires the consent of the owner or exercises the right of eminent domain as herein provided. It is the policy of the legislature to favor those projects with contractual agreements which provide that, upon completion of revenue bond pay-out, the project will revert to the ownership and management of that group or entity, public or private, which has paid for the project. [1965, ch. 320, § 8, p. 901.]

Compiler's notes. Section 9 of S.L. 1965, ch. 320 read: "Effect on existing statutes. — Any statute inconsistent with the provisions of this act or vesting in other agencies, boards or departments, powers or duties delegated by this act shall be deemed modified to the extent necessary to give full force and effect to the provisions of this act and permit execution of all delegated powers and duties by the Idaho water resource board."

Section 10 of S.L. 1965, ch. 320 read: "The provisions of this act are hereby declared to be separable and if any provision of this act or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of remaining portions of this act."

Section 11 of S.L. 1965, ch. 320 declared an emergency. Approved March 30, 1965.

42-1739. Bond authorization. — The Idaho water resource board is authorized, for the purpose of carrying out the lawful powers granted it by the laws of this state, to contract indebtedness and issue revenue bonds evidencing such indebtedness in conformity with this chapter. [1965, ch. 319, § 1, p. 898.]

Compiler's notes. The words "this chapter" refer to §§ 42-1739 — 42-1749.

Sec. to sec. ref. Sections 42-1739 — 42-1749 are referred to in § 42-2042.

This section is referred to in § 42-1776.

Cited in: Idaho Water Resource Bd. v. Kramer, 97 Idaho 535, 548 P.2d 35 (1976).

42-1740. Purposes. — All revenue bonds authorized under the terms of this act may be issued and sold from time to time and in such amounts as is deemed necessary to provide sufficient funds for carrying out all its powers and, without limiting the generality thereof, shall include the following: rehabilitation and repair of existing irrigation projects and irrigation facilities, and construction, maintenance, repair and operation of water projects, engineering and other costs for investigation and promotion of water projects, fiscal and legal expenses, cost of issuance of bonds including printing and advertising expenses, the establishment of bond reserves, and payment of interest on bonds. [1965, ch. 319, § 2, p. 898; am. 1981, ch. 90, § 2, p. 125.]

Compiler's notes. The words "this act" refer to S.L. 1965, ch. 319, which is compiled herein as §§ 42-1739 — 42-1749.

Sections 1 and 3 of S.L. 1981, ch. 90 are

compiled as §§ 42-1734 and 42-1767, respectively.

Sec. to sec. ref. This section is referred to in § 42-1767.

42-1741. Form. — Revenue bonds shall bear such date or dates, mature at such time or times, bear interest at a rate or rates, be payable at such place or places, be in such form either coupon or registered or both, carry such registration privileges and be subject to such terms of redemption as the Idaho water resource board shall by resolution determine. [1965, ch. 319, § 3, p. 898; am. 1970, ch. 133, § 5, p. 309.]

Compiler's notes. Section 1 of S.L. 1970, ch. 133 is compiled herein as § 38-1023. Section 2 is compiled as a note to § 39-1338.

Sections 3 and 4 have been repealed. Section 6 is compiled as § 42-2954.

42-1742. Special funds. — Bonds issued under the provisions of this act shall be payable solely out of revenues of the Idaho water resource board. Such bonds shall be authorized by resolution, which resolution shall create a special fund or funds into which the Idaho water resource board shall obligate and bind the board to set aside and pay any part or parts of, or all of, or a fixed proportion of, or a fixed amount of the available revenue of the board sufficient to pay the principal of and interest on such bonds as the same shall become due and, if deemed necessary, to maintain adequate reserves therefor. No appropriated moneys shall be paid into such special fund or funds provided that any loan repayments to the Idaho water resource board, regardless of the source of funds for the loan, may be deposited to such fund or funds. Such fund or funds shall be drawn upon for

the sole purpose of paying the principal of and interest on bonds issued pursuant to this act.

The bonds shall be negotiable instruments within the provisions and intent of the negotiable instrument laws of this state even though they shall be payable solely from such special fund or funds. The bonds and any coupons attached thereto shall state upon their face that they are payable solely from such special fund or funds. If the board fails to set aside and pay into such fund or funds the payments provided for in such resolution, the holder of any such bonds may bring suit to compel compliance with the provisions of the resolution. [1965, ch. 319, § 4, p. 898; am. 2003, ch. 80, § 2, p. 254.]

Compiler's notes. For words "this act" see Section 1 of S.L. 2003, ch. 80, is compiled as
Compiler's notes, § 42-1740. § 42-1734.

42-1743. Covenants. — The board may provide such covenants as it may deem necessary to secure and guarantee the payment of the principal of and interest on such bonds, including but not limited to covenants to create reserve accounts and to authorize the deposit of certain moneys therein for the purpose of securing and guaranteeing the payment of such principal and interest, to appoint a state or national bank or trust company as trustee for the bondholders to hold, invest and disburse moneys set aside and pledged to pay and guarantee the payment of such bonds and/or as a trustee for safeguarding the disbursing of the proceeds of the sale of such bonds, to fix such powers and duties of such trustee or trustees as may be found necessary to carry out the purpose of this act, and to make any and all other covenants not inconsistent with the provisions of this act which in the judgment of the board will increase the marketability of such bonds. The board may also provide that revenue bonds payable out of the same source or sources may be later issued on a parity with any revenue bonds being issued and sold. The provisions of this act and any resolution or resolutions providing for the authorization, issuance and sale of such bonds shall constitute a contract with the holders of such bonds and the provisions thereof shall be enforceable by any owner or holder of such bonds by any appropriate suit, action or proceeding in any court of competent jurisdiction. [1965, ch. 319, § 5, p. 898.]

Compiler's notes. For words "this act" see
Compiler's notes, § 42-1740.

42-1744. Issuance. — Such bonds shall be signed on behalf of the board by the chairman of the board and shall be attested by the secretary of the board, one (1) of which signatures may be a facsimile signature, and shall have the seal or facsimile seal of the board impressed or imprinted thereon. All interest coupons attached thereto may be signed with the facsimile signatures of such officials. Such bonds shall be sold in the manner and at such price as the board shall deem advisable, either at public or private sale. [1965, ch. 319, § 6, p. 898.]

42-1745. Warrants. — The board may also issue revenue warrants for the same purposes for which they may issue revenue bonds and the provisions of this act relating to the terms, conditions, covenants, issuance and sale of revenue bonds shall be applicable to such revenue warrants. [1965, ch. 319, § 7, p. 898.]

Compiler's notes. For words "this act" see
Compiler's notes, § 42-1740.

42-1746. Funding, refunding bonds. — The board may by resolution, from time to time, provide for the issuance of funding or refunding revenue bonds to fund or refund any outstanding revenue or other warrants or bonds, and any premiums thereon, and coupons evidencing interest upon any such bonds at or before the maturity or first optional redemption date of such coupons, warrants or bonds, and may combine various outstanding revenue warrants and parts or all of various series and issues of outstanding revenue bonds and matured coupons in the amount thereof to be funded or refunded. Revenue bonds may be refunded only at maturity, upon call for redemption in accordance with their terms or with consent of the holder.

The board shall create a special fund or funds for the sole purpose of paying the principal of and interest on such funding or refunding revenue bonds, into which fund the board shall obligate and bind the board to set aside and pay any part or parts of, or all of, or a fixed proportion of, or a fixed amount of the available revenue of the board sufficient to pay such principal and interest as the same shall become due, and if deemed necessary to maintain adequate reserves therefor.

Such funding or refunding bonds shall be negotiable instruments within the provisions and intent of the negotiable instrument laws of this state.

The board may exchange such funding or refunding bonds for the warrants, bonds, and coupons being funded or refunded, or it may sell such funding or refunding bonds in the manner and at such price as the board shall deem to be in the best interest of the state, either at public or private sale, or may both exchange and sell.

The provisions of this act relating to the terms, conditions, covenants, issuance, and sale of revenue bonds shall be applicable to such funding or refunding bonds except as may be otherwise specifically provided in this section. [1965, ch. 319, § 8, p. 898.]

Compiler's notes. For words "this act" see
Compiler's notes, § 42-1740.

42-1747. Tax exemption. — Bonds issued pursuant to the authority contained in this act shall be exempt from taxation under the Idaho Income Tax law. [1965, ch. 319, § 9, p. 898.]

Compiler's notes. For words "this act" see
Compiler's notes, § 42-1740.

42-1748. Construction of act. — This act shall be authority for the issuance of the bonds and warrants hereby authorized, and shall be liberally

construed to accomplish its purposes. Any restrictions, limitations or regulations relative to the issuance of such bonds or warrants contained in any other act shall not apply to the bonds or warrants issued under this act. Any act inconsistent herewith shall be deemed modified to conform with the provisions of this act for the purpose of this act only. [1965, ch. 319, § 10, p. 898.]

Compiler's notes. For words "this act" see Compiler's notes, § 42-1740.

42-1749. Compelling issuance. — In the event that any official required to participate in any act leading to the issuance of such bonds shall refuse to perform such act alleging as his reason illegality of the bonds to be issued, the board may institute judicial proceedings to compel such step to be taken and legality of the bonds to be determined. [1965, ch. 319, § 11, p. 898.]

Compiler's notes. Section 12 of S.L. 1965, ch. 319 read: "Separability. — The provisions of this act are hereby declared to be separable and if any provision of this act or the applica-

tion of such provision is declared invalid for any reason, such declaration shall not affect the validity of remaining portions of this act."

42-1750. Revolving fund — Public policy and purpose. — It is in the public interest and it is the public policy of this state, in which there are vast areas of arid land, to develop and to financially assist in and support the development of the water resources of this state through the construction of water projects, including the rehabilitation, improvement, or extension of existing systems or facilities relating thereto, and to achieve that end, to create an Idaho water resource board revolving development fund to be used for that purpose. [1969, ch. 333, § 1, p. 1051.]

Cited in: Nelson v. Marshall, 94 Idaho 726, 497 P.2d 47 (1972).

42-1751. Definitions. — As used in this act, unless the context requires otherwise:

(a) "Board" means Idaho water resource board.

(b) "Irrigation district," "canal or irrigation company," "water users' association," "municipal corporation," or "municipality," mean such entities created and existing under the laws of the state of Idaho.

(c) "Construction" means the construction, in whole or in part, of a new project, or the improvement or renovation, in whole or in part, of an existing project, or both such construction and improvement or renovation.

(d) "Project" means any project by means of which water shall be utilized or benefits accrue within this state for purposes within the limitations of this act.

(e) "Revolving fund" means Idaho water resource board revolving development fund. [1969, ch. 333, § 2, p. 1051.]

Compiler's notes. The words "this act" herein as §§ 42-1750 — 42-1759. refer to S.L. 1969, ch. 333 which is compiled

Opinions of Attorney General. It is stat-

utorily authorized and constitutionally permissible for the state Water Resource Board to issue revenue bonds to a local water project sponsor to construct a hydroelectric power

project which serves no other water development, usage, or conservation purpose. OAG 85-2.

42-1752. Establishment of Idaho water resource board revolving development fund. — There is hereby established in the state treasury a special fund to be known as the Idaho water resource board revolving development fund. All money in the fund is appropriated continuously to the board to be used and administered by it for the purpose of developing the state's water resources, and shall not be subject to the provisions of the Standard Appropriations Act of 1945 or section 67-3516, Idaho Code. [1969, ch. 333, § 3, p. 1051.]

Compiler's notes. The Standard Appropriations Act of 1945 is compiled herein as §§ 67-3601 — 67-3614.

§ 13. *Nelson v. Marshall*, 94 Idaho 726, 497 P.2d 47 (1972).

Constitutionality.

The continuous appropriation provided by this section does not violate Const., Art. 7,

42-1753. Source of fund. — Funds borrowed from the revolving development fund, together with interest due thereon, shall be repaid to the board and placed in the revolving fund together with receipts and revenues of any type and nature derived from any project constructed, operated, or maintained, in whole or in part, with moneys from the revolving fund, revenues received over and above the cost of projects financed by revenue bonds, revenues received from the sale of state land acquired by the board for water projects, surplus revenues from the sale of Carey Act (Title 43 USCA s. 641) lands, fees received from water deliveries which are in excess of costs on projects sponsored by the board, gifts or grants from any source when the same are made for purposes consistent with those for which the revolving fund is established, and moneys from any other appropriate source. [1969, ch. 333, § 4, p. 1051.]

42-1754. Allocation of fund. — The Idaho water resource board revolving development fund shall be allocated for use:

(a) To the board for a project which it deems to be "in the public interest" and which, in its opinion, further implements any extant Idaho state water plan, in such amounts as are necessary for preparation of a feasibility study of the project, engineering services in preparing designs and specifications, and for construction of the project.

(b) As loans from the revolving development fund which may be approved by the board and made to irrigation districts, canal or irrigation companies, water users' associations, municipal or private corporations, or, in special cases when approved by the board, to individuals to finance project costs, provided, however, that no loans shall be made to finance feasibility studies except as a part of overall project costs.

(c) To establish reserve accounts or guarantee funds in the state treasury to aid in the funding of water projects. Interest earned on such moneys

invested by the state treasurer shall be paid into the water resource board revolving development account.

(d) To the board to finance joint ventures for project construction with federal agencies, neighboring states, legal subdivisions of the state, private corporations, or other organizations, and including the costs of feasibility studies, investigations, and other preparatory expenses, for purposes consistent with those for which the fund is established, and the board is authorized to use the fund for these purposes.

(e) To the board to finance feasibility studies, investigations, and other preparatory expenses for projects it intends to fund through the sale of revenue bonds or through use of funds from other sources. [1969, ch. 333, § 5, p. 1051; am. 1979, ch. 154, § 1, p. 469.]

Compiler's notes. Section 2 of S.L. 1979, ch. 154 is compiled as § 42-1756.

ANALYSIS

Constitutionality.

Loans.

Constitutionality.

Provision authorizing loans to individuals "in special cases" does not violate Const., Art. 8, § 2, prohibiting the giving or loaning of the credit of the state in the aid of any individual, neither is such provision violative of the equal protection guarantees of the federal Constitu-

tion, nor does it render the section void for vagueness under Const., Art. 3, § 17. *Nelson v. Marshall*, 94 Idaho 726, 497 P.2d 47 (1972).

Loans.

Where district court entered findings of fact fully substantiated by the record, in prohibition action brought by taxpayer, and a review of plaintiff's evidence indicated total failure to prove any arbitrary or capricious action by water resource board in approving loans, motion to dismiss pursuant to Rule 41(b) was properly granted. *Nelson v. Marshall*, 94 Idaho 726, 497 P.2d 47 (1972).

42-1755. Projects — Plans and cost estimates — Repayment contracts — Title. — When a project has been selected by the board to be constructed by the board with money made available from the revolving fund, the board shall cause plans and cost estimates of such project to be prepared and the board is authorized to enter into a contract or contracts for construction of such project after legislative approval. The board shall insure that water developed or conserved by any such project shall be utilized or benefits accrue within this state, and it shall enter into appropriate repayment contracts with the project water users. The board shall assess against any project water user such charge, as in the opinion of the board, is necessary and reasonable for the maintenance and operation of the project during the repayment period and for repayment to the revolving fund of the amount allocated therefrom for making the feasibility study and for construction of the project, including costs for engineering services, design, specifications, and other preparatory expenses. All money allocated to the project from the revolving fund shall be repaid as determined by the board, provided that the repayment period shall not exceed 60 years.

Title to all projects constructed by the board with money from the revolving fund shall vest in the board. At the end of the repayment period, the board shall make a determination, guided by the principles set forth in the act under which it operates, as to whether or not it is in the public interest to turn title to such project over to the users of such project. Its action shall be based upon such determination, and the board is specifically authorized to convey title to the project to those who use the water from such

project if it finds this to be in the public interest. [1969, ch. 333, § 6, p. 1051.]

42-1756. Loans from account — Application — Investigation — Approval — Repayment — Statement — Filing — Default. — (a) Any irrigation district, canal or irrigation company, water users' association, municipal corporation, municipality, private corporation, or, in special cases approved by the board, an individual may file an application with the board for a loan from the revolving account for the purpose of financing project costs. Such application shall be filed in such manner, and shall be in such form and be accompanied by such information as may be prescribed by the board; provided, however, that any such application filed with the board under the provisions of this act, shall:

- (1) Describe the nature and purpose(s) of the proposed project.
- (2) Set forth or be accompanied by a plan for development of the proposed project, together with such engineering and economic feasibility data and estimated costs of construction as may be required by the board.
- (3) State whether money other than that for which application is made to the board will be used for project costs, and whether such money is available or has been sought for this purpose.
- (4) Show that the applicant holds or can acquire title to all lands or has the necessary easements and rights-of-way for the project and related lands, and has or can acquire all water rights necessary for the construction, operation and maintenance of the proposed project, or that there exists sufficient water available for appropriation by proof of a permit issued by the director of the department of water resources.

(b) Upon receipt of an application, the board shall evaluate and, if it deems it to be necessary, investigate all aspects of the proposed project and the proposed construction thereof. As a part of such investigation, the board shall determine whether the plan for development of the project is satisfactory. If the board determines that the plan is unsatisfactory, it shall return the application to the applicant and may make such recommendations to the applicant as are considered necessary to make the plan satisfactory.

(c) The board may approve a loan for project costs if after investigation (if this is deemed necessary,) and evaluation it finds that:

- (1) The plan does not conflict with any extant Idaho state water plan;
- (2) The proposed project is feasible from an engineering standpoint and economically justified, with studies showing a favorable benefit to cost ratio;
- (3) The plan for development of the proposed project is satisfactory;
- (4) The applicant is qualified and responsible;
- (5) There is reasonable assurance that the borrower can repay the loan;
- (6) That money in the revolving account is available for the loan; and
- (7) That the loan does not exceed five hundred thousand dollars (\$500,000) unless legislative approval has been obtained.

(d) If the board approves a loan, the board and the applicant or applicants shall enter into an agreement for repayment to the revolving account of money loaned therefrom, together with interest thereon at reasonable rates

as determined by the board. The agreement shall further provide that repayment of the loan, together with interest thereon, shall commence no later than one (1) full year after construction of the project is completed, and that repayment shall be completed within the time period specified by the board; provided that repayment to reserve accounts or guarantee funds shall be made as provided by order of the board. The repayment period shall not exceed sixty (60) years, except that the board may extend the time for making repayment in the event of emergency or hardship. Such agreement shall also provide for such assurances of, and security for, repayment of the loan as are considered necessary by the board.

(e) The state shall have a lien upon a project constructed with money from the revolving account for the amount of the loan, together with the interest thereon. This lien shall attach to all project facilities, equipment, easements, real property and property of any kind or nature associated with the project and all water rights associated in any way with the project. The board shall file a statement of the loan, its amount, terms and a description of the project with the county recorder of each county in which the project or any part thereof is located. The county recorder shall record the lien in a book kept for the recording of liens and it shall be indexed as other liens are required by law to be indexed. The lien shall be valid until paid in full or otherwise discharged. The lien shall be foreclosed in accordance with applicable state law governing foreclosure of mortgages and liens as set forth in chapter 1 of title 6, Idaho Code, chapter 13 of title 45, Idaho Code, and related provisions of the statutes of this state.

(f) If an applicant fails to comply with the repayment contract, its interest in the project may be conveyed to a successor upon approval by the board, which may contract with the qualified successor in interest of the original obligor for repayment of the loan, together with the interest thereon, and for succession to its rights and obligations in any contract with the board.

(g) The state shall have a lien on any or all projects which the board improves or renovates with money from the revolving account, and such lien shall be valid and continue in effect until such funds, together with interest thereon, have been paid in full and the lien discharged. The board shall file a statement of the lien, and the lien shall be foreclosed upon all project property and rights as provided in subsection (e) above. [1969, ch. 333, § 7, p. 1051; am. 1978, ch. 345, § 12, p. 884; am. 1979, ch. 154, § 2, p. 469.]

Compiler's notes. For words "this act" see Compiler's note, § 42-1751.

Section 11 of S.L. 1978, ch. 345 is compiled as §§ 42-1501 — 42-1505.

Section 1 of S.L. 1979, ch. 154 is compiled as § 42-1754.

Section 13 of S.L. 1978, ch. 345 read: "The provisions of this act are hereby declared to be severable and if any provision of this act or the application of such provision to any person or circumstance is declared invalid or unconstitutional for any reason, such declaration shall not affect the validity of remaining portions of this act."

Section 3 of S.L. 1979, ch. 154 declared an

emergency. Approved March 29, 1979.

Sec. to sec. ref. This section is referred to in §§ 42-1760 and 42-2042.

Constitutionality.

Provision authorizing loans to individuals "in special cases" does not violate Const., Art. 8, § 2, prohibiting the giving or loaning of the credit of the state in the aid of any individual, neither is such provision violative of the equal protection guarantees of the federal Constitution, nor does it render the section void for vagueness under Const., Art. 3, § 17, and section was not unconstitutional for failure to expressly restate mandate of Const., Art. 4,

§ 18 relating to approval by board of examiners of all claims against the state. *Nelson v. Marshall*, 94 Idaho 726, 497 P.2d 47 (1972).

42-1757. Members of board — Conflicts of interest. — No member of the board shall participate in the action of the board, nor be present during the board's deliberations, concerning an application for a loan by an entity in which such board member is an officer, agent or employee, or in which such board member has any interest. [1969, ch. 333, § 8, p. 1051.]

42-1758. Rules and regulations. — The board may make such rules and regulations consistent with this act as it considers necessary to carry out the provisions of this act. [1969, ch. 333, § 9, p. 1051.]

Compiler's notes. For words "this act" see Compiler's note, § 42-1751.

42-1759. Annual report and financial statement to governor and legislature. — An annual report shall be made to the governor and the legislature prior to each November following the close of the year, describing the work accomplished by use of the revolving development fund and including a complete financial statement. [1969, ch. 333, § 10, p. 1051.]

Compiler's notes. Section 11 of S.L. 1969, ch. 333 read: "The provisions of this act are hereby declared to be severable and if any provisions of this act or the application of such provisions to any entity or circumstance is declared invalid for any reason, such decla-

ration shall not affect the validity of remaining portions of this act."

Section 12 of S.L. 1969, ch. 333 provided that the act should become effective as of July 1, 1969.

42-1760. Water management account. — (1) There is hereby created and established in the trust and agency fund the water management account. All moneys in the account are appropriated continuously to the water resource board to be used and administered by it for the purposes specified in subsection (2) of this section, and shall not be subject to the provisions of the standard appropriations act of 1945 or section 67-3516, Idaho Code.

(2) The board may expend, loan or grant moneys from the water management account for new water projects or the rehabilitation of existing water projects limited to the following purposes: reclamation, upstream storage, offstream storage, aquifer recharge, reservoir site acquisition and protection, water supply, water quality, recreation, and water resource studies, including feasibility studies for qualifying projects.

(a) Expenditures may be made from the account to provide public moneys for participation in any project constructed with funds from the water resource board revolving development account provided by section 42-1756, Idaho Code.

(b) Grants and loans may be made by the board from the account for any project in the public interest for the projects authorized by this section; no single grant shall exceed \$50,000 unless legislative approval has been obtained.

(3) The director of the department of water resources shall assist the board in any way the board deems necessary to fulfill the policy and purpose of the water management account, including technical evaluation of proposed projects and coordination in state and federal agencies. [I.C., § 42-1760, as added by 1978, ch. 356, § 1, p. 939; am. 1988, ch. 217, § 1, p. 411.]

42-1761. Water supply bank created. — The water resource board shall have the duty of operating a water supply bank. The water supply bank shall make use of and obtain the highest duty for beneficial use from water, provide a source of adequate water supplies to benefit new and supplemental water uses, and provide a source of funding for improving water user facilities and efficiencies. [I.C., § 42-1761, as added by 1979, ch. 193, § 1, p. 560.]

Sec. to sec. ref. Sections 42-1761 — 42-1765A are referred to in § 42-223.

Sections 42-1761 — 42-1764 are referred to in § 42-1763B.

This section is referred to in § 42-1764.

42-1762. Rules and regulations — Acquisition of water rights. —

(1) The water resource board shall adopt rules and regulations governing the management, control, delivery and use and distribution of water to and from the water supply bank in compliance with chapter 52, title 67, Idaho Code.

(2) The board may contract with lessors and lessees to act as an intermediary in facilitating the rental of water. The board may purchase, lease, or otherwise obtain decreed, licensed or permitted water rights to be credited to the water supply bank. The use to which the owner is entitled under the water right shall be reduced by the portion of the water right leased to the bank. The water rights may be retained in the water supply bank for a period as determined by the board, all under such provisions as are specified in the terms of the purchase or lease. [I.C., § 42-1762, as added by 1979, ch. 193, § 2, p. 560; am. 1990, ch. 318, § 1, p. 868.]

42-1763. Rentals from bank — Approval by director. — The terms and conditions of any rental of water from the water supply bank must be approved by the director of the department of water resources. The director of the department of water resources may reject and refuse approval for or may partially approve for a less quantity of water or may approve upon conditions any proposed rental of water from the water supply bank where the proposed use is such that it will reduce the quantity of water available under other existing water rights, the water supply involved is insufficient for the purpose for which it is sought, the rental would cause the use of water to be enlarged beyond that authorized under the water right to be rented, the rental will conflict with the local public interest as defined in section 42-202B, Idaho Code, or the rental will adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates. The director shall consider in determining whether to approve a rental of water

for use outside of the state of Idaho those factors enumerated in subsection (3) of section 42-401, Idaho Code. [I.C., § 42-1763, as added by 1979, ch. 193, § 3, p. 560; am. 1990, ch. 318, § 2, p. 868; am. 1992, ch. 101, § 1, p. 319; am. 2003, ch. 298, § 5, p. 806.]

Compiler's notes. Section 4 of S.L. 2003, ch. 298, is compiled as § 42-240.

Sec. to sec. ref. This section is referred to in §§ 42-1763B and 42-1765.

42-1763A. Interim authority for rental of storage water to augment lower snake river flows during the migration of snake river salmon. [Null and void date January 1, 1996.]

Compiler's notes. Section 4, S.L. 1992, ch. 101 as amended by Section 2 of S.L. 1994, ch. 452 provided: "Section 2 of this act [§ 42-1763A] shall be null, void and of no force and effect on and after January 1, 1996." Prior to the amendment by S.L. 1994, ch. 452, the original date contained in S.L. 1992, ch. 101 provided that this section would be null and void on and after January 1, 1995. The exten-

sion of the null and void date to 1996 takes effect, according to § 3 of S.L. 1994, ch. 452, as follows: "This act shall be in full force and effect when the Governor shall make a proclamation that the U.S. Bureau of Reclamation has agreed to withdraw or hold in abeyance for a period of one (1) year its applications for transfer of water rights in the Payette River Basin." Now see § 42-1763B.

42-1763B. Interim authority for rental of storage water to augment flows during the migration of snake river salmon. [Null and void effective January 1, 2005.] — (1) Legislative findings and intent regarding rental of storage water from U.S. bureau of reclamation projects in the Snake River basin within Idaho to augment lower Snake River flows during the migration of Snake River salmon.

(a) The legislature finds that the U.S. bureau of reclamation desires to release up to four hundred twenty-seven thousand (427,000) acre feet of water to augment salmon flows during 2002, 2003 and 2004. The state of Idaho is experiencing serious drought conditions and it is therefore uncertain whether four hundred twenty-seven thousand (427,000) acre feet of water will be available for rental for flow augmentation purposes. Nonetheless, the legislature finds that authorization of this legislation will facilitate ongoing negotiations in the Snake River basin adjudication. Therefore, the legislature authorizes the U.S. bureau of reclamation to release water from its projects under the limited conditions of this section in 2002, 2003 and 2004.

(b) It is the intent of the legislature to promptly consider the repeal of this section in the event that the provisions of the supplemental biological opinion issued by the national marine fisheries service on January 24, 2002, related to the provision of flows for salmon from the Snake River basin above Brownlee Reservoir are modified or declared arbitrary, capricious or otherwise unlawful or set aside by any federal court.

(2) Rental of storage water from U.S. bureau of reclamation storage.

(a) Notwithstanding the legislative approval required in section 42-108, Idaho Code, any storage water release from U.S. bureau of reclamation reservoirs within the state of Idaho for use to augment river flows during the migration of Snake River salmon pursuant to this section must be rented through the water bank operated by the Idaho water resource

board pursuant to sections 42-1761 through 42-1764, Idaho Code, or through local water rental committees, created pursuant to section 42-1765, Idaho Code, under their respective water bank rules.

(b) For any rental of water pursuant to this section, the director shall not be required to determine under section 42-1763, Idaho Code, whether the water supply is sufficient for the purpose for which it is sought, whether the rental would cause the use of water to be enlarged beyond that authorized under the water right to be rented, whether such use is in the public interest, or whether such use is consistent with the factors enumerated under subsection (3) of section 42-401, Idaho Code.

(3) Conditions on storage water rentals.

(a) Any storage water made available under this section shall be obtained only from willing lessors. Any water rented under this section from reservoirs located within a basin having a local rental pool committee established pursuant to section 42-1765, Idaho Code, shall be rented pursuant to this section only through the local rental pool committee.

(b) Storage water made available under this section shall be limited to four hundred twenty-seven thousand (427,000) acre feet annually. These releases from storage shall be reduced by other water the U.S. bureau of reclamation provides for augmentation of salmon flows from the Snake River and its tributaries.

(c) In no event shall the release of water under this section cause the water surface of Cascade Reservoir to be below the elevation required to maintain a storage volume of three hundred thousand (300,000) acre feet, fifty thousand (50,000) acre feet of which is dead space, which is currently estimated to be at an elevation of four thousand eight hundred nine and two-tenths (4,809.2) feet.

(d) The U.S. bureau of reclamation shall submit a report to the director by January 15 of each year describing the time, volume and purpose of storage water released for salmon purposes during the past year and shall report on the plan for releases for the spring and summer chinook by April 1 and on the plan for releases for the fall chinook by July 15 of each year.

(e) All storage water rented from U.S. bureau of reclamation reservoirs under this section must be used for power production purposes within the state of Idaho.

(f) Nothing herein shall entitle the U.S. bureau of reclamation to rent storage water upon termination or expiration of the permission given in this section.

(4) Nothing in this section shall be construed to alter in any way the existing contractual obligations of the U.S. bureau of reclamation or to constitute a finding by the legislature that the rental or use of storage water for augmentation of flows for salmon migration is a beneficial use of water, that it is in the public interest, or whether such use injures existing water rights.

(5) This section shall not become effective until the director certifies to the governor that the U.S. bureau of reclamation's applications to transfer water right numbers 4616, 4617, 4618, 4623, 4625, 4626, 4627, 4628, 4629, 4630, 4631, 4632, 4633 and 4636, and to amend water right permit numbers 25-07004 and 63-3618 will be held in abeyance until July 1, 2005.

(6) On and after January 1, 2005, this act shall be null, void and of no force and effect. [I.C., § 42-1763B, as added by 2000, ch. 222, § 2, p. 616; am. 2001, ch. 394, § 1, p. 1372; am. 2002, ch. 349, § 1, p. 997.]

Compiler's notes. Former § 42-1763B, which comprised I.C., § 42-1763B, as added by 1996, ch. 282, § 1, p. 912, was repealed by S.L. 2000, ch. 222, § 1, effective April 12, 2000.

The words "this act" refer to S.L. 2000, ch. 222 which is compiled as § 42-1763B.

Section 3 of S.L. 2000, ch. 222 declared an emergency retroactively to January 1, 2000 and approved April 12, 2000.

Section 2 of S.L. 2001, ch. 394 declared an emergency retroactively to January 1, 2001 and approved April 17, 2001.

Section 2 of S.L. 2002, ch. 349 declared an emergency retroactively to January 1, 2002 and approved March 27, 2002.

Subdivision (6) of this section provides that the act shall be null, void and of no force and effect on and after January 1, 2005.

42-1764. Substitution for transfer proceeding — Rights not subject to forfeiture — No dedication of rights. — (1) The approval of a rental of water from the water supply bank may be a substitute for the transfer proceeding requirements of section 42-222, Idaho Code.

(2) Water rights obtained by the board or by a local committee appointed by the board and credited to the water supply bank are not subject to forfeiture for nonuse pursuant to section 42-222(2), Idaho Code, while retained in or rented from the water supply bank. The five (5) year period of nonuse for forfeiture of a water right shall begin to accrue upon removal of a right from the bank by the owner of the right if a period of nonuse did not occur prior to the date of acceptance of the right into the bank. The five (5) year period of nonuse shall continue to accrue if a period of nonuse occurred prior to the effective date of acceptance of the right into the bank and the right was not beneficially used while in the bank.

(3) The rental of water rights from the water supply bank shall not constitute a dedication to the lands of any renter since the rental or distribution of water by the water bank is only incidental to its primary purposes listed in section 42-1761, Idaho Code. [I.C., § 42-1764, as added by 1979, ch. 193, § 4, p. 560; am. 1990, ch. 318, § 3, p. 912.]

Opinions of Attorney General. On its face, this section seems to require that a water right be accepted and subsequently rented out in order to toll the forfeiture provisions of § 42-222(2); however, when this section is interpreted in light of the entire

Water Supply Bank Act, it is possible to argue that the forfeiture period should be tolled whenever a water right is placed into the bank. Because of the ambiguity within the Act, it is not possible to predict which interpretation a court might adopt. OAG 88-4.

42-1765. Local committees — Rental of stored water — Apportionment of rental proceeds. — The water resource board may appoint local committees, including water district advisory committees as provided in section 42-605(6), Idaho Code, to facilitate the rental of stored water. When so appointed, the committee shall have the authority to market stored water between consenting owners and consenting renters under rules and regulations adopted by the board. The director of the department of water resources may approve a general lease which the local rental committee may utilize to meet the approval requirements enumerated in section 42-1763, Idaho Code.

In exercising its authority under this section, the local rental committee, if also the advisory committee of a water district, shall determine, in advance, at the annual meeting of water users of the water district held pursuant to section 42-605, Idaho Code, each year, that portion of the proceeds for the year from the lease of stored water to be paid to consenting contract holders of the storage water rights as reimbursement for their costs and that portion to be retained by the district in which the committee is located. Any proceeds retained by a district shall be used exclusively by the advisory committee of the water district for public purposes as set forth in section 42-613A, Idaho Code, and as provided by resolutions adopted by the water users of the district. [I.C., § 42-1765, as added by 1979, ch. 193, § 5, p. 560; am. 1986, ch. 78, § 2, p. 236; am. 1992, ch. 339, § 22, p. 1014.]

Compiler's notes. Sections 1 and 3 of S.L. 1986, ch. 78 are compiled as §§ 42-604 and 42-613A, respectively.

Section 21 of S.L. 1992, ch. 339 is compiled as § 42-619.

Sec. to sec. ref. This section is referred to in §§ 42-605, 42-613A, 42-1763B and 42-1765A.

Opinions of Attorney General. This section does not vest in the local committee of a water district any responsibilities regarding the collection, investment, or disbursement of water bank funds; the water district retains authority over water bank funds. OAG 91-7.

42-1765A. Lemhi river basin — Local rental committee. — (1) The water resource board will appoint a local rental committee to facilitate operation of the water supply bank within the Lemhi river basin comprised of the Lemhi river and all tributary water sources. Section 42-1765, Idaho Code, and the board's water supply bank rules applicable to the operation of a storage water rental pool shall apply to the operation of the water supply bank in the Lemhi river basin, except as inconsistent with this section.

(2) When so appointed, the local rental committee for the Lemhi river basin shall have authority to rent natural flow water rights between consenting owners and consenting renters.

(3) Rights to the use of water for a portion of the approved period of use under a water right may be accepted into the water supply bank and rented out to satisfy the board's minimum stream flow water right authorized under section 42-1506, Idaho Code, provided the owner demonstrates to the satisfaction of the director that there will be an equivalent reduction in the extent of beneficial use made under the right. [I.C., § 42-1765A, as added by 2001, ch. 373, § 2, p. 1309.]

Compiler's notes. Section 1 of S.L. 2001, ch. 373, is compiled as § 42-1506.

Section 3 of S.L. 2001, ch. 373 declared an

emergency. Approved April 10, 2001.

Sec. to sec. ref. This section is referred to in §§ 42-223 and 42-1506.

42-1766. Appeals procedure for water right holders. — (1) During the period of a lease, any water right holder who determines that the lease is causing a water right to which the holder is entitled, to be deprived of water to which it may be otherwise entitled, may petition the director of the department of water resources to revoke or modify the lease. Upon such a petition, the director shall cause an investigation to be made and may hold hearings or gather information in some other manner. In the event that the

director finds that an interference is occurring, he may revoke or require the lease to be modified to insure that no injury to other water rights occurs.

(2) Any person feeling aggrieved by a decision or action of the director shall be entitled to contest the action of the director pursuant to section 42-1701A(3), Idaho Code. [I.C., § 42-1766, as added by 1979, ch. 193, § 6, p. 560; am. 1980, ch. 238, § 18, p. 526.]

Compiler's notes. Sections 17 and 19 of S.L. 1980, ch. 238 are compiled as §§ 42-1737 and 42-2504, respectively.

Section 7 of S.L. 1979, ch. 193 read: "The provisions of this act are hereby declared to be severable and if any provision of this act or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect

the validity of remaining portions of this act."

Section 25 of S.L. 1980, ch. 238 read: "The provisions of this act are hereby declared to be severable and if any provision of this act or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of remaining portions of this act."

42-1767. Approval of projects — Authority of water users to contract with board — Authorizing the board's acquisition of interest in projects. — Irrigation districts, canal companies, irrigation companies, water user associations and water associations are authorized to hold elections, subject to the provisions of section 34-106, Idaho Code, for the purpose of submitting a question to their qualified voters, members or stockholders, as the case may be, as to whether the district, company or association should finance the projects and facilities through the Idaho water resource board for the purposes set forth in section 42-1740, Idaho Code. A two-thirds ($\frac{2}{3}$) vote is required to approve the project. Any irrigation district, canal company, irrigation company, water user association or water association, is hereby authorized to enter into any agreement or agreements with the board with respect to an approved project within the state of Idaho, including but not limited to, agreements providing for the sale, lease or other transfer of title to real and personal property or providing for the maintenance or operation of projects rehabilitated or repaired, or pertaining to the loan or grant of funds for such projects, and said irrigation district, canal company, irrigation company, water user association or water association is hereby authorized to levy assessments as may be necessary therefor. The statutory rights and duties of any such entity shall not in any way be limited or diminished due to any such agreement or agreements with the board. In the event the board acquires an ownership interest, the board shall not assume any liabilities thereon as a result of such transfer of ownership, provided however, that it shall not acquire any voting rights in any irrigation district, canal company, water user's association or similar entity as a result thereof. [I.C., § 42-1767, added by 1981, ch. 90, § 3, p. 125; am. 1995, ch. 118, § 58, p. 417.]

Compiler's notes. Section 2 of S.L. 1981, ch. 90 is compiled as § 42-1740.

Sections 57 and 59 of S.L. 1995, ch. 118 are compiled as §§ 39-2806 and 42-2801, respectively.

Section 4 of S.L. 1981, ch. 90 declared an emergency. Approved March 23, 1981.

42-1768. Task force to study issues pertaining to the development of the Bear River. [Expired.]

Compiler's notes. Section 3 of S.L. 1989, ch. 258 provided that this section would become null, void and of no force and effect on

and after January 1, 1991, unless reauthorized by the legislature by law.

42-1769 — 42-1774. [Reserved.]

42-1775. Declaration of policy and purpose. — The welfare and well-being of the people of the state of Idaho is dependent upon the conservation, development and optimum use of the state's water resources. Water development involves extensive planning, special studies, public support and efficient implementation. The people of Idaho declared their intention to develop the state's water resources in the Idaho constitution, article 15, section 7, providing for a state water plan. Funding by the state of Idaho will insure timely implementation of water projects in the public interest. [I.C., § 42-1775, as added by 1979, ch. 325, § 1, p. 883.]

Decrees.

Nowhere in this title is the Director obligated to accept a prior decree issued in a private adjudication as being conclusive proof of the nature of a water right. Although a

decree evidences a legal right to the use of water, it does not obligate the Director to make a recommendation contrary to his findings. *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 947 P.2d 409 (1997).

42-1776. Water resources conservation and development trust account. — There is hereby created and established in the agency asset fund the water resources conservation and development trust account. All moneys in the account are to be utilized by the Idaho water resources board, upon appropriation by the legislature, to conduct water project feasibility and engineering studies authorized in conjunction with the powers and duties of the board as provided in section 42-1734, Idaho Code, and to secure revenue bonds authorized by section 42-1739, Idaho Code.

The state treasurer is directed to invest all moneys in the account. All interest or other income occurring from such investment shall accrue to the account.

In the event that a project is approved subsequent to a feasibility study funded from the account, the funds expended from the account shall be included as a cost of the project to be repaid to the fund through repayments contracted by the board. It shall be the duty of the board to specify such repayment provisions without regard to the source of funding of the project. [I.C., § 42-1776, as added by 1979, ch. 325, § 2, p. 883.]

Compiler's notes. Section 3 of S.L. 1979, ch. 325 has been repealed.

Section 5 of S.L. 1979, ch. 325 read: "The provisions of this act are hereby declared to be severable and if any provision of this act or

the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of remaining portions of this act."

42-1777. Water resources adjudication account. — (1) A water resource adjudication account is hereby created and established in the

agency asset fund. Fee moneys in the account are to be utilized by the department of water resources, upon appropriation by the legislature, to pay the costs of the department attributable to general water rights adjudications conducted pursuant to chapter 14, title 42, Idaho Code.

The state treasurer is directed to invest all moneys in the account. All interest or other income accruing from such investment shall accrue to the account.

(2) Fee moneys in the account may also be utilized by the judiciary, upon appropriation by the legislature, to pay for judicial expenses directly relating to the Snake river adjudication including, but not limited to, compensation and expenses of special masters appointed by the Idaho supreme court or by the district court, compensation and expenses of clerical staff of the district court, and publication, notice and mailing costs incurred by the district court. [I.C., § 42-1777, as added by 1985, ch. 18, § 4, p. 27; am. 1986, ch. 220, § 24, p. 558.]

Compiler's notes. Section 3 of S.L. 1985, ch. 18 is compiled as § 42-1414.

Sections 23 and 25 of S.L. 1986, ch. 220 are compiled as §§ 42-1423 (now 42-1428) and 31-2402.

Sec. to sec. ref. This section is referred to in § 42-1414.

Cited in: United States v. Idaho ex rel. Dir., Idaho Dep't of Water Resources, 508 U.S. 1, 113 S. Ct. 1893, 123 L. Ed. 2d 563 (1993).

Fees Not Taken From Account.

Trial court did not abuse its discretion in

awarding attorney fees pursuant to § 12-117 in a case where director of department of water resources was ordered by writ of mandate to comply with § 42-602, and ordering that the fees and costs not come out of the Snake River Basin Adjudication account; the court ruled that there was no reasonable basis in law or fact for the director to have refused to comply with § 42-602. Musser v. Higginson, 125 Idaho 392, 871 P.2d 809 (1994).

42-1778. Water rights enforcement account. — (1) The water rights enforcement account is hereby created and established in the agency asset fund.

(2) All moneys in the water rights enforcement account are reserved, set aside, appropriated and made available until expended as may be directed by the director of the department of water resources in carrying out a water rights enforcement program. [I.C., § 42-1778, as added by 1986, ch. 313, § 9, p. 763.]

Compiler's notes. Sections 8 and 10 of S.L. 1986, ch. 313 are compiled as §§ 42-350 — 42-352 and 42-1805, respectively.

Sec. to sec. ref. This section is referred to in § 42-1701B.

CHAPTER 18

DIRECTOR OF DEPARTMENT OF WATER RESOURCES

SECTION.

- 42-1801. Appointment, oath and bond of director of department.
- 42-1801a. Name of department changed.
- 42-1802. Political activity prohibited.
- 42-1803. Removal.
- 42-1804. Successor to commissioner of reclamation — State reclamation

SECTION.

- engineer — Director of department of water administration.
- 42-1805. Additional duties.
- 42-1806. Moratorium on approval of applications to appropriate water. [Null and void December 31, 1997.]

42-1801. Appointment, oath and bond of director of department.

— The director of the department of water resources shall be appointed by the governor for a term of four (4) years commencing as of the first Monday of January, 1975, and thereafter for like terms of four (4) years commencing on the first Monday of January of each such terms of office, and until his successor shall be appointed and qualified in the manner as herein provided, and shall, before entering upon the discharge of the duties of his office, take and subscribe an oath to faithfully discharge the duties of his office. The director of the department of water resources shall also be bonded to the state of Idaho in the time, form and manner prescribed by chapter 8, title 59, Idaho Code. If the office of director shall be vacated by the incumbent by death, resignation or otherwise, it shall be the duty of the governor to fill the same by appointment; and the appointee shall hold his office for the balance of the unexpired term of four (4) years and until his successor is appointed and qualified. [1943, ch. 58, § 6, p. 120; am. 1970, ch. 12, § 1, p. 21; am. 1971, ch. 136, § 31, p. 522; am. 1974, ch. 20, § 27, p. 533.]

Compiler's notes. Section 5 of S.L. 1943, ch. 58 is compiled as § 67-2412 (now repealed).

Section 26 of S.L. 1974, ch. 20, is compiled as § 42-1737.

Section 87 of S.L. 1971, ch. 136 declared an

emergency. Approved March 18, 1971.

Cited in: *Briggs v. Golden Valley Land & Cattle Co.*, 97 Idaho 427, 546 P.2d 382 (1976); *Ritter v. Standal*, 98 Idaho 446, 566 P.2d 769 (1977).

42-1801a. Name of department changed. — Wherever the words department of reclamation or department of water administration appear in the Idaho Code they shall mean the department of water resources, and wherever the words state reclamation engineer or deputy state reclamation engineer appear in the Idaho Code they shall mean the director of the department of water resources or the deputy director of the department of water resources, respectively. [1970, ch. 12, § 2, p. 21; am. 1974, ch. 20, § 28, p. 533.]

Compiler's notes. Section 3 of S.L. 1970, ch. 12 read: "This act shall not in any way affect the status of the state reclamation engineer holding office at the time of this act, and he shall continue in office under the appointment as such existed at the time of this act. This act shall not in any way affect the status of any employee of the department

of reclamation at the time of this act."

Section 4 provided that the act should be in full force and effect on and after July 1, 1970.

Cited in: *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 513 P.2d 627 (1973); *Briggs v. Golden Valley Land & Cattle Co.*, 97 Idaho 427, 546 P.2d 382 (1976).

42-1802. Political activity prohibited. — The director of the department of water resources shall not, during his incumbency, take any active part in political party management or in political campaigns, nor shall he use his official authority or influence for the purpose of interfering with an election or affecting the results thereof, or for the purpose of coercing the political action of any person or body. [1943, ch. 58, § 7, p. 120; am. 1974, ch. 20, § 29, p. 533.]

42-1803. Removal. — The governor may remove the director of the department of water resources for inefficiency, neglect of duty, or misconduct

in office, delivering to him a copy of the charges and affording him an opportunity of being publicly heard in person or by counsel in his own defense, upon not less than ten (10) days' notice; such hearing to be held publicly in the office of the governor at the capitol.

If the director shall be removed, the governor shall file in the office of the secretary of state a complete statement of all charges made against such director, and his findings thereon, together with a complete record of the proceedings. [1943, ch. 58, § 8, p. 120; am. 1974, ch. 20, § 30, p. 533.]

Compiler's notes. Section 63 of S.L. 1974, ch. 20 read, "The director of the department of water administration serving on the effective date of this act shall continue in office as the

director of the department of water resources until the first Monday of January, 1975, subject to the provisions of section 42-1803, Idaho Code."

42-1804. Successor to commissioner of reclamation — State reclamation engineer — Director of department of water administration. — Whenever rights, powers and duties have heretofore been vested in, or exercised by, the commissioner of reclamation, the state reclamation engineer or the director of the department of water administration, all such rights, powers and duties are hereby transferred to and are vested in and shall be exercised by the director of the department of water resources, and every act done in the exercise of such rights, powers and duties shall have the same legal effect as if done by the former commissioner of reclamation, state reclamation engineer, or director of the department of water administration, or the department of reclamation or the department of water administration, or any deputy inspector or subordinate officer thereof, and the said director of the department of water resources shall be subject to the same obligations and duties and shall have the same rights arising from the exercise of such rights, powers and duties as if such rights, powers and duties were exercised by the said commissioner of reclamation, state reclamation engineer, or director of the department of water administration, or department of reclamation or department of water administration, deputy or subordinate officer thereof designated in the respective laws which are to be administered by the said director of the department of water resources and he shall be subject to the same penalty or penalties, civil or criminal, for failure to perform any such obligation or duty or for doing a prohibited act as if such obligation or duty or such act were prohibited in the exercise of such rights, powers or duties by the commissioner of reclamation, state reclamation engineer, or director of the department of water administration designated in the respective laws which are to be administered by the said director of the department of water resources, and the office of commissioner of reclamation, the office of state reclamation engineer, the office of director of the department of water administration each is hereby abolished and the said director of the department of water resources is hereby declared to be the successor of the said commissioner, the said engineer, or the said director of the department of water administration as to all rights, powers and duties and as to all proceedings now pending in the said department of reclamation, or department of water administration or in an appeal therefrom or in any action pending in any court of competent

jurisdiction in which the said commissioner of reclamation, the state reclamation engineer, or the director of the department of water administration is a party in any such action or proceeding. All books, records, papers, documents, property, real and personal, unexpended appropriations and pending business in any way pertaining to the rights, powers and duties hereby transferred to and vested in the said director of the department of water resources shall be delivered and transferred to the said director of the department of water resources.

This act shall not affect any act done, ratified or confirmed or any right accrued or established or any action or proceeding had or commenced in a civil or criminal cause before this act takes effect but such actions or proceedings may be prosecuted and continued by the said department of water resources and the director of the department of water resources under the provisions of this act. [1943, ch. 58, § 9, p. 120; am. 1974, ch. 20, § 31, p. 533.]

Compiler's notes. The words "this act" refer to S.L. 1943, ch. 58, §§ 6-10, which are compiled as §§ 42-1801 — 42-1805.

Cited in: Briggs v. Golden Valley Land & Cattle Co., 97 Idaho 427, 546 P.2d 382 (1976).

42-1805. Additional duties. — In addition to other duties prescribed by law, the director of the department of water resources shall have the following powers and duties:

(1) To represent the state in all matters pertaining to interstate and international water rights affecting Idaho water resources; and to cooperate with all agencies, now existing or hereafter to be formed, within the state or within other jurisdictions, in matters affecting the development of the water resources of this state.

(2) To prepare a present and continuing inventory of the water resources of this state, ascertain means and methods of conserving and augmenting these and determine as accurately as possible the most effective means by which these water resources may be applied for the benefit of the people of this state.

(3) To conduct surveys, tests, investigations, research, examinations, studies, and estimates of cost relating to availability of unappropriated water, effective use of existing supply, conservation, storage, distribution and use of water.

(4) To prepare and compile information and data obtained and to make the same available to interested individuals or agencies.

(5) To cooperate with and coordinate activities with the director of the department of environmental quality as such activities relate to the functions of either or both departments concerning water quality. Such cooperation and coordination shall specifically require that:

(a) The director meet at least quarterly with the director of the department of environmental quality and his staff to discuss water quality programs. A copy of the minutes of such meeting shall be transmitted to the governor.

(b) The director transmit to the director of the department of environmental quality reports and information prepared by him pertaining to

water quality programs, and proposed rules pertaining to water quality programs.

(c) The director shall make available to the director of the department of environmental quality and the director of the department of environmental quality shall make available to the director all notices of hearings relating to the promulgation of rules relating to water quality, waste discharge permits, and stream channel alteration, as such directly affect water quality, and notices of any other hearings and meetings which relate to water quality.

(6) To perform administrative duties and such other functions as the board may from time to time assign to the director to enable the board to carry out its powers and duties.

(7) After notice, to suspend the issuance or further action on permits or applications as necessary to protect existing vested water rights or to ensure compliance with the provisions of chapter 2, title 42, Idaho Code, or to prevent violation of minimum flow provisions of the state water plan.

(8) To promulgate, adopt, modify, repeal and enforce rules implementing or effectuating the powers and duties of the department.

(9) To seek a preliminary or permanent injunction, or both, or a temporary restraining order restraining any person from violating or attempting to violate (a) those provisions of law relating to all aspects of the appropriation of water, distribution of water, headgates and measuring devices; or (b) the administrative or judicial orders entered in accordance with the provisions of law.

(10) To develop, coordinate and provide, through contract or by other means, for weather modification projects involving cloud seeding that are designed to increase the water supplies of the state by enhancing natural precipitation and which conform to state water planning objectives. To accomplish these purposes the director is authorized to accept and use funds acquired through legislative appropriation or by gift, grant, contribution or funding received from any private or public individual or entity. All funds accepted under this provision shall be transmitted to the state treasurer for deposit in the water administration fund and shall be reserved and made available until expended as ordered by the director for weather modification purposes determined by the director to be beneficial.

(11) To develop and implement a plan for data gathering to determine any effect of the weather modification efforts in which the department is involved. [1943, ch. 58, § 10, p. 120; am. 1969, ch. 469, § 4, p. 1352; am. 1974, ch. 20, § 32, p. 533; am. 1985, ch. 15, § 1, p. 21; am. 1986, ch. 313, § 10, p. 763; am. 1993, ch. 32, § 1, p. 106; am. 2001, ch. 103, § 83, p. 253.]

Compiler's notes. Sections 3, 5 of S.L. 1969, ch. 469 are compiled as §§ 42-1737, 42-2014, respectively.

Section 33 of S.L. 1974, ch. 20 is compiled as § 42-3802.

Section 9 of S.L. 1986, ch. 313 is compiled as § 42-1778.

Sections 82 and 84 of S.L. 2001, ch. 103 are compiled as §§ 42-1734 and 42-3902, respectively.

Section 11 of S.L. 1943, ch. 58 repealed all acts and parts of acts in conflict therewith.

Section 12 of S.L. 1943, ch. 58 declared an emergency. Approved Feb. 16, 1943.

Section 64 of S.L. 1974, ch. 20 provided that this act take effect on and after July 1, 1974.

ANALYSIS

Decrees.

Examination of premises.

Decrees.

Nowhere in this title is the Director obligated to accept a prior decree issued in a private adjudication as being conclusive proof of the nature of a water right. Although a decree evidences a legal right to the use of water, it does not obligate the Director to make a recommendation contrary to his findings. *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 947 P.2d 409 (1997).

cation for a water permit, and examined the premises to be irrigated did not constitute legal error, where the agreement that the director could decide the case based in part "upon the records of the department" contained no limitation on the director's statutory authority to examine the premises. *Collins Bros. Corp. v. Dunn*, 114 Idaho 600, 759 P.2d 891 (1988).

Examination of Premises.

The fact that the department went out, after the conference on the company's appli-

cation for a water permit, and examined the premises to be irrigated did not constitute legal error, where the agreement that the director could decide the case based in part "upon the records of the department" contained no limitation on the director's statutory authority to examine the premises. *Collins Bros. Corp. v. Dunn*, 114 Idaho 600, 759 P.2d 891 (1988).

42-1806. Moratorium on approval of applications to appropriate water. [Null and void December 31, 1997.] — [I.C., § 42-1806, as added by 1994, ch. 449, § 1, p. 1433.]

Compiler's notes. Section 2 of S.L. 1994, ch. 449, declared an emergency and provided that this act shall be in full force and effect on

and after April 11, 1994, and shall be null, void and of no force and effect on and after December 31, 1997. Approved April 11, 1994.

CHAPTER 19

DAMS AND BOOMS IN CLEARWATER RIVER

SECTION.

42-1901. Conditions of construction.

42-1902. Supervision of department of water resources.

42-1903. Limitation on right to flood land of others.

SECTION.

42-1904. Regulation by public utilities commission.

42-1901. Conditions of construction. — Dams and booms may be constructed and maintained in the Clearwater river and the tributaries thereof in this state: provided, however, that any such dam or boom has connected therewith a sluiceway or other fixture, appliance or opening sufficient and so arranged as to permit floating timber in the form of loose logs, boards, planks, lumber, ties, poles, rails, posts, cordwood or beams but not in rafts, booms or brails, to pass around, through or over such dam or booms without unreasonable delay or hindrance and without any charge therefor. [1911, ch. 100, § 1, p. 343; am. 1915, ch. 59, § 1, p. 146; am. 1917, ch. 130, § 1, p. 437; reen. C.L. 126:15; C.S., § 2992; I.C.A., § 41-1601.]

Cross ref. Booms and weirs when nuisances, § 38-807.

was not repugnant to Const., Art. 3, § 19. *Grice v. Clearwater Timber Co.*, 20 Idaho 70, 117 P. 112 (1911).

Constitutionality.

Act of legislature authorizing the placing of dams in the North Fork of Clearwater river

42-1902. Supervision of department of water resources. — The construction and maintenance of any such dam shall be subject to the provisions of sections 42-1707 and 42-1708. [1911, ch. 100, § 2, p. 343; reen. 1915, ch. 59, § 2, p. 147; reen. 1917, ch. 130, § 2, p. 437; compiled and reen. C.L. 126:16; C.S., § 2993; I.C.A., § 41-1602.]

Compiler's notes. The name of the department of water administration (formerly the department of reclamation) in the section heading has been changed to the department of water resources on the authority of S.L.

1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

Sections 42-1707 and 42-1708 have been repealed.

42-1903. Limitation on right to flood land of others. — This chapter shall not be construed to authorize any person to construct or maintain a dam or boom upon land above highwater mark owned by another person, or to flood, overflow or otherwise take, damage or interfere with land above highwater mark owned by another person without the consent of such owner, unless the right to do so is first acquired by agreement, purchase or condemnation. [1911, ch. 100, part of § 2, p. 343; reen. 1915, ch. 59, § 2, p. 147; am. 1917, ch. 130, § 2, p. 438; reen. C.L. 126:17; C.S., § 2994; I.C.A., § 41-1603.]

Collateral References. 93 C.J.S., Waters, §§ 54-90.

42-1904. Regulation by public utilities commission. — Any such dam or boom and the use thereof shall be subject to the regulation and control of the public utilities commission, under chapters 1 to 7 of title 59, and any amendments thereof heretofore or hereafter adopted, but only, while and as to, any service, such dam or boom, or the owner thereof, for hire or compensation, furnishes therefrom to the public. [1915, ch. 159, part of § 2, p. 147; am. 1917, ch. 130, § 2, p. 438; reen. C.L. 126:18; C.S., § 2995; I.C.A., § 41-1604.]

Cross ref. "Water system" defined in public utilities law, § 61-124.

CHAPTER 20

RECLAMATION OF CAREY ACT LANDS

SECTION.

- 42-2001. Acceptance of the Carey Act.
- 42-2002. Duties of department.
- 42-2003. Proposals to construct irrigation works.
- 42-2004. Certified check to accompany proposal.
- 42-2005. Application for appropriation permit to be filed.
- 42-2006. Submission of proposal to department.
- 42-2007. Action by the department on proposal for segregation.
- 42-2008. Adverse report by department.
- 42-2009. Contract for construction of reclamation works.
- 42-2010. Contract for construction — Limitations on terms.
- 42-2011. Forfeiture of contract for contractor's default — Sale of project.
- 42-2012. State not to be responsible for work.

SECTION.

- 42-2013. Entry, settlement, and cultivation of lands — Publication of notice of opening — Preference to ex-service persons.
- 42-2013A. Preference.
- 42-2014. Application to enter — Preference to ex-service person — "Ex-service person" defined.
- 42-2015. State land officials and employees not to enter land.
- 42-2016. Duty of department.
- 42-2017. Penalty for violating preceding sections.
- 42-2018. Carey Act trust fund — Continuing appropriation.
- 42-2019. Proof of reclamation and settlement — Patent.
- 42-2020. Settlement after notice of availability of water.
- 42-2021. Final proof after death of entryman.
- 42-2022. Issuance of patent.

SECTION.

- 42-2023. Lands eliminated from project — Repayment of fees, commissions, and purchase moneys — Repayment upon cancellation of entry.
- 42-2024. Manner of repayment.
- 42-2025. Appurtenancy of water rights.
- 42-2026. Lien for purchase price of water right.
- 42-2027. Record of water contract.
- 42-2028. Foreclosure of lien.
- 42-2029. Foreclosure sale.
- 42-2030. Foreclosure sale — Limitation on bid of lienholder.
- 42-2031. Record of certificate of sale.
- 42-2032. Disposition of proceeds of sale.
- 42-2033. Redemption by owner.
- 42-2034. Redemption purchase by prospective settler.

SECTION.

- 42-2035. Sheriff's deed to purchaser on foreclosure.
- 42-2036. Rights of way for canals.
- 42-2037. Department to prescribe rules — Reports of contractors — Waiver of rules.
- 42-2038. Fees of department — Duties of employees.
- 42-2039. Restoration of lands authorized.
- 42-2040. Suits by department.
- 42-2041. Indian Hills Project — Legislative finding.
- 42-2042. Authorization — Financing.
- 42-2043. Source of lands.
- 42-2044. Exemption from appropriation restrictions.

42-2001. Acceptance of the Carey Act. — The state of Idaho accepts the conditions of section 4 of an act of congress, entitled "An act making appropriations for sundry civil expenses of the government for the fiscal year ending June 30, 1894, and for other purposes," approved August 18, 1894, and the acts amendatory thereof, together with all the grants of land to the state under the provisions of the aforesaid act and its amendments.

The selection, management and disposal of said land shall be vested in the department of water resources. [1895, p. 215, §§ 1, 2; reen. 1899, p. 282, ch. 2, §§ 1, 2; reen. R.C. & C.L., § 1613; am. 1919, ch. 8, § 44, p. 67; C.S., § 2996; I.C.A., § 41-1701.]

Compiler's notes. Original act, August 18, 1894, ch. 301, § 4, 28 Stat. 422; first amendment, act of June 11, 1896, ch. 420, § 1, 29 Stat. 413; second amendment, act of March 3, 1901, ch. 853, § 3, 31 Stat. 1188; additional lands for Idaho, J. R. May 25, 1908, No. 28, 35 Stat. 577; act of May 27, 1908, ch. 200, § 1, 35 Stat. 347; temporary withdrawals, act of March 15, 1910, ch. 96, 36 Stat. 237; Warren Act, Feb. 21, 1911, ch. 141, 36 Stat. 237.

S.L. 1919, ch. 8, § 37, p. 43 (§ 67-3301 herein) vests the powers and duties of the state board of land commissioners in relation to the administration of the Carey Act in the department of reclamation.

S.L. 1970, ch. 12, § 2, p. 21 (§ 42-1801a) substituted the department of water administration for the department of reclamation. Such act was amended by S.L. 1974, ch. 20, § 28, p. 533 wherein the department of water resources was substituted for the department of water administration.

The name of the department of water administration (formerly the department of reclamation) has been changed to the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

Cross ref. Federal laws pertaining to Carey Act lands, Vol. 1, Idaho Code, Federal Laws, ch. 3, §§ 57-59, 59a, 59b and 59c.

Administration of Carey Act excepted from powers of department of lands, § 58-119.

Sec. to sec. ref. This chapter is referred to in § 42-2041.

Cited in: Idaho Irrigation Co. v. Gooding, 265 U.S. 518, 44 S. Ct. 618, 68 L. Ed. 1157 (1924); Commonwealth Trust Co. v. Smith, 266 U.S. 152, 45 S. Ct. 26, 69 L. Ed. 219 (1924); Portneuf-Marsh Valley Canal Co. v. Brown, 274 U.S. 630, 47 S. Ct. 692, 71 L. Ed. 1243 (1927); Twin Falls Salmon River Land & Water Co. v. Alexander, 260 F. 270 (D. Idaho 1919), aff'd, 267 F. 382 (9th Cir. 1920); Twin Falls Oakley Land & Water Co. v. Martens, 271 F. 428 (9th Cir. 1921); Twin Falls Salmon River Land & Water Co. v. Caldwell, 272 F. 356 (9th Cir. 1921); Idaho Irrigation Co. v. Gooding, 285 F. 453 (9th Cir. 1922); Glavin v. Commonwealth Trust Co., 295 F. 103 (9th Cir. 1924); Tapper v. Idaho Irrigation Co., 36 Idaho 78, 210 P. 591 (1922); Edholm v. Idaho Irrigation Co., 37 Idaho 116, 214 P. 1036 (1923); Palmer v. Maney, 45 Idaho 731, 266 P. 424 (1928); Carter v. Blaine County Inv. Co., 45 F.2d 643 (D. Idaho 1930); Pierson v. State

Bd. of Land Comm'rs, 14 Idaho 159, 93 P. 775 (1908); *Craig v. Smith*, 33 Idaho 590, 196 P. 1038 (1921).

ANALYSIS

Beneficial use of water.
Construction contracts.
Contract for right of way.
Estoppel as to duty of water.
Improper duty of water.
Lien on segregated lands.
Operation of act.
Public trust.
Right to sell water.

Beneficial Use of Water.

The entire area for which water rights were sold by a Carey Act construction company were the proper basis for determining beneficial use of water. *Twin Falls Land & Water Co. v. Twin Falls Canal Co.*, 7 F. Supp. 238 (D. Idaho 1933), aff'd, 79 F.2d 431 (9th Cir. 1935); cert. denied, 296 U.S. 654, 56 S. Ct. 581, 80 L. Ed. 466 (1936).

Construction Contracts.

Where construction company failed to furnish water in accordance with its contract, it was liable for damages sustained by settler on land it contracted to irrigate. *Hanes v. Idaho Irrigation Co.*, 21 Idaho 512, 122 P. 859 (1912).

Contract under Carey Act was held to be only a construction contract although it contained provisions not usually contained in Carey Act construction contracts. *Sauve v. Title Guar. & Sur. Co.*, 29 Idaho 146, 158 P. 112 (1916).

Contract for Right of Way.

Provisions of Carey Act are broad enough to sustain contract between land and water company and state, providing in part that "all water users on lands irrigated from said canals or laterals shall have such right of way as may be necessary from the second party's canal or laterals to their own land in order to construct and maintain the necessary service ditches for their own use * * *." *McElroy v. Helmer*, 38 Idaho 327, 222 P. 290 (1923).

Estoppel as to Duty of Water.

Under Carey Act construction, a construction company was estopped from asserting that surplus water rights were available as a basis for sale of additional stock to water users. *Twin Falls Land & Water Co. v. Twin Falls Canal Co.*, 7 F. Supp. 238 (D. Idaho 1933), aff'd 79 F.2d 431 (9th Cir. 1935), cert. denied, 296 U.S. 654, 56 S. Ct. 381, 80 L. Ed. 466 (1936).

Improper Duty of Water.

Under Carey Act, evidence in the cited case was insufficient to establish improper duty of

water as basis for contention that surplus water rights were available. *Twin Falls Land & Water Co. v. Twin Falls Canal Co.*, 7 F. Supp. 238 (D. Idaho 1933), aff'd, 79 F.2d 431 (9th Cir. 1935), cert. denied, 296 U.S. 654, 56 S. Ct. 381, 80 L. Ed. 466 (1936).

Lien on Segregated Lands.

A Carey Act construction company, taking over land and water rights under its lien for construction costs where the purchaser thereof had defaulted, held such lands and water rights subject to the statutory lien of the operating company for furnishing water. *North Side Canal Co. v. Idaho Farms Co.*, 107 F.2d 481 (9th Cir. 1939). See also *Portneuf-Marsh Valley Canal Co. v. Brown*, 274 U.S. 630, 47 S. Ct. 692, 71 L. Ed. 1243 (1927); *North Side Canal Co. v. Idaho Farms Co.*, 60 Idaho 748, 96 P.2d 232 (1939).

Lien cannot attach until both state and federal acts have been complied with. *Idaho Irrigation Co. v. Pew*, 26 Idaho 272, 141 P. 1099 (1914).

Operation of Act.

Under the Carey Act and amendments thereto, the government issues its patent to state for segregated lands to which it is shown that provision has been made for supplying sufficient water for their irrigation and reclamation, and state holds such title in trust for settlers and purchasers. *Bothwell v. Bingham County*, 24 Idaho 125, 132 P. 972 (1913), aff'd, 237 U.S. 642, 35 S. Ct. 702, 59 L. Ed. 1157 (1915).

Procedure for carrying out Carey Act and Idaho statutes applicable thereto, see *State v. Twin Falls Salmon River Land & Water Co.*, 30 Idaho 41, 166 P. 220 (1916). See also *Twin Falls Salmon River Land & Water Co. v. Caldwell*, 242 F. 177 (9th Cir. 1917); *State v. Twin Falls Land & Water Co.*, 37 Idaho 73, 217 P. 252 (1923).

Although the board (department of water resources) was vested with very wide discretionary powers in the exercise of the duties imposed upon it with regard to Carey Act lands, when it had thrown open to entry land of Carey Act segregation, or portion thereof, and published its notice to that effect in compliance with the statute, it was not vested with discretionary power to refuse to allow entry on said land by person possessing the statutory qualification and who had complied with the statutory conditions precedent to a right to make an entry, and in case of such refusal, mandamus will lie to compel board to allow entry. *Furbree v. Alexander*, 31 Idaho 738, 176 P. 97 (1918).

Public Trust.

Although a Carey Act construction company had legal title to an irrigation system and water rights, such property was subject

to public use and was held in trust for the state and prospective owners. *Twin Falls Land & Water Co. v. Twin Falls Canal Co.*, 7 F. Supp. 238 (D. Idaho 1933), *aff'd*, 79 F.2d 431 (9th Cir. 1935), *cert. denied*, 296 U.S. 654, 56 S. Ct. 381, 80 L. Ed. 466 (1936).

Right to Sell Water.

A construction corporation under the Carey Act only had a right to sell water rights for the

purpose of reimbursing itself for the costs of construction. *Twin Falls Land & Water Co. v. Twin Falls Canal Co.*, 7 F. Supp. 238 (D. Idaho 1933), *aff'd*, 79 F.2d 431 (9th Cir. 1935), *cert. denied*, 296 U.S. 654, 56 S. Ct. 381, 80 L. Ed. 466 (1936).

Collateral References. 45 Am. Jur. 2d, Irrigation, §§ 97-102.

94 C.J.S., Waters, §§ 763-765.

42-2002. Duties of department. — The department of water resources shall receive and file all proposals for the construction of irrigation works to reclaim lands selected under the provisions of this chapter; keep for public inspection maps or plats, on a scale of two (2) inches to the mile, of all lands selected; receive entries of settlers on these lands, and hear or receive the final proof of their reclamation; and do any and all work required in carrying out the provisions of this chapter. It shall have authority to administer oaths whenever necessary in the performance of its duties. [1895, p. 215, ch. 2, § 5; reen. 1899, p. 282, ch. 2, § 5; modified 1905, p. 131, § 30; compiled and reen. R.C. & C.L., § 1614; C.S., § 2997; I.C.A., § 41-1702.]

Compiler's notes. The name of the department of water administration (formerly the department of reclamation) has been changed to the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

Cross ref. Department of water resources to exercise certain rights, powers, and duties of register of land board, § 58-119.

Powers.

Commissioner of reclamation (director of the department of water resources) was the proper party to bring suit to secure from court

of equity advice and direction in the administration of reclamation project. *Carter v. Blaine County Inv. Co.*, 45 F.2d 643 (D. Idaho 1930).

State board of land commissioners (department of water resources) and director of the department of water resources are creatures of constitution and statutes and can exercise no authority except that expressly given them and such incidental and implied authority as is necessary to enable them to exercise powers expressly granted. *Evans v. Swendsen*, 34 Idaho 290, 200 P. 136 (1921).

42-2003. Proposals to construct irrigation works. — Any person, company of persons, association or incorporated company, constructing, having constructed or desiring to construct, ditches, canals or other irrigation works to reclaim land under the provisions of this chapter, shall file with the department of water resources a request for the selection, on behalf of the state, by the department, of the land to be reclaimed designating said land by legal subdivisions.

This request shall be accompanied by a proposal to construct the ditch, canal or other irrigation works necessary for the complete reclamation of the land asked to be selected. The proposal shall be prepared in accordance with the rules of the department of water resources of Idaho as adopted by the director and with the regulations of the department of the interior; and shall be accompanied by the certificate of the director of the department of water resources that application for permit to appropriate water has been filed in its office, together with the department's report thereon. It shall state the source of water supply, the location and dimensions of the proposed works, the estimated cost thereof, the price and terms per acre at which perpetual water rights will be sold to settlers on the land to be reclaimed, said

perpetual rights to embrace a proportionate interest in the canal or other irrigation works, together with all the rights and franchises attached thereto, and whether the applicants intend to apply for settlement of the lands under the provisions of section 42-2013A, Idaho Code.

In the case of incorporated companies it shall state the name of the company, the purpose of its incorporation, the names and places of residence of its directors and officers, the amount of its authorized and of its paid up capital. If the applicant is not an incorporated company, the proposal shall set forth the name or names of the party or parties, and such other facts as will enable the director to determine his or their financial ability to carry out the proposed undertaking. [1895, p. 215, ch. 2, § 6; reen. 1899, p. 282, ch. 2, § 6; reen. R.C. & C.L., § 1615; C.S., § 2998; I.C.A., § 41-1703; am. 1974, ch. 164, § 1, p. 1397.]

Compiler's notes. The words "this chapter" refer to §§ 42-2001 — 42-2040.

Section 2 of S.L. 1974, ch. 164 is compiled as § 42-2011.

Cross ref. Proposals by irrigation districts, §§ 43-1701 — 43-1712.

Submission of proposal to department, § 42-2006.

Sec. to sec. ref. This section is referred to in §§ 42-2006, 42-2013A and 42-2014.

Cited in: *Hobbs v. Twin Falls Canal Co.*, 24 Idaho 380, 133 P. 899 (1913); *Twin Falls Salmon River Land & Water Co. v. Twin Falls County*, 231 F. 769 (D. Idaho 1916); *Ireton v. Idaho Irrigation Co.*, 30 Idaho 310, 164 P. 687 (1917).

ANALYSIS

Priorities.
Proportionate interest.
Proposals.
Rights and franchises.

Priorities.

All settlers who purchased water rights and applied water to land were in same class, without priorities as among themselves, and shared alike. *Faris v. Blaine County Inv. Co.*, 3 F. Supp. 381 (D. Idaho 1933); *Sanderson v. Salmon River Canal Co.*, 34 Idaho 303, 200 P. 341, 26 A.L.R. 292 (1921), appeal dismissed, 260 U.S. 755, 43 S. Ct. 94, 67 L. Ed. 497 (1922).

42-2004. Certified check to accompany proposal. — A certified check for a sum not less than \$250 nor more than \$2500, as may be determined by the rules of the department, shall accompany each request and proposal, the same to be held as a guaranty of the execution of the contract with the state, in accordance with its terms, by the party submitting such proposal, in case of the approval of the same and the selection of the land by the department, and to be forfeited to the state in case of failure of said parties to enter into a contract with the state in accordance with the

Proportionate Interest.

The theory of proportionate sharing of water appropriated has no application where there is not sufficient water to reclaim entire tract. *State v. Twin Falls Salmon River Land & Water Co.*, 30 Idaho 41, 166 P. 220 (1916).

Interest which each purchaser had was proportionate and any loss must also be shared proportionately. *State v. Twin Falls Canal Co.*, 21 Idaho 410, 121 P. 1039, 1916F L.R.A. 236 (1911), appeal dismissed, 235 U.S. 690, 59 L. Ed. 427, 35 S. Ct. 205 (1914); *State v. Twin Falls Canal Co.*, 27 Idaho 728, 151 P. 1013 (1915).

Proposals.

Proposal was held to amount to a bid. *State v. Twin Falls Salmon River Land & Water Co.*, 30 Idaho 41, 166 P. 220 (1916).

Rights and Franchises.

Term "rights and franchises" means water rights as well as all other rights, including dams, canals, ditches, laterals, etc. *State v. Twin Falls Canal Co.*, 21 Idaho 410, 121 P. 1039, 1916F L.R.A. 236 (1911), appeal dismissed, 235 U.S. 690, 59 L. Ed. 427, 35 S. Ct. 205 (1914); *State v. Twin Falls Canal Co.*, 27 Idaho 728, 151 P. 1013 (1916).

Collateral References. 45 Am. Jur. 2d, Irrigation, § 102.

provisions of this chapter. [1895, p. 215, ch. 2, § 7; reen. 1899, p. 282, ch. 2, § 7; reen. R.C. & C.L., § 1616; C.S., § 2999; I.C.A., § 41-1704.]

Sec. to sec. ref. This section is referred to in § 42-2038.

42-2005. Application for appropriation permit to be filed. — The person, company of persons, association or incorporated company making application to the department of water resources for the selection of lands by the state, shall have filed with the department an application for a permit to appropriate water for the reclamation of the lands described in his request. This application for a permit shall be of a form prescribed by the department of water resources, and shall be accompanied by two (2) copies of a map of the land to be selected, and it shall show accurately the location and dimensions of the proposed irrigation works. The maps of the lands and proposed irrigation works shall be prepared in accordance with the regulations of the department of water resources of the state of Idaho and the rules of the department of the interior. [1895, p. 215, ch. 2, § 8; reen. 1899, p. 282, ch. 2, § 8; reen. R.C. & C.L., § 1617; C.S., § 3000; I.C.A., § 41-1705.]

Compiler's notes. The name of the department of water administration (formerly the department of reclamation) has been changed to the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

State v. Twin Falls Canal Co., 21 Idaho 410, 121 P. 1039, 1916F L.R.A. 236 (1911), appeal dismissed, 235 U.S. 690, 35 S. Ct. 205, 59 L. Ed. 427 (1914).

Ownership of Permit.

Permit was one of the rights and franchises in which settler had proportionate interest.

42-2006. Submission of proposal to department. — Immediately upon the receipt of any request and proposal, as designated in section 42-2003, it shall be the duty of the department to examine the same and ascertain if it complies with its rules and the regulations of the department of the interior. If it does not, it is to be returned for correction; but, if it does so comply, the department shall examine the same and make a written report, stating whether or not the proposed works are feasible, whether the proposed diversion of the public waters of the state will prove beneficial to the public interest; whether there is sufficient unappropriated water in the source of supply; and whether or not a permit to divert and appropriate water through the proposed works has been approved by the department; whether the capacity of the proposed works is adequate to reclaim the land described; whether or not the proposed cost of construction is reasonable; and whether or not the maps filed in its office comply with the requirements of said department and the regulations of the department of the interior; also whether or not the lands proposed to be irrigated are desert in character and such as may properly be set apart under the provisions of the aforesaid act of congress and the rules and regulations of the department of the interior thereunder. [1895, p. 215, ch. 2, § 9; reen. 1899, p. 282, ch. 2, § 9; modified 1905, p. 131, § 30; compiled and reen. R.C. & C.L., § 1618; C.S., § 3001; I.C.A., § 41-1706.]

Cited in: Twin Falls Oakley Land & Water Co. v. Martens, 271 F. 428 (9th Cir. 1921); State v. Twin Falls Canal Co., 21 Idaho 410, 121 P. 1039, 1916F L.R.A. 236 (1911).

seems to have been intended to be final. State v. Twin Falls Salmon River Land & Water Co., 30 Idaho 41, 166 P. 220 (1916) (decided before amendment).

Finality of State Engineer's Determination.

This determination of state engineer (director of the department of water resources)

42-2007. Action by the department on proposal for segregation.

— It shall be the duty of the department to satisfy itself as to the financial ability of the applicant to do the things which will be required to be done in the event the application is approved.

In case of approval, the department shall file in the local land office a request for the withdrawal of the land described in said proposal.

No request on which the department of water resources has reported adversely, either as to the water supply, the feasibility of the construction, the cost or capacity of the works or as to the character of the lands sought to be irrigated, shall be approved by the department. [1895, p. 215, ch. 2, § 10; reen. 1899, p. 282, ch. 2, § 10; modified 1905, p. 131, § 30; compiled and reen. R.C., § 1619; am. 1917, ch. 104, § 1, p. 379; reen. C.L., § 1619; C.S., § 3002; I.C.A., § 41-1707.]

Compiler's notes. The name of the department of water administration (formerly the department of reclamation) has been changed to the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and

S.L. 1974, ch. 20, § 28 (§ 42-1801a).

Cited in: State v. Twin Falls Canal Co., 21 Idaho 410, 121 P. 1039, 1916F L.R.A. 236 (1911); State v. Twin Falls Salmon River Land & Water Co., 30 Idaho 41, 166 P. 220 (1916).

42-2008. Adverse report by department. — In case the department of water resources shall report adversely upon the proposed irrigation works, or where requests and proposals are not approved by the department, the said department shall notify the parties making such proposal of such action and the reasons therefor. The parties so notified shall have sixty (60) days in which to submit a satisfactory proposal; but the department may, at its discretion, extend the time to six (6) months. [1895, p. 215, ch. 2, § 11; reen. 1899, p. 282, ch. 2, § 11; compiled and reen. R.C. & C.L., § 1620; C.S., § 3003; I.C.A., § 41-1708.]

Compiler's notes. The name of the department of water administration (formerly the department of reclamation) has been

changed to the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

42-2009. Contract for construction of reclamation works. — Upon the withdrawal of the land by the department of the interior, it shall be the duty of the department of water resources to enter into a contract with the parties submitting the proposal, which contract shall contain complete specifications of the location, dimensions, character and estimated cost of the proposed ditch, canal or other irrigation works, the amount of water per acre which said works will make available at the water user's headgate, the price and terms per acre at which such works and perpetual water rights shall be sold to settlers and the price and terms upon which the state is to

dispose of the lands to settlers. This contract shall not be entered into on the part of the state until the withdrawal of the lands by the department of the interior and the filing of a satisfactory bond on the part of the proposed contractor, which bond shall be in a penal sum equal to five per cent (5%) of the estimated cost of the works, and shall be conditioned for the faithful performance of the provisions of the contract with the state.

Should it appear at any time, in the judgment of the department of water resources, that the water supply of the party or parties with which such contract had been made, is inadequate to properly and sufficiently irrigate the lands so proposed in said contract to be irrigated, or that water rights have been sold to the full carrying capacity of the proposed ditch, canal or other irrigation works, or that water rights have been sold by said party or parties to the full amount or in excess of the actual appropriation of water made by said party or parties or to the full amount or in excess of the supply of water made actually available by said parties, then in that event the department of water resources shall have the right to enter an order forbidding said parties from making any further or additional sales of water rights or of shares of stock in any company representing or evidencing water rights, and after the entry of such order all further or additional sales of such water or water rights, shares of stock and contracts to sell the same made by said party or parties shall be null and void, and said department of water resources shall have the power to refuse to issue entryman's certificates thereon. This section shall apply to contracts heretofore made as well as contracts hereafter to be made by the department. [1895, p. 215, ch. 2, § 12; reen. 1899, p. 282, ch. 2, § 12; reen. R.C., § 1621; am. 1917, ch. 104, § 1, p. 379; reen. C.L., § 1621; am. 1919, ch. 70, §§ 1, 2, p. 247; C.S., § 3004; I.C.A., § 41-1709.]

ANALYSIS

Availability of water.

Bond.

Capacity of state.

Character of work.

Construction of contract.

Determination of cost.

Foreclosure of lien.

Liability of company for damages.

Mechanics' lien.

Overselling water supply.

Rotation in use of water.

Status of company.

Availability of Water.

To make water available under provisions of a Carey Act construction contract means to bring it to the half mile point from a quarter section of such land, measured in a direct line, so that water can be taken from company lateral to point upon the land to be irrigated under gravity system. *Collins v. Twin Falls North Side Land & Water Co.*, 28 Idaho 1, 152 P. 200 (1915).

Under contract with construction company, duty devolved upon settler to construct properly his own service ditch from the lateral of

construction company and to furnish one headgate into his service ditch, and company was not liable for nondelivery prior to construction of settler's service lateral. *Collins v. Twin Falls North Side Land & Water Co.*, 28 Idaho 1, 152 P. 200 (1915).

Bond.

Bond could not be resorted to for the purpose of reimbursing individual locators for damages sustained by failure to complete works, but must be resorted to by state for the benefit of all locators on the project. *Sauve v. Title Guar. & Sur. Co.*, 29 Idaho 146, 158 P. 112 (1916).

Provisions other than those contained in this section may be inserted in the contract but liability on bond is limited to statutory provisions. *Sauve v. Title Guar. & Sur. Co.*, 29 Idaho 146, 158 P. 112 (1916).

Capacity of State.

State in dealing with Carey Act project acts by virtue of its sovereignty and not in a proprietary capacity. *State v. Twin Falls Salmon River Land & Water Co.*, 30 Idaho 75, 166 P. 232, overruling original opinion, 30 Idaho 41, 166 P. 220 (1916), on this point.

Character of Work.

Under provisions of statute, completing of said works is supervised by state and ultimately the works must be turned over to settlers, thereby providing a kind of municipal ownership. *State v. Twin Falls Canal Co.*, 21 Idaho 410, 121 P. 1039, 1916F L.R.A. 236 (1911), appeal dismissed, 235 U.S. 690, 35 S. Ct. 205, 59 L. Ed. 427 (1914); *City of Twin Falls v. Harlan*, 27 Idaho 769, 151 P. 1191 (1915).

Mere construction and operation of Carey Act ditch could not be a nuisance as it was not only permitted by law, but was the result of contract with state land board under the statute. *City of Twin Falls v. Harlan*, 27 Idaho 769, 151 P. 1191 (1915).

Construction of Contract.

Laws of state applicable to appropriation and use of water were controlling and all parties contracting under the Carey Act did so with at least the presumed knowledge of such laws. *Twin Falls Salmon River Land & Water Co. v. Caldwell*, 242 F. 177 (9th Cir. 1917).

Contract contemplated was held to be a construction contract only, although it contained provisions not usually contained in Carey Act construction contracts. *Sauve v. Title Guar. & Sur. Co.*, 29 Idaho 146, 158 P. 112 (1916).

Determination of Cost.

Amendment to the federal Carey Act, in fixing amount of lien upon land to be created by state at "the actual cost of reclamation and reasonable interest thereon from date of reclamation until disposed of to actual settlers," contemplates determination of such cost by state, and that in a contract between state and corporation for construction of irrigation works, such cost must be estimated or determined in advance as a basis for the contract. *Idaho Irrigation Co. v. Pew*, 26 Idaho 272, 141 P. 1099 (1914).

In a contract between a Carey Act irrigation company and settler, in which, by reference, terms and conditions of contract between state and irrigation company were assented to, and price of water rights was fixed upon the basis of the estimated cost of the works contained in state contract, both company and settler were estopped from afterward raising question as to whether such estimated cost was the actual cost of the works. *Idaho Irrigation Co. v. Pew*, 26 Idaho 272, 141 P. 1099 (1914).

Foreclosure of Lien.

Where, under Carey Act contract, it appeared that less land could be irrigated than was expected at first, and limits of area had been reduced, all contract holders were necessary parties to suit to foreclose lien on water rights. *Commonwealth Trust Co. v.*

Smith, 273 F. 1 (9th Cir. 1921), *aff'd*, 266 U.S. 152, 69 L. Ed. 219, 45 S. Ct. 26 (1924).

Liability of Company for Damages.

Where construction company while operating system failed to furnish water in accordance with its contract, it was liable for damages sustained by settler. *Hanes v. Idaho Irrigation Co.*, 21 Idaho 512, 122 P. 859 (1912).

Where construction company changed location of proposed canal, it was liable in damages to settler injured thereby. *Sommerville v. Idaho Irrigation Co.*, 21 Idaho 546, 123 P. 302 (1912).

Mechanics' Lien.

Irrigation works constructed under the Carey Act are subject to the mechanics' lien law of Idaho, particularly § 45-501. *Continental & Com. Trust & Sav. Bank v. Corey Bros. Constr. Co.*, 208 F. 976 (9th Cir. 1913).

In a suit to enforce mechanics' liens on an irrigation system, the trustees under trust deeds securing bonds on the system were entitled to defend and claim priority over the mechanics' liens on the ground that the dam constructed was a failure, owing to the fault of the construction company in that it so far departed from the terms and specifications of its contract with the irrigation company as to make the dam a useless structure. *Continental & Com. Trust & Sav. Bank v. Corey Bros. Constr. Co.*, 208 F. 976 (9th Cir. 1913).

In a suit to enforce mechanics' liens on an irrigation system by the trustees under trust deeds securing bonds on the system, such trustees were bound by the construction placed upon the doubtful or uncertain provisions of the contract by the parties thereto, and by any waiver by the irrigation company of strict performance of the contract. *Continental & Com. Trust & Sav. Bank v. Corey Bros. Constr. Co.*, 208 F. 976 (9th Cir. 1913).

Overselling Water Supply.

Where a corporation which had contracted with the state of Idaho for the construction of an irrigation system made contracts with settlers which totaled in excess of the capacity of the system, the court, under the circumstances of the case, could not scale all contracts down proportionately both in the amount of water and the consideration to be paid therefor, but the court could and did restrain the company from making any contracts or waiving any right of forfeiture of existing ones, and also restrained it, together with the other defendants, from collecting or attempting to enforce payments upon the contracts until the settlers had been provided with the water supply contracted for, or were given trustworthy assurance that it would be provided. *Caldwell v. Twin Falls Salmon*

River Land & Water Co., 225 F. 584 (D. Idaho 1915).

Rotation in Use of Water.

Although there is no statutory provision for rotation in the use of water, contracts providing for rotation will be enforced by the courts. *State v. Twin Falls Canal Co.*, 21 Idaho 410, 121 P. 1039, 1916F L.R.A. 236 (1911), appeal dismissed, 235 U.S. 690, 35 S. Ct. 205, 59 L. Ed. 427 (1914); *Twin Falls Salmon River Land & Water Co. v. Caldwell*, 242 F. 177 (9th Cir. 1917).

Status of Company.

Company entering into this contract with state was related to the undertaking simply as construction company, whose duty it was under the provisions of the state law and terms of the contract to build a canal under supervision of state, money spent in such construction being secured by land which

canal was designed to irrigate. *State v. Twin Falls Canal Co.*, 21 Idaho 410, 121 P. 1039, 1916F L.R.A. 236 (1911), appeal dismissed, 235 U.S. 690, 35 S. Ct. 205, 59 L. Ed. 427 (1914).

In the operation of said canal and furnishing of water, construction company was a quasi-public service corporation, and under the state contract, construction company was bound to construct its works in accordance with said contract. *Hanes v. Idaho Irrigation Co.*, 21 Idaho 512, 122 P. 859 (1912).

Collateral References. 45 Am. Jur. 2d, Irrigation, § 102.

Right of owner of land within reclamation project in respect to which a water right was allowed upon application pursuant to reclamation act, to perpetual right beyond control of federal government for sufficient amount beneficially to irrigate land. 115 A.L.R. 1320.

42-2010. Contract for construction — Limitations on terms. — No contract shall be made by the department which requires a greater time than five (5) years for the construction of the works, but such time may be extended by the department for a period not exceeding three (3) years. All contracts shall state that the work shall begin within six (6) months from date of contract; that at least one tenth ($\frac{1}{10}$) of the construction work shall be completed within two (2) years from the date of said contract and that the construction shall be prosecuted diligently and continuously to completion. A failure to complete the works within the time required by the contract, or an extension thereof as herein provided, shall forfeit to the state all rights under the same.

This section shall apply to contracts heretofore made as well as to contracts hereafter to be made by the department. [1895, p. 215, ch. 2, § 13; reen. 1899, p. 282, ch. 2, § 13; reen. R.C., § 1622; am. 1911, ch. 35, §§ 1, 2, p. 75; reen. C.L., § 1622; C.S., § 3005; I.C.A., § 41-1710.]

Bond.

Remedy created by this provision was exclusive, and obligor of bond could insist that

the statutory remedy be followed. *Sauve v. Title Guar. & Sur. Co.*, 29 Idaho 146, 158 P. 112 (1916).

42-2011. Forfeiture of contract for contractor's default — Sale of project. — Upon the failure of any parties having contracts with the state for the reclamation of lands segregated under the Carey Act to commence the construction of such ditches, canals or other irrigation works within the time specified by the contract or to perform all of the requirements of said contract within the time specified in said contract with the state to the satisfaction of the director of the department of water resources, it shall be the duty of the director to give such parties written notice of such failure, and if, after a period of sixty (60) days from the sending of such notice, they shall have failed to proceed with the work or to conform to the provisions of their contract with the state, the bond and contract of such parties and all

works constructed thereunder shall be at once and thereby forfeited to the state.

It shall be the duty of the director at once so to declare and give notice once each week for a period of four (4) weeks in some newspaper of general circulation in the county in which the work is situated and in one (1) newspaper at the state capital in like manner and for a like period of the forfeiture of said contract, and that upon a fixed day proposals will be received at the office of the department for the purchase of ditches, canals, other irrigation works, water rights and all other rights, privileges and benefits obtained under the provisions of the said contract and for the performance of the provisions of said contract with the state. The time for receiving said bids shall be at least sixty (60) days subsequent to the issuing of the last notice of forfeiture. Upon the request of any bidder the director shall specify in particular the needful things to be done in order to accomplish the substantial and satisfactory performance of said contract, and the director may require good and sufficient bond for such performance before confirming such sale. The money received by the department from the sale under the provisions of this section shall first be applied to the expenses incurred by the state in the forfeiture and disposal and to satisfying the bond, and the surplus, if any exists, shall be paid into the Carey Act trust fund created under section 42-2018, Idaho Code. [1895, p. 215, ch. 2, § 14; reen. 1899, p. 282, ch. 2, § 14; modified 1905, p. 131, § 30; compiled and reen. R.C., § 1623; am. 1917, ch. 104, p. 380; compiled and reen. C.L., § 1623; C.S., § 3006; I.C.A., § 41-1711; am. 1974, ch. 164, § 2, p. 1397; am. 2001, ch. 183, § 18, p. 613.]

Compiler's notes. The Carey Act referred to herein is found in 43 U.S.C., § 641. See §§ 57, 59 of the Federal Laws in Vol. 1 of the Idaho Code.

Section 1 of S.L. 1974, ch. 164 is compiled as § 42-2003.

Sections 17 and 19 of S.L. 2001, ch. 183 are compiled as §§ 42-1733 and 43-401, respectively.

Cited in: Twin Falls Salmon River Land & Water Co. v. Twin Falls County, 231 F. 769 (D. Idaho 1916); City of Twin Falls v. Harlan, 27 Idaho 769, 151 P. 1191 (1915); State v. Twin Falls Salmon River Land & Water Co., 30 Idaho 41, 166 P. 220 (1916).

ANALYSIS

Duty of department.

Forfeiture of contract by department.

Duty of Department.

Upon failure of construction company to complete works according to contract, it was the duty of land board to follow provisions of this statute. *Sauve v. Title Guar. & Sur. Co.*, 29 Idaho 146, 158 P. 112 (1916).

Forfeiture of Contract by Department.

Duty of reclamation commissioner (now director of department of water resources) to forfeit Carey Act reclamation contract on failure of party to perform all requirements of contract held not ministerial so as to authorize mandamus to compel performance thereof. *Logan v. Carter*, 49 Idaho 393, 288 P. 424 (1930).

Members of state land board (department of water resources) were without authority to forfeit Carey Act reclamation contract. *Logan v. Carter*, 49 Idaho 393, 288 P. 424 (1930).

42-2012. State not to be responsible for work. — Nothing in this chapter shall be construed as authorizing the director to obligate the state to pay for any work constructed under any contract, or to hold the state in any way responsible to settlers for the failure of contractors to complete the work according to the terms of their contracts with the state. [1895, p. 215, ch. 2, § 15; reen. 1899, p. 282, ch. 2, § 15; reen. R.C. & C.L., § 1624; C.S., § 3007; I.C.A., § 41-1712; am. 1974, ch. 164, § 3, p. 1397.]

Compiler's notes. The words "this chapter" refer to §§ 42-2001 — 42-2040.

Status of Construction Company.

A Carey Act construction company was not a construction or selling agent of the state

after the foreclosure of its lien on land for failure of the entryman to pay the contract price. *North Side Canal Co. v. Idaho Farms Co.*, 60 Idaho 749, 96 P.2d 232 (1939).

42-2013. Entry, settlement, and cultivation of lands — Publication of notice of opening — Preference to ex-service persons. —

Immediately upon the withdrawal of any land for the state by the department of the interior, and the inauguration of work by the contractor, it shall be the duty of the director of the department of water resources, by publication once each week in some newspaper of the county in which said lands are situated, and one (1) newspaper at the state capital, for a period of four (4) weeks, to give notice that said land, or any part thereof as the director in his discretion may deem is for the best interests of the state, is open for settlement, the price for which said land will be sold to settlers by the state and the contract price at which settlers can purchase water rights or shares in such works provided, however, that in said notice two (2) dates of opening shall be stated, the first of which shall be at least thirty (30) days prior to the second. Said notice shall state that at the first opening only ex-service persons may participate in the entry and selection of land, and that on the day of opening all those present will be allowed to make a selection by lot, the method of drawing by lot to be determined by the director of the department of water resources; and that said notice shall state that due proof that they are ex-service persons, will be required of all applicants for the entry and selection of land at the first opening, and shall state what proof will be required.

For the purpose of any drawing and/or selection of land for entry under this section or section 42-2013A, Idaho Code, a husband and wife shall be allowed to join their entries and receive a total of three hundred twenty (320) acres in one drawing or selection. A spouse of an ex-service person, whether or not an ex-service person, shall be considered an ex-service person for the purpose of joining entries under the ex-service person preference granted in this act. [1899, p. 282, ch. 2, § 16; am. 1901, p. 191, § 6; reen. R.C. & C.L., § 1625; C.S., § 3008; am. 1921, ch. 156, § 1, p. 348; I.C.A., § 41-1713; am. 1974, ch. 164, § 4, p. 1397.]

Compiler's notes. The words "this act" refer to §§ 42-2001 — 42-2040.

Sec. to sec. ref. This section is referred to in § 42-2013A.

Cited in: *State v. Twin Falls Salmon River Land & Water Co.*, 30 Idaho 41, 166 P. 220 (1916).

Notice.

Publication of notice was one step of procedure to consummate purposes of Carey Act, but had nothing to do with final question as to

actual reclamation, cultivation, and settlement of land. *Evans v. Swendsen*, 34 Idaho 290, 200 P. 136 (1921).

Statute contains no express authority to cancel or withdraw notice when once it is given, nor is such authority implied. *Evans v. Swendsen*, 34 Idaho 290, 200 P. 136 (1921).

Collateral References. 45 Am. Jur. 2d, Irrigation, § 103.

Priority as between contract holders under a Carey Act project. 26 A.L.R. 296.

42-2013A. Preference. — Any other provision of this chapter notwithstanding, any person or group of persons proposing a project as provided in

section 42-2003, Idaho Code, who intend to apply for settlement and entry of the lands for which the project is proposed, shall be given the right of first selection and entry before any lands in the project are opened by the director for settlement as provided in section 42-2013, Idaho Code. This section shall apply to any lands for which a project is proposed regardless of the number of acres proposed to be included. [I.C., § 42-2013A, as added by 1974, ch. 164, § 5, p. 1397.]

Compiler's notes. The words "this chapter" refer to §§ 42-2001 — 42-2040.

Sec. to sec. ref. This section is referred to in §§ 42-2003 and 42-2013.

Collateral References. 45 Am. Jur. 2d, Irrigation, §§ 103, 108.

42-2014. Application to enter — Preference to ex-service person — "Ex-service person" defined. — Any citizen of the United States or any person having declared his intention to become a citizen of the United States may make application under oath, to the department of water resources, to enter any of said land in an amount not to exceed the maximum number of acres for which such person is permitted to apply by federal law for any one (1) person: provided, that ex-service persons as herein defined shall have a thirty (30) day preference right of entry upon any and all lands opened for entry by the state of Idaho under this act; and such application shall set forth that the person desiring to make such entry does so for the purpose of actual reclamation, cultivation and settlement in accordance with the act of congress and the laws of this state relating thereto, and that the applicant has never received the benefit of the provisions of this chapter to an amount greater than the maximum number of acres for which such person is permitted to apply by federal law, including the number of acres specified in the application under consideration.

Each application shall be accompanied by evidence of the applicant's ability to meet standards of personal financial responsibility or acceptable personal credit backing or membership in a group as provided in section 42-2003, Idaho Code, and said group shall establish composite financial responsibility and/or acceptable credit. Such standards shall be prescribed by the director by rule and regulation. Such application must be accompanied by a certified copy of a contract for a perpetual water right, made and entered into by the party making application with the person, company or association who has been authorized by the director to furnish water for the reclamation of said lands; and if said applicant has at any previous time entered lands under the provisions of this chapter he shall so state in his application, together with description, date of entry and location of said land. The director shall thereupon file in his office the application and papers relating thereto, and, if allowed, issue a certificate of location to the applicant. All applications for entry shall be accompanied by the payment of five dollars (\$5.00) per acre, which shall be paid as a partial payment on the land if the application is allowed; and all certificates when issued shall be recorded in a book to be kept for the purpose. If the application is not allowed, the five dollars (\$5.00) per acre accompanying it shall be refunded to the applicant. The director shall dispose of all lands accepted by the state

under the provisions of this chapter at a uniform price of ten dollars (\$10.00) per acre, half to be paid at the time of entry and the remainder at the time of making final proof by the settler: provided further, that the term ex-service person as used in this act is hereby defined to mean any person who was regularly enlisted, inducted or commissioned, and who served on active duty in any branch of the armed forces of the United States during any period of war recognized by the United States department of veterans affairs for the purpose of awarding federal veterans benefits as may be defined in title 38, U.S. code, chapter 1, section 101(11), and is a citizen of the United States and a bona fide resident of the state of Idaho preceding the date of such opening. [1895, p. 215, ch. 2, § 17; reen. 1899, p. 282, ch. 2, § 17; reen. R.C. & C.L., § 1626; C.S., § 3009; am. 1921, ch. 156, § 2, p. 348; I.C.A., § 41-1714; am. 1945, ch. 167, § 1, p. 250; am. 1949, ch. 106, § 1, p. 195; am. 1969, ch. 469, § 5, p. 1346; am. 1974, ch. 164, § 6, p. 1397; am. 1976, ch. 109, § 1, p. 433; am. 1977, ch. 41, § 1, p. 73; am. 1991, ch. 219, § 1, p. 523; am. 1992, ch. 53, § 3, p. 157.]

Compiler's notes. The words "this act" refer to §§ 42-2001 — 42-2040.

Section 4 of S.L. 1969, ch. 469 is compiled herein as § 42-1805.

Section 7 of S.L. 1974, ch. 164, is compiled as § 42-2019.

Section 2 of S.L. 1976, ch. 109, is compiled herein as § 42-2039.

Section 2 of S.L. 1991, ch. 219 is compiled as § 49-415.

Section 2 of S.L. 1992, ch. 53 is compiled as § 66-901.

Section 2 of S.L. 1945, ch. 167 declared an emergency. Approved Mar. 16, 1945.

Section 4 of S.L. 1992, ch. 53 declared an emergency. Approved March 19, 1992.

Sec. to sec. ref. This section is referred to in §§ 42-2019, 42-2021 and 42-2038.

Cited in: State v. Twin Falls Canal Co., 21 Idaho 410, 121 P. 1039, 1916F L.R.A. 236 (1911), appeal dismissed, 235 U.S. 690, 59 L. Ed. 427, 35 S. Ct. 205 (1914).

ANALYSIS

Right of entry.

Water rights.

When taxable.

Right of Entry.

Where one offered to contest an entry made under the Carey Act, before state board of land commissioners, and said board refused to hear contest on ground that it had extended time in which the law requires entryman to make improvement and irrigation of land entered, contestant could by writ of mandate compel board to hear the contest. *Pierson v. Loveland*, 16 Idaho 628, 102 P. 340 (1909).

Board had no discretion to refuse to allow entry of person who possessed the statutory

qualifications and had complied with the statutory conditions precedent to the exercise of the right, and in case of such refusal mandamus would lie. *Furbee v. Alexander*, 31 Idaho 738, 176 P. 97 (1918).

Water Rights.

Corporation constructing Carey Act irrigation system was not taxable as to water rights sold or unsold. *Twin Falls Salmon River Land & Water Co. v. Twin Falls County*, 231 F. 769 (D. Idaho 1916), modified on other grounds, 242 F. 177 (9th Cir. 1917).

Water right, being exempt from taxation, could not be included in assessment of land to which it was appurtenant. *Bennett v. Twin Falls North Side Land & Water Co.*, 27 Idaho 643, 150 P. 336 (1915).

When Taxable.

One who had acquired beneficial ownership of land and was not excluded from its enjoyment could not be permitted to use fact that naked legal title remained in government to avoid his just share of state taxation. *Bothwell v. Bingham County*, 237 U.S. 642, 35 S. Ct. 702, 59 L. Ed. 1157 (1915).

When final proof had been made and accepted, lands were taxable. *Bothwell v. Bingham County*, 24 Idaho 125, 132 P. 972 (1913), *aff'd*, 237 U.S. 642, 35 S. Ct. 702, 59 L. Ed. 1157 (1915).

States have no right to define and tax as property interest of entryman upon public lands, before equitable title passes. *Leney v. Twin Falls County*, 40 Idaho 600, 236 P. 531 (1925).

Collateral References. Priority as between contract holders under a Carey Act project. 26 A.L.R. 296.

Right of owner of land within reclamation project in respect to which water right was

allowed upon application pursuant to reclamation act, to perpetual right beyond control of federal government for sufficient amount beneficially to irrigate land. 115 A.L.R. 1320.

42-2015. State land officials and employees not to enter land. — It shall be unlawful for any state official or state employee or appointee of this state having anything to do, directly or indirectly, with the disposal of Carey Act or other public lands of this state, during his or her term of office, to enter, file upon, or make application to enter or file upon any Carey Act lands of this state. [1911, ch. 51, § 1, p. 117; reen. C.L., § 1626a; C.S., § 3010; I.C.A., § 41-1715.]

Cross ref. Land officials prohibited from buying state lands, § 58-112.

42-2016. Duty of department. — It shall be unlawful for the department of water resources, or for any public officer or agent of the state having immediate charge of the filing and entering and distribution of Carey Act lands, during his term of office, to issue to any of the persons indicated in the preceding section any certificate of entry or filing heretofore referred to in the preceding section. [1911, ch. 51, § 2, p. 117; reen. C.L., § 1626b; C.S., § 3011; I.C.A., § 41-1716.]

Compiler's notes. The name of the department of water administration (formerly the department of reclamation) has been changed to the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

Cross ref. Land officials prohibited from buying state lands, § 58-112.

42-2017. Penalty for violating preceding sections. — Any of said officers, employees, appointees or agents aforesaid who shall violate any of the provisions of the two (2) preceding sections shall be punished by a fine not to exceed \$1000*, or by imprisonment in the penitentiary of the state of Idaho for a term not to exceed five (5) years. [1911, ch. 51, § 3, p. 117; reen. C.L., § 1626c; C.S., § 3012; I.C.A., § 41-1717.]

Cross ref. Land officials prohibited from buying state lands, § 58-112.

42-2018. Carey Act trust fund — Continuing appropriation. — As provided in the act of congress all moneys received by the department of water resources from the sale of lands selected under the provisions of this chapter shall be deposited with the state treasurer, and such sums as may be necessary shall be available for the payment of the expenses of the department of water resources incurred in carrying out the provisions of this chapter.

Such expenses shall be paid by the state controller in the manner provided by law, upon vouchers duly approved by the state board of examiners, for the work performed under the direction of the department of water resources; and any balance remaining over and above the expense necessary to carry out the provisions of this chapter shall constitute a trust fund in the hands of the state treasurer to be used only for the reclamation of other arid lands; provided, however, that any funds in the hands of the

state treasurer in excess of fifty thousand dollars (\$50,000) may be loaned by the department of finance in the manner and form prescribed by the laws of this state for the loan of school funds; provided, also, that said department of finance shall have and is hereby granted power and authority to sell, transfer or assign said securities, or any part thereof, whenever said department of water resources shall determine that the Carey Act fund has use for, and needs, the money aforesaid in carrying out the purposes of the trust imposed upon the state by the laws of the state or United States. No sale, transfer or assignment, aforesaid, shall be made by said department of finance for less than the face value and accrued interest of said securities. [1895, p. 215, ch. 2, § 18; reen. 1899, p. 282, ch. 2, § 18; am. R.C., § 1627; am. 1911, ch. 219, § 1, p. 701; C.L., § 1627; C.S., § 3013; I.C.A., § 41-1718; am. 1969, ch. 466, § 6, p. 1326; am. 1994, ch. 180, § 84, p. 420.]

Compiler's notes. Section 241 of S.L. 1994, ch. 180 provided that such act should become effective on and after the first Monday in January, 1995 [January 2, 1995] if the amendment to the Constitution of Idaho changing the names of the state auditor to state controller [1994 S.J.R. No. 109, p. 1493] was adopted at the general election held on November 8, 1994. Since such amendment was adopted, the amendment to this section by § 84 of S.L. 1994, ch. 180 became effective January 2, 1995.

The Carey Act referred to herein is found in 43 U.S.C., § 641. See §§ 57, 59 of the Federal Laws in Vol. 1 of the Idaho Code.

The name of the department of water administration (formerly the department of reclamation) was changed to the department of water resources on the authority of S.L. 1974,

ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

The words "this chapter" refer to §§ 42-2001 — 42-2044.

Sections 5, 7 of S.L. 1969, ch. 466 are compiled herein as §§ 33-1119, 43-2002, respectively.

Sections 83 and 85 of S.L. 1994, ch. 180 are compiled as §§ 42-202 and 42-2024, respectively.

Cross ref. Continuing appropriation of Carey Act trust fund, § 42-2704.

Funds accumulated under this section available for cooperative work with United States reclamation service, §§ 42-2703 — 42-2705.

Sec. to sec. ref. This section is referred to in §§ 42-2011, 42-2704.

42-2019. Proof of reclamation and settlement — Patent. — Within one (1) year after any person, company, or persons, association or incorporated company authorized to construct irrigation works under the provisions of this chapter shall have notified the settlers under such works that they are prepared to furnish water for the full irrigation season under the terms of their contract with the state, which notice, however, must first have been served upon the director of the department of water resources, who must cause an investigation of said works to be made, which shall include a report thereon by an engineer of the department; the said settler shall cultivate and reclaim not less than one sixteenth ($\frac{1}{16}$) part of the land filed upon, and within two (2) years after the said notice, the settler shall have actually irrigated and cultivated not less than one eighth ($\frac{1}{8}$) of the land filed upon, and within three (3) years from the date of said notice, the settler, or if the settler be in the armed forces of the United States at such time, then any person designated by him, shall appear before the director of the department of water resources, a judge or clerk of any court of record within the state, and make final proof of reclamation, settlement and occupation, which proof shall embrace evidence that he is the owner of shares in the works which entitle him to a water right for his entire tract of land sufficient

in volume for the complete irrigation and reclamation thereof; that he has been an actual settler thereon and has cultivated and irrigated not less than one eighth ($\frac{1}{8}$) part of said tract; and such further proof, if any, as may be required by the regulations of the department of the interior and the department of water resources of the state of Idaho as promulgated by the director: provided, that any settler, after having made application for entry on such land, or acquired the entry by assignment before entering the service, enters the armed forces of the United States as defined as ex-service person in section 42-2014, Idaho Code, may deduct the actual time he was in such service from the time he would otherwise be required to be an actual settler thereon, and provided further, that it shall not be necessary for such ex-service person to show proof of having actually cultivated or irrigated any portion of such land or placed any improvements thereon if such settler has been in actual service in the armed forces as herein defined for one (1) year, or more, or (who) has been honorably discharged from the service, after having made application for entry, or acquired the assignment thereof before entering the service.

All proof so received shall be submitted to the director of the department of water resources, and shall be accompanied by the final payment for said land, and, upon approval of the same by the director, the settler shall be entitled to his patent. If the land shall not be embraced in any patent theretofore issued to the state by the United States, the proofs shall be forwarded to the secretary of the interior, with the request that a patent to said lands be issued to the state.

When the works designed for the irrigation of lands under the provisions of this chapter shall be so far completed as to actually furnish an ample supply of water in a substantial ditch or canal to reclaim any particular tract or tracts of such lands, the state of Idaho shall, through the department of water resources, make proof of such fact and shall apply for a patent to such lands in the manner provided in the regulations of the department of the interior. [1895, p. 215, ch. 2, § 19; reen. 1899, p. 282, ch. 2, § 19; am. 1901, p. 191, § 7; am. 1905, p. 95, § 1; am. R.C., § 1628; am. 1911, ch. 201, § 1, p. 666; reen. C.L., § 1628; C.S., § 3014; I.C.A., § 41-1719; am. 1945, ch. 188, § 1, p. 294; am. 1974, ch. 164, § 7, p. 1397.]

Compiler's notes. The word "who" in the second proviso of the first paragraph was placed in parentheses by the compiler as surplusage.

The words "this chapter" refer to §§ 42-2001 — 42-2040.

Sections 6 and 8 of S.L. 1974, ch. 164 are compiled as §§ 42-2014 and 42-2029, respectively.

Section 2 of S.L. 1945, ch. 188 declared an emergency. Approved Mar. 19, 1945.

Cross ref. Issuance of patent, § 42-2022.

Sec. to sec. ref. This section is referred to in § 42-2020.

Cited in: *Sallee v. Commonwealth Trust Co.*, 8 F.2d 227 (9th Cir. 1925); *Nelson Bennett Co. v. Twin Falls Land & Water Co.*, 14 Idaho 5, 93 P. 789 (1908); *State v. Twin*

Falls Canal Co., 21 Idaho 410, 121 P. 1039, 1916F L.R.A. 236 (1911); *McElroy v. Helmer*, 38 Idaho 327, 222 P. 290 (1923).

ANALYSIS

Accrual of annual share of water.
Extension of time.
Issuance of patent.
Notice.
Taxation.
Title of water user.
Use of water.

Accrual of Annual Share of Water.

Rule of corporation operating water project to the effect that when user had not used his allotment at end of the season he was to be credited with such portion and the following

spring, if the reservoir was not filled, an amount not to exceed one third his entire right less 40 per cent for seepage would be delivered to him in addition to his regular share was valid. *Rayl v. Salmon River Canal Co.*, 66 Idaho 199, 157 P.2d 76 (1945).

Extension of Time.

State board of land commissioners had no power or authority under the law to extend time to entryman in which to place required improvements upon and irrigate land entered by him. *Pierson v. Loveland*, 16 Idaho 628, 102 P. 340 (1909).

Issuance of Patent.

Action of the United States land department in approving plan of irrigation adopted by state under Carey Act and segregating land was not conclusive determination that state was entitled to land as whether or not state had actually furnished ample supply of water for reclamation of particular tract in order to entitle it to patent was a question of fact to be determined by the department. *Twin Falls Salmon River Land & Water Co. v. Caldwell*, 242 F. 177 (9th Cir. 1917).

Government issues patent to state for segregated land shown to have sufficient water to be reclaimed, and state holds such title in trust for those who settle upon, cultivate and reclaim land. *Bothwell v. Bingham County*, 24 Idaho 125, 132 P. 972, aff'd, 237 U.S. 642, 35 S. Ct. 702, 59 L. Ed. 1157 (1913).

Notice.

Under provisions of this section, it was made the duty of Carey Act irrigation company to notify settler when water was ready for delivery, in order that settler might improve his land and make reclamation required in order to secure title from state to his land. *Hanes v. Idaho Irrigation Co.*, 21 Idaho 512, 122 P. 859 (1912).

Giving of the notice that the company was prepared to furnish water served to fix time within which settler must cultivate and reclaim his land, and also fixed the time, if water was furnished, when interest began on deferred payments on his water contract, and it was the duty of construction company to furnish water after it had given notice. *Hanes v. Idaho Irrigation Co.*, 21 Idaho 512, 122 P. 859 (1912).

Taxation.

Corporation constructing Carey Act irrigation system was not taxable as to water rights sold or unsold. *Twin Falls Salmon River Land & Water Co. v. Twin Falls County*, 231 F. 769 (D. Idaho 1916), modified on other grounds, 242 F. 177 (9th Cir. 1917).

Carey Act land was taxable when patent issued from government to state. *Bothwell v. Bingham County*, 24 Idaho 125, 132 P. 972, aff'd, 237 U.S. 642, 35 S. Ct. 702, 59 L. Ed. 1157 (1913).

Water right, being exempt from taxation, could not be included in an assessment of land to which it was appurtenant. *Bennett v. Twin Falls North Side Land & Water Co.*, 27 Idaho 643, 150 P. 336 (1915).

States have no right to define and tax as property the interest of entryman upon public lands, before equitable title passes. *Leney v. Twin Falls County*, 40 Idaho 600, 236 P. 531 (1925).

Title of Water User.

A water user on a Carey Act project has fee simple title to the land and water and the only restriction on his title is that he must apply the water to a beneficial use and may not waste it. *In re Robinson*, 61 Idaho 462, 103 P.2d 693 (1940).

Use of Water.

An owner of land and water rights under a Carey Act project could change the place of use of such water if it could be done without material injury to other appropriators. *In re Robinson*, 61 Idaho 462, 103 P.2d 693 (1940).

Where individual user of water under the Carey Act allowed portions of his land to lie idle and sold, leased, or used his water on other lands, in absence of intent to abandon his right, he did not forfeit or lose same. *Rayl v. Salmon River Canal Co.*, 66 Idaho 199, 157 P.2d 76 (1945).

Collateral References. 45 Am. Jur. 2d, Irrigation, § 103.

Constitutionality of statutes affecting riparian rights. 56 A.L.R. 277.

Right to injunction to protect water rights as affected by fact that party seeking injunction contemplates no immediate use of right, or by doctrine of comparative injury. 106 A.L.R. 687.

42-2020. Settlement after notice of availability of water. — Where land was unentered at the time that the person, company or corporation authorized to construct irrigation works under the provisions of this chapter gave notice to the settlers under such works that they were prepared to furnish water under the term of their contract with the state, then such settlers or any new entryman entering land after such notice shall have the same time in which to make cultivation, proof and reclamation as is

provided in section 42-2019, that is to say, that the time shall start from the date of entry instead of from the date of the notice given. [R.C., § 1628a, as added by 1913, ch. 125, § 1, p. 472; reen. C.L., § 1628a; C.S., § 3015; I.C.A., § 41-1720.]

42-2021. Final proof after death of entryman. — In all cases where lands have been entered under the provisions of section 42-2014 where entryman or his assignee has died prior to making final proof of reclamation, settlement and occupation, proof of reclamation may be made by an executor, administrator, heir or devisee, and proof of settlement may be made by such person or persons, or by an agent thereof. Any such entry may be devised or shall descend as other real estate. [1911, ch. 14, § 1, p. 30; reen. C.L., § 1628b; C.S., § 3016; I.C.A., § 41-1721.]

Taxation.

States have no right to define and tax as property, interest of entryman upon public lands before equitable title passes. *Leney v.*

Twin Falls County, 40 Idaho 600, 236 P. 531 (1925) following *Irwin v. Wright*, 258 U.S. 219, 42 S. Ct. 293, 66 L. Ed. 573 (1922).

42-2022. Issuance of patent. — Upon the issuance of a patent to any lands by the United States to the state, notice shall be forwarded to the settler upon such land. It shall be the duty of the department of water resources to issue a patent to said lands from the state to the settler. [1895, p. 215, ch. 2, part of § 20; reen. 1899, p. 282, ch. 2, § 20; reen. R.C. & C.L., § 1629; C.S., § 3017; I.C.A., § 41-1722.]

Compiler's notes. The name of the department of water administration (formerly the department of reclamation) has been changed to the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

Conclusiveness of Decision of Federal Land Department.

Decision of federal land department in issuing patent to state was not conclusive in

suit to foreclose lien for water rights furnished to patented lands, where other settlers on unpatented lands held similar water contracts, resulting in patented lands not receiving their full supply. *Twin Falls Oakley Land & Water Co. v. Martens*, 271 F. 428 (9th Cir.), cert. denied, 257 U.S. 637, 42 S. Ct. 49, 66 L. Ed. 410 (1921).

Collateral References. 45 Am. Jur. 2d, Irrigation, § 103.

42-2023. Lands eliminated from project — Repayment of fees, commissions, and purchase moneys — Repayment upon cancellation of entry. — In all cases where it shall, upon due proof being made, appear to the satisfaction of the director of the department of water resources that persons have made entry under what is commonly known as the Carey Act Laws of the state of Idaho, and have paid to the state of Idaho any fees, commissions or purchase moneys as required by the laws of the state of Idaho relating to Carey Act entries, which entries were, and the lands embraced in such entries have been, by order of the state board of land commissioners, the director of the department of water resources, or final decree of a court of competent jurisdiction, eliminated from the Carey Act project or segregation of which it was a part, and such order of elimination or judgment is based upon the ground that the water supply was deficient, and the entry is canceled or relinquished, the treasurer of the state of Idaho

is authorized to repay to such persons or their legal representatives the fees, commissions and purchase moneys so paid by them, upon proper showing and presentation of such claim. [1921, ch. 52, § 1, p. 83; I.C.A., § 41-1723.]

Compiler's notes. The name of commissioner of reclamation has been changed to director of the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

Collateral References. Rights of user of water as to discontinuance of use of water. 112 A.L.R. 230.

42-2024. Manner of repayment. — Such claim shall be paid from the funds herein appropriated by warrant drawn by the state controller upon the treasurer of the state upon allowance of a verified claim by the state board of examiners in the manner provided by law, but no claim shall be allowed except the approval of the director of the department of water resources be indorsed thereon. [1921, ch. 52, § 2, p. 83; I.C.A., § 41-1724; am. 1994, ch. 180, § 85, p. 420.]

Compiler's notes. Section 241 of S.L. 1994, Ch. 180 provided that such act should become effective on and after the first Monday in January, 1995 [January 2, 1995] if the amendment to the Constitution of Idaho changing the names of the state auditor to state controller [1994 S.J.R. No. 109, p. 1493] was adopted at the general election held on November 8, 1994. Since such amendment was adopted, the amendment to this section by § 85 of S.L. 1994, ch. 180 became effective January 2, 1995.

The name of commissioner of reclamation was changed to director of the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

Section 3 of S.L. 1921, ch. 52 appropriated

\$39,000 from the general fund of the state to carry out the provisions of the act.

Chapter 148 of S.L. 1933 directed the state treasurer to transfer certain moneys to the general fund from the continuing appropriation made in chapter 147 of the Idaho Session Laws of 1927, known as the "investigation of water resources" fund; and from the continuing appropriation made in chapter 52 of the Idaho Session Laws of 1921, known as the "Carey Act relief" fund; and declared an emergency.

Sections 84 and 86 of S.L. 1994, ch. 180 are compiled as §§ 42-2018 and 42-2807, respectively.

Section 4 of S.L. 1921, ch. 52 declared an emergency.

42-2025. Appurtenancy of water rights. — The water rights to all lands acquired under the provisions of this chapter shall attach to and become appurtenant to the land as soon as title passes from the United States to the state. [1895, p. 215, ch. 2, part of § 20; reen. 1899, p. 282, ch. 2, § 20; reen. R.C., § 1629; reen. C.L., § 1629a; C.S., § 3018; I.C.A., § 41-1725.]

Cited in: Twin Falls Salmon River Land & Water Co. v. Caldwell, 242 F. 177 (9th Cir. 1917); Andrews v. North Side Canal Co., 52 Idaho 117, 12 P.2d 263 (1932).

ANALYSIS

Attachment includes water.
Certificate under Carey Act.
Construction of section.
Employees of irrigation corporation.
Injunction and foreclosure.
Nature of appurtenancy.
Property right.

Realty.
Sale.

Attachment Includes Water.

Levy of writ of attachment upon land included within the writ the water right which was appurtenant thereto, although not mentioned in the levy. Bothwell v. Keefer, 53 Idaho 658, 27 P.2d 65 (1933).

Certificate Under Carey Act.

Certificate, in carrying out the whole plan, represented water right sold to settler and dedicated to his land, and of which he was the

beneficial owner. *Leland v. Twin Falls Canal Co.*, 51 Idaho 204, 3 P.2d 1105 (1931).

Construction of Section.

This section does not have the effect of making the water right an inseparable appurtenance of the land. *Sanderson v. Salmon River Canal Co.*, 34 Idaho 145, 199 P. 999 (1921), appeal dismissed, 260 U.S. 755, 43 S. Ct. 94, 67 L. Ed. 497 (1922).

Employees of Irrigation Corporation.

Employees of a mutual nonprofit irrigation corporation, engaged in the operation of such system, are agricultural laborers and not entitled to the benefits of unemployment compensation law, being within the exception thereto. *Big Wood Canal Co. v. Unemployment Comp. Div.*, 61 Idaho 247, 100 P.2d 49 (1940).

Injunction and Foreclosure.

Injunction against further sales because water supply has been exhausted attaches to water rights acquired by foreclosure before filing of lis pendens in injunction suit. *Idaho Irrigation Co. v. Gooding*, 265 U.S. 518, 44 S. Ct. 618, 68 L. Ed. 1157 (1924).

Lien on appurtenant right is not subject to foreclosure by assignee of canal company by pledge sale. *Leland v. Twin Falls Canal Co.*, 51 Idaho 204, 3 P.2d 1105 (1931).

Nature of Appurtenancy.

This section does not make water right inseparable appurtenance to land. *Bennett v. Twin Falls North Side Land & Water Co.*, 27 Idaho 643, 150 P. 336 (1915); *Sanderson v. Salmon River Canal Co.*, 34 Idaho 145, 199 P. 999 (1921); *Tapper v. Idaho Irrigation Co.*, 36 Idaho 78, 210 P. 591 (1922); *Strong v. Twin Falls Canal Co.*, 44 Idaho 427, 258 P. 173 (1927).

In absence of any showing of separation, water right is an appurtenance to land to which it was dedicated, and is part of that property. *Leland v. Twin Falls Canal Co.*, 51 Idaho 204, 3 P.2d 1105 (1931).

That appurtenant right may be transferred to other lands does not make it less a complement to the land. *Leland v. Twin Falls Canal Co.*, 51 Idaho 204, 3 P.2d 1105 (1931).

Property Right.

Water right is a distinct property right from land on which it is used; and, being exempt from taxation, it cannot be included in an assessment of such land; hence, tax deed transferring title to land does not transfer water right, at least where payment has not been made for water right. *Bennett v. Twin Falls North Side Land & Water Co.*, 27 Idaho 643, 150 P. 336 (1915).

Lessee of state's school lands formerly held by United States, who initiates water rights, is entitled thereto as his property as against owner of land. *First Sec. Bank v. State*, 49 Idaho 740, 291 P. 1064 (1930).

Water right is a property right. *First Sec. Bank v. State*, 49 Idaho 740, 291 P. 1064 (1930).

Realty.

Water right has all attributes of real estate, and right of entryman to particular land to which water right is appurtenant, in effect, constitutes purchase of realty, although title to land is deraigned from government and water right acquired from state. *Tapper v. Idaho Irrigation Co.*, 36 Idaho 78, 210 P. 591 (1922).

While shares of water stock may be personality, the water right which such shares control is real property. *Bothwell v. Keefer*, 53 Idaho 658, 27 P.2d 65 (1933).

Sale.

Owner of water right by purchase or original appropriation may sell water right separate and apart from his land. *Sanderson v. Salmon River Canal Co.*, 34 Idaho 145, 199 P. 999 (1921), appeal dismissed, 260 U.S. 755, 43 S. Ct. 94, 67 L. Ed. 497 (1922).

Collateral References. 45 Am. Jur. 2d, Irrigation, § 108.

42-2026. Lien for purchase price of water right. — Any person, company or association, furnishing water for any tract of land, shall have a first and prior lien on said water right and land upon which said water is used, for all deferred payments for said water right; said lien to be in all respects prior to any and all other liens created or attempted to be created by the owner and possessor of said land; said lien to remain in full force and effect until the last deferred payment for the water right is fully paid and satisfied according to the terms of the contract under which said water right was acquired. [1895, p. 215, ch. 2, part of § 20; reen. 1899, p. 282, ch. 2, § 20; reen. R.C., § 1629; reen. C.L., § 1629c; C.S., § 3019; I.C.A., § 41-1726.]

Cross ref. Lien for maintenance or rental, § 42-906.

See note under heading "Parties," § 42-2028. *Commonwealth Trust Co. v. Smith*, 273 F. 1 (9th Cir. 1921), aff'd, 266 U.S. 152, 45 S. Ct. 26, 69 L. Ed. 219 (1924).

ANALYSIS

Construction.

Cost of reclamation.

Extent of lien.

Foreclosure of liens.

Priorities.

Statute of limitations.

When lien attaches.

Construction.

Lien of this section inured to benefit of Carey Act company, or to bondholders furnishing money for construction by such company. *Brown v. Portneuf-Marsh Valley Irrigation Co.*, 5 F.2d 895 (9th Cir. 1925), aff'd, 274 U.S. 630, 47 S. Ct. 692, 71 L. Ed. 1243 (1927).

Insofar as land is concerned, lien must be subject to limitations of the congressional act; but the national act apparently recognizes right of state to control the disposition of its public waters, and purchaser of water right, under a Carey Act project, may so contract as to eventually result in a lien being created upon all the property rights that he acquires. *Idaho Irrigation Co. v. Pew*, 26 Idaho 272, 141 P. 1099 (1914).

Cost of Reclamation.

Amendment to federal Carey Act in fixing amount of lien upon land to be created by state at the actual cost of reclamation and reasonable interest thereon from the date of reclamation until disposed of to actual settlers contemplates determination of such cost by state. *Idaho Irrigation Co. v. Pew*, 26 Idaho 272, 141 P. 1099 (1914).

In contract between Carey Act irrigation company and settler in which price of water rights was fixed upon basis of the estimated cost of the works contained in the state contract, both company and settler were estopped from afterward raising the question as to whether such estimated cost was the actual cost of the works. *Idaho Irrigation Co. v. Pew*, 26 Idaho 272, 141 P. 1099 (1914).

Carey Act company's remuneration was limited to the actual cost of construction and the necessary expense of reclamation and reasonable interest thereon. *Idaho Irrigation Co. v. Lincoln County*, 28 Idaho 98, 152 P. 1058 (1915).

Extent of Lien.

Settlers held contracts and land subject to lien given by statute. *Twin Falls Salmon River Land & Water Co. v. Caldwell*, 242 F. 177 (9th Cir. 1917), See also, 272 F. 356 (9th

Cir. 1921); aff'd, 266 U.S. 85, 45 S. Ct. 22, 69 L. Ed. 178 (1924).

The act of a construction company under a Carey Act project, in taking over land and water rights where a default had been made by the purchaser, did not free such land and water from the statutory lien of the operating company for water furnished. *North Side Canal Co. v. Idaho Farms Co.*, 107 F.2d 481 (9th Cir. 1939).

Lien extended to all lands in the segregation that could be irrigated to the full extent of the price per acre for which such person, company, or association contracted and agreed to sell water rights. *Nelson Bennett Co. v. Twin Falls Land & Water Co.*, 14 Idaho 5, 93 P. 789 (1908).

Subcontractor could acquire no rights under his lien that did not exist in original contractor, nor deprive water right purchasers of their rights under their water contracts. *Craig v. Smith*, 33 Idaho 590, 196 P. 1038 (1921).

Foreclosure of Liens.

Where, under Carey Act contract, it appeared that less land could be irrigated than was expected at first, and limits of area had been reduced, all contract holders were necessary parties to suit to foreclose lien on water rights. *Commonwealth Trust Co. v. Smith*, 273 F. 1 (9th Cir. 1921), aff'd, 266 U.S. 152, 45 S. Ct. 26, 69 L. Ed. 219 (1924).

United States was not necessary party to action by Carey Act construction company to foreclose lien on settler's interest in a water right. *Idaho Irrigation Co. v. Dill*, 25 Idaho 711, 139 P. 714 (1914).

When settler defaulted in payment of instalments of principal or interest in accordance with his contract for purchase of water right, construction company should have resorted to the security afforded it by liens created by statute. *Adams v. Twin Falls-Oakley Land & Water Co.*, 29 Idaho 357, 161 P. 322 (1916).

Priorities.

Where there were separate liens for purchase of stock in Carey Act company and for maintenance of project, and each lien set out a stipulation in consideration of the other, priority between such liens must be ascertained from these stipulations. *Portneuf-Marsh Valley Canal Co. v. Brown*, 274 U.S. 630, 47 S. Ct. 692, 71 L. Ed. 1243 (1927).

Purchase money liens for stock in construction company necessarily had priority in point of time over maintenance liens. *Portneuf-Marsh Valley Canal Co. v. Brown*, 274 U.S. 630, 47 S. Ct. 692, 71 L. Ed. 1243 (1927).

Lien created by mortgage executed by entryman was held superior to lien of construction company under statute, where company did not record its contract with

entryman. *Ireton v. Idaho Irrigation Co.*, 30 Idaho 310, 164 P. 687 (1917).

The only liens to which lien of Carey Act contract is superior are those created or attempted to be created by owner of land, and this is not limitation upon power of sovereign to create lien. *Continental & Com. Trust & Sav. Bank v. Werner*, 36 Idaho 601, 215 P. 458 (1922), appeal dismissed, 264 U.S. 576, 44 S. Ct. 452, 68 L. Ed. 857 (1924).

Lien for taxes, under C.S., § 3097 (§ 63-102 herein) was held not subordinate to lien under this section. *Continental & Com. Trust & Sav. Bank v. Werner*, 36 Idaho 601, 215 P. 458 (1922), appeal dismissed, 264 U.S. 576, 44 S. Ct. 452, 68 L. Ed. 857 (1924). See also *Equitable Trust Co. v. Cassia County*, 5 F.2d 955 (9th Cir. 1925).

Statute of Limitations.

This section does not except water contracts from operation of general statute of limitations. *Mendini v. Milner*, 47 Idaho 439, 276 P. 313 (1929).

42-2027. Record of water contract. — The contract for the water right upon which the aforesaid lien is founded shall be recorded in the office of the recorder of the county where said land is situate. [1895, p. 215, ch. 2, part of § 20; reen. 1899, p. 282, ch. 2, § 20; am. R.C., § 1629; reen. C.L., § 1629b; C.S., § 3020; I.C.A., § 41-1727.]

Cited in: *Idaho Irrigation Co. v. Dill*, 25 Idaho 711, 139 P. 714 (1914); *Ireton v. Idaho Irrigation Co.*, 30 Idaho 310, 164 P. 687 (1917).

42-2028. Foreclosure of lien. — Upon default of any of the deferred payments secured by any lien under the provisions of this chapter, the person, company of persons, association or incorporated company, holding or owning said lien, may foreclose the same according to the terms and conditions of the contract granting and selling to the settler the water right. [1895, p. 215, ch. 2, part of § 20; reen. 1899, p. 282, ch. 2, § 20; reen. R.C., § 1629; reen. C.L., § 1629d; C.S., § 3021; I.C.A., § 41-1728.]

ANALYSIS

Exclusive remedy.
Parties.
Pleading.
Procedure.

Exclusive Remedy.

Remedy herein provided for collection of payments other than for maintenance is exclusive and provision in contract between Carey Act construction company and settler empowering company to deprive settler of water during default in payments on contract other than for maintenance was void. *Adams v. Twin Falls-Oakley Land & Water Co.*, 29 Idaho 357, 161 P. 322 (1916).

When Lien Attaches.

Water contracts did not make deferred payments a lien upon the water rights and land until the water had been made permanently available for the reclamation of the land. *Childs v. Neitzel*, 26 Idaho 116, 141 P. 77 (1914).

If a company that is seeking to enforce a lien has not made water permanently available to the land in question, and available in sufficient quantities and seasons to comply with the provisions of the contract, such defense will always be open to the settler. *Idaho Irrigation Co. v. Pew*, 26 Idaho 272, 141 P. 1099 (1914); *Columbia Trust Co. v. Eikelberger*, 42 Idaho 90, 245 P. 78 (1925).

Under this section, lien is created both against land and water right, but it is not stated when lien attaches. *Columbia Trust Co. v. Eikelberger*, 42 Idaho 90, 245 P. 78 (1925).

Parties.

Where, under Carey Act contract, it appeared that less land could be irrigated than was expected at first, and limits of area had been reduced, all contract holders were necessary parties to suit to foreclose lien on water rights. *Commonwealth Trust Co. v. Smith*, 273 F. 1 (9th Cir. 1921), aff'd, 266 U.S. 152, 45 S. Ct. 26, 69 L. Ed. 219 (1924).

Where action was brought by Carey Act construction company to foreclose lien upon all of the right, title and interest of a Carey Act settler in and to a water right and real estate, and title of land was in the United States, the United States was not a necessary or proper party. *Idaho Irrigation Co. v. Dill*, 25 Idaho 711, 139 P. 714 (1914).

Pleading.

In suit to foreclose Carey Act lien where the cause of action arose under state statute, and it was not necessary to allege in complaint that a requirement of the federal statute, not contained in the state statute, had been complied with, though it would be good practice to do so. *Idaho Irrigation Co. v. Pew*, 26 Idaho 272, 141 P. 1099 (1914).

It was not necessary to allege in complaint that the entire irrigation system had been completed if it appeared from the allegations of complaint that an ample supply of water had been made permanently available for the

tract of land upon which the lien was sought to be foreclosed. *Idaho Irrigation Co. v. Pew*, 26 Idaho 272, 141 P. 1099 (1914).

Procedure.

This procedure is somewhat analogous to the general procedure for foreclosure of mortgages. *Adams v. Twin Falls-Oakley Land & Water Co.*, 29 Idaho 357, 161 P. 322 (1916). See § 6-101 et seq.

Collateral References. Deed or mortgage foreclosure as passing rights in ditch company. 70 A.L.R. 1008.

42-2029. Foreclosure sale. — All sales shall be advertised in a newspaper of general circulation, published in the county where said land and water right is situate, for three (3) consecutive weeks, and shall be sold to the highest bidder at the front door of the courthouse of the county, or such place as may be agreed upon by the terms of the aforesaid contract. And the sheriff of said county shall in all such cases give all notices of sale, and shall sell all such lands and water rights, and shall make and execute a certificate of sale to the purchaser thereof. [1895, p. 215, ch. 2, part of § 20; reen. 1899, p. 282, ch. 2, § 20; reen. R.C., § 1629; reen. C.L., § 1629f; C.S., § 3023; I. C. A., § 41-1730; am. 1974, ch. 164, § 8, p. 1397.]

Compiler's notes. Sections 7 and 9 of S.L. 1974, ch. 164, are compiled as §§ 42-2019 and 42-2038.

42-2030. Foreclosure sale — Limitation on bid of lienholder. — At such sale no person, company of persons, association or incorporated company, owning and holding any lien, shall bid in or purchase any land or water right at a greater price than the amount due on said deferred payment for said water right and land, and the costs incurred in making the sale of said land and water right. [1895, p. 215, ch. 2, part of § 20; reen. 1899, p. 282, ch. 2, § 20; reen. R.C., § 1629; reen. C.L., § 1629f; C.S., § 3023; I.C.A., § 41-1730.]

Cited in: *Adams v. Twin Falls-Oakley Land & Water Co.*, 29 Idaho 357, 161 P. 322 (1916).

42-2031. Record of certificate of sale. — Upon issuing any certificate of sale it shall be the duty of the sheriff to file for record in the office of the recorder of the county where such land is situated, a certified copy of such certificate of sale. [1895, p. 215, ch. 2, part of § 20; reen. 1899, p. 282, ch. 2, § 20; am. R.C., part of § 1629; reen. C.L., § 1629g; C.S., § 3024; I.C.A., § 41-1731.]

42-2032. Disposition of proceeds of sale. — Where such land and water rights are not purchased by the lienholder at such foreclosure sale, it shall be the duty of the sheriff to first pay the lienholder out of the proceeds of such sale, the amount of the lien, together with all interest, costs and

fixed charges thereon, and to pay any balance remaining to the person against whom such lien has been foreclosed, and for his services in such cases the sheriff shall receive the same fees as are provided by the law in civil cases. [1895, p. 215, ch. 2, part of § 20; reen. 1899, p. 282, ch. 2, § 20; reen. R.C., § 1629; reen. C.L., § 1629h; C.S., § 3025; I.C.A., § 41-1732.]

Cross ref. Sheriff's fees, § 31-3203.

42-2033. Redemption by owner. — At any time within nine (9) months after the foreclosure sale by the sheriff of the land and water rights aforesaid, the original owner against whom the lien has been foreclosed, may apply to the person, company of persons, association or incorporated company, purchasing at such sale, to redeem such land and water rights and the purchaser shall assign the certificate of sale of such land and water rights to such original owner, upon the payment by him within such nine (9) months, of the amount of the lien for which the same was sold at such foreclosure sale, together with the interest, costs and fixed charges thereon. In case the original owner shall redeem the land and water rights sold as aforesaid, he shall file for record in the office of the recorder, the certificate of sale assigned to him by the purchaser as aforesaid, upon his redemption of such land and water rights. [1895, p. 215, ch. 2, part of § 20; reen. 1899, p. 282, ch. 2, § 20; am. R.C., § 1629; reen. C.L., § 1629i; C.S., § 3026; I.C.A., § 41-1733.]

Cited in: Idaho Irrigation Co. v. Dill, 25 Idaho 711, 139 P. 714 (1914); Adams v. Twin Falls-Oakley Land & Water Co., 29 Idaho 357, 161 P. 322 (1916).

42-2034. Redemption purchase by prospective settler. — Where the lienholder becomes the purchaser at such foreclosure sale, if such land and water rights are not redeemed by the original owner within nine (9) months, then at any time within three (3) months after the expiration of such nine (9) months, any person desiring to settle upon and use such land and water rights, may apply to the purchaser at such foreclosure sale to redeem such land and water rights, and such purchaser shall assign the certificate of sale of such land and water rights to the person desiring to redeem the same, upon the payment by him, within such three (3) months, of the amount of the lien for which the same was sold at such foreclosure sale, together with the interest, costs and fixed charges thereon. In case the land and water rights shall be redeemed by any person other than the original owner, the sheriff shall, upon presentation of such certificate, issue a deed for such land and water rights to the person so redeeming the same. [1895, p. 215, ch. 2, part of § 20; reen. 1899, p. 282, ch. 2, § 20; reen. R.C., § 1629; reen. C.L., § 1629j; C.S., § 3027; I.C.A., § 41-1734.]

Cited in: Adams v. Twin Falls-Oakley Land & Water Co., 29 Idaho 357, 161 P. 322 (1916).

Liability for Prior Lien.

A Carey Act construction company, after foreclosure of its lien on land for failure of

entryman to pay the contract price, took title to the land and became liable for the prior lien of an operating company for water. North Side Canal Co. v. Idaho Farms Co., 60 Idaho 748, 96 P.2d 232 (1939).

42-2035. Sheriff's deed to purchaser on foreclosure. — If the land and water rights shall not be redeemed by any person within the times and in the manner hereinbefore provided, it shall be the duty of the sheriff, upon presentation of the certificate of sale by the original purchaser, to issue a deed to such purchaser. [1895, p. 215, ch. 2, part of § 20; reen. 1899, p. 282, ch. 2, § 20; reen. R.C., § 1629; reen. C.L., § 1629k; C.S., § 3028; I.C.A., § 41-1735.]

ANALYSIS

Liability for prior lien.
Statutory lien.

Liability for Prior Lien.

A Carey Act construction company, after foreclosure of its lien on land for failure of the entryman to pay the contract price and purchase at the foreclosure sale by the construction company, took title to the land and became liable for the prior lien of an operating company for water furnished. *North Side Canal Co. v. Idaho Farms Co.*, 60 Idaho 748, 96 P.2d 232 (1939).

Statutory Lien.

The act of a construction company under a Carey Act project, in taking over land and water rights where a default had been made by the purchaser, did not free such land and water from the statutory lien of the operating company for water furnished. *North Side Canal Co. v. Idaho Farms Co.*, 107 F.2d 481 (9th Cir. 1939).

Collateral References. Deed or mortgage foreclosure as passing rights in a ditch company. 70 A.L.R. 1008.

Deed involving water rights as conveying a fee or easement. 136 A.L.R. 404.

42-2036. Rights of way for canals. — The maps in the office of the department of water resources of the lands selected under the provisions of this chapter shall show the location of the canals or other irrigation works approved in the contract with the department, and all lands filed upon shall be subject to the rights of way of such canals or irrigation works. Each right of way shall embrace the entire width of the canal and such additional width as may be required for its proper operation and maintenance, the width of right of way to be specified in the contracts provided for in this chapter. [1895, p. 215, ch. 2, § 21; reen. 1899, p. 282, ch. 2, § 21; reen. R.C. & C.L., § 1630; C.S., § 3029; I.C.A., § 41-1736.]

Compiler's notes. The name of the department of water administration (formerly the department of reclamation) has been changed to the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

ANALYSIS

Persons chargeable with notice.
Service ditches.

Persons Chargeable with Notice.

One dealing with Carey Act land was chargeable with notice of canal rights of way created by congress and legislature. *Schurger v. Mooreman*, 20 Idaho 97, 117 P. 122, 36 L.R.A. (n.s.) 313, 1912D Ann. Cas. 1114 (1911).

Service Ditches.

This section, though not expressly mentioning service ditches and seeming to refer particularly to the main canals and distributing system, in no way prohibits provision, in contract between the state and land and water company, with reference to rights of way for construction and maintenance of service ditches. *McElroy v. Helmer*, 38 Idaho 327, 222 P. 290 (1923).

Collateral References. Exercise of eminent domain for purpose of irrigating land of private owner. 9 A.L.R. 583; 27 A.L.R. 519.

Effect of combination of public and private purposes in exercise of eminent domain for irrigation purposes. 53 A.L.R. 18.

42-2037. Department to prescribe rules — Reports of contractors — Waiver of rules. — The department of water resources shall provide suitable rules for the filing of proposals for constructing irrigation works,

and for the entry of and payment for the land by settlers, and for the forfeiting of entry by settlers upon failure to comply with the provisions of this chapter. There shall be kept in the office of the department, for public inspection, copies of all maps, plats, contracts for the construction of irrigation works, and of the entries of lands by settlers.

The department shall require from each person, company of persons, association or incorporated company engaged in the construction of irrigation works, under the provisions of this chapter, an annual report, to be submitted to the department on or before November first of each year. This report shall show the number of water rights sold, the number of users of water under said irrigation works, the legal subdivisions of land for which water is to be furnished, the names of the officers of the company, the acreage of land which the said irrigation works are prepared to supply with water, and such other data as the department sees fit to require.

The rules required by this section may be waived in the case of irrigation works being constructed by a person, colony or association of persons to furnish water for land settled upon and being reclaimed by themselves. [1895, p. 215, ch. 2, § 22; reen. 1899, p. 282, ch. 2, § 22; reen. R.C. & C. L., § 1631; C.S., § 3030; I.C.A., § 41-1737.]

Compiler's notes. The name of the department of water administration (formerly the department of reclamation) has been changed to the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

Cited in: Hanes v. Idaho Irrigation Co., 21

Idaho 512, 122 P. 859 (1912).

Waiver.

Board had no authority by rule to extend time within which entryman could improve and irrigate his land. *Pierson v. Loveland*, 16 Idaho 628, 102 P. 340 (1909).

42-2038. Fees of department — Duties of employees. — The director shall prescribe the duties of all its employees and shall collect the following fees:

(1) For filing an application requesting temporary withdrawal — each project application shall be accompanied by the guaranteed deposit required by section 42-2004, Idaho Code, and by a one hundred dollar (\$100) nonrefundable application fee.

(2) For filing an application for segregation of lands — each project application shall be accompanied by the guaranteed deposit required by section 42-2004, Idaho Code, unless the required guaranteed deposit has already been made with an application requesting temporary withdrawal, and by a nonrefundable application fee to be based upon an estimate by the director of the department's cost of reviewing the project feasibility reports including any necessary on-site inspections of the project. However, in no case shall the application fee be less than five hundred dollars (\$500) nor exceed ten dollars (\$10.00) per acre of land requested to be segregated.

(3) For filing detailed project plans and specifications and entering a contract to construct the project works — the detailed plans and specifications and the proposed contract for construction of works for the project shall be accompanied by a nonrefundable fee to be based upon an estimate by the director of the department's costs of reviewing the detailed plans and specifications and the proposed contract, and for inspection of project

construction. However, in no case shall the fee be less than five hundred dollars (\$500) nor exceed ten dollars (\$10.00) per acre of land segregated for the project.

(4) For filing applications to enter project lands — each application to enter project lands shall be accompanied by the payment on the land required by section 42-2014, Idaho Code, and by a one hundred dollar (\$100) nonrefundable application for entry fee.

(5) In administering the charges authorized in paragraphs (2) and (3) above, the director shall make every effort to group project studies and in every way take that action which will minimize the fees charged to the settlers. The money collected for fees shall be paid to the treasurer of the state and by him credited to the fund created by virtue of this chapter. No fee shall be required of any state agency proposing to construct a project under this act. [1895, p. 215, ch. 2, § 23; reen. 1899, p. 282, ch. 2, § 23; reen. R.C. & C.L., § 1632; C.S., § 3031; I.C.A., § 41-1738; am. 1974, ch. 164, § 9, p. 1397; am. 1981, ch. 314, § 1, p. 658.]

Compiler's notes. The words "this act" and "this chapter" refer to §§ 42-2001 — 42-2040.

Section 8 of S.L. 1974, ch. 164, is compiled as § 42-2029.

Section 2 of S.L. 1981, ch. 314 declared an emergency. Approved April 7, 1981.

Collateral References. Right of governmental unit, or officers thereof, to compensation for collecting assessments levied by, or owed to, irrigation district. 114 A.L.R. 1098.

42-2039. Restoration of lands authorized. — The legislature hereby recognizes and acknowledges the need to assure replacement of the grazing and wildlife land uses displaced by Carey Act developments. In order to facilitate such replacements, any settlers having contracts with the state for reclamation of lands segregated under the Carey Act shall include grazing and wildlife restoration work in total or in part to the maximum expenditure of five dollars (\$5.00) per acre for grazing restoration and one dollar (\$1.00) per acre for wildlife restoration as a legitimate and necessary cost of the reclamation effort. The settlers are hereby authorized to subcontract with the bureau of land management, or any party designated by the bureau, for the purpose of accomplishing this restoration work. Payment by the Carey Act settlers for the restoration work shall be at the time the settler is granted patent to the lands developed. The director of the department of water resources is hereby authorized and directed to accept restoration expenditures as bona fide land development costs of the company up to an amount not to exceed five dollars (\$5.00) per acre for grazing restoration and one dollar (\$1.00) per acre for wildlife restoration.

In the event that no suitable lands are available for restoration as grazing lands as provided herein, the director is authorized to so certify, and the payment in lieu of restoration shall be made directly to the person with previous grazing rights to the land under Carey Act development.

In those instances where a Carey Act project application is filed for land on which any livestock watering improvements, established trail rights, or recent successful reseeds of less than five (5) years usage are in place and functional at the time of the filing, then these watering improvements, trail

rights or reseeding shall be replaced in kind notwithstanding costs in excess of the limitation of five dollars (\$5.00) imposed herein. The director of the department of water resources shall be responsible for the negotiation and determination of the values in excess of five dollars (\$5.00) per acre which are involved in qualifying water improvements, trail rights or recent reseeding and to whom the payments for excess values shall be made. [I.C., § 42-2039, as added by 1975, ch. 61, § 1, p. 127; am. 1976, ch. 109, § 2, p. 433.]

Compiler's notes. The former section which comprised 1895, p. 215, ch. 2, § 24; reen. 1899, p. 282, ch. 2, § 24; reen. R.C. & C.L., § 1633; C.S., § 3032; I.C.A., § 41-1739 was repealed by section 10 of S.L. 1974, ch. 164 and the present material substituted therefor.

The Carey Act referred to herein is found in 43 U.S.C. § 641. See §§ 57, 59 of the Federal Laws in Vol. 1 of the Idaho Code.

Section 1 of S.L. 1976, ch. 109, is compiled herein as § 42-2014.

42-2040. Suits by department. — All suits or actions under the provisions of this chapter, shall be brought by the director of the department of water resources. [1895, p. 215, ch. 2, § 25; reen. 1899, p. 282, ch. 2, § 25; reen. R.C. & C.L., § 1634; C.S., § 3033; I.C.A., § 41-1740; am. 1974, ch. 164, § 11, p. 1397.]

Compiler's notes. The words "this chapter" refer to §§ 42-2001 — 42-2040.

Section 12 of S.L. 1974, ch. 164 declared an emergency. Approved March 30, 1974.

Suit by Commissioner.

Suit to secure from court of equity advice

and direction in the administration of trust imposed by the Carey Act could have been brought by state commissioner of reclamation (now director of the department of water resources). *Carter v. Blaine County Inv. Co.*, 45 F.2d 643 (D. Idaho 1930).

42-2041. Indian Hills Project — Legislative finding. — The legislature finds and declares that the development and settlement of arid lands under the Carey Act as provided in chapter 20, title 42, Idaho Code, and development of Carey Act projects by the Idaho water resource board are in the public interest. [1976, ch. 306, § 1, p. 1049.]

Compiler's notes. The Carey Act referred to herein is found in 43 U.S.C. § 641.

42-2042. Authorization — Financing. — Pursuant to section 42-1756(c)(7), Idaho Code, the Idaho water resource board is authorized to plan, finance, construct, acquire, operate, own, maintain, and be the project sponsor and developer of a water resource development project as provided in the provisions of the Carey Act and to use the water resource board revolving development fund and revenues or other additions thereto from any source, including but not limited to proceeds from loans secured by project revenues, to finance or guarantee the funding of said project. Said project is known as the Indian Hills Project, which is located in Owyhee County approximately two (2) miles southwest of Hammett, Idaho. The Idaho water resource board is authorized by this act to proceed with the project on the basis identified and approved by the Idaho water resource board in the proposal submitted, pursuant to section 42-1734(m) [section

42-1734(11)], Idaho Code, to the governor of Idaho on November 25, 1974; and the Idaho water resource board is further authorized to proceed in accordance with and exercise the authority for issuance of revenue bonds as provided in section 42-1734(s) [section 42-1734(17)], Idaho Code. The Idaho water resource board is further authorized to own, sell, convey, mortgage, pledge or incumber the lands for said project and do all things necessary for the construction and completion of said project including the acquisition of all necessary real and personal property in connection therewith, together with all necessary pumping and water distribution works and facilities at the site of such water project and all other necessary and related structures and equipment, and, in addition to the powers conferred elsewhere on the Idaho water resource board, to issue and sell revenue bonds under the provisions of sections 42-1739 through 42-1749, Idaho Code, pledging thereto the revenues which the board shall derive from such water project, and such other revenues as may come into the water resource board revolving development fund from any source whatsoever, including but not limited to any tax funds pledged or dedicated to the water resource board revolving development fund, in order to pay the costs of planning, financing, acquiring, construction, operation and maintenance of such water project. The water resource board is further authorized to charge and collect such fees and assessments necessary for payment and reimbursement for all the costs of said project and the water resource board shall have a first and prior lien upon all lands of the project and water rights now appurtenant or to become appurtenant to said lands and water distribution facilities; said lien shall be in all respects prior to any and all other liens no matter how created or attempted to be created by the owner or possessor of the project lands or by law and shall remain in full force and effect until the last deferred payment for water rights and project facilities is fully paid and satisfied according to the terms of the contract under which water is acquired for said project by persons making entry upon said lands. [1976, ch. 306, § 2, p. 1049.]

Compiler's notes. The words "this act" were inserted by the compiler due to the 1988 refer to §§ 42-2041 — 42-2044. amendment of § 42-1734.

The bracketed references in this section

42-2043. Source of lands. — If the lands in the project area become available to the state of Idaho by direct grant from the United States, other than through provisions of the Carey Act, the Idaho water resource board is authorized to proceed, as set forth in this act, as though the project were under the provisions of the Carey Act. [1976, ch. 306, § 3, p. 1049.]

Compiler's notes. The Carey Act referred to herein is found in 43 U.S.C., § 641. The words "this act" refer to §§ 42-2041 — 42-2044.

42-2044. Exemption from appropriation restrictions. — The development of the water project authorized in this act is hereby declared to be exempt from the provision expressed in the last sentence of section 1 of chapter 470, Idaho Laws of 1969. [1976, ch. 306, § 4, p. 1049.]

Compiler’s notes. The words “this act” refer to §§ 42-2041 — 42-2044. Section 5 of S.L. 1976, ch. 306, declared an emergency. Approved April 1, 1976. Law without governor’s signature March 31, 1976.

CHAPTER 21

CAREY ACT CONSTRUCTION COMPANIES ACTING AS OPERATING COMPANIES

SECTION.
42-2101. Maintenance charges — Statement to be filed with department of water resources.
42-2102. Publication of statement.
42-2103. Hearing by department.

SECTION.
42-2104. Operating regulations subject to review.
42-2105. Operation matters subject to review.

42-2101. Maintenance charges — Statement to be filed with department of water resources. — Every company or corporation operating, in whole or in part, irrigation works constructed or used for the purpose of furnishing water to or reclaiming, in whole or in part, any land granted, segregated or set apart by the United States to the state of Idaho under the provisions of an act of congress commonly known as the Carey Act, where such operating company is under the control, direction or management of persons other than the actual stockholders thereof, or where a majority of the stock in such company is represented by persons other than the owners thereof, either by agreement or contract, or is represented by such persons as trustees for the actual owners thereof, or where settlers or water users under such system of irrigation have contracted for the purchase of the stock in such operating company, in all of such cases the operating company shall file with the department of water resources an itemized statement of tolls, assessments, water charges or other obligations alleged to be proper charges for the operation of said irrigation works and the maintenance thereof and proposed to be assessed against the water users of such project or the stockholders in such operating company, or both, together with a statement of the number of acres or the number of shares of stock, or both, against which assessments are proposed to be made for such proposed expenditures, the amount per acre or per share of stock, or both, proposed to be levied by such company to raise such amount and such other statement of the affairs of the company as may be required by said department to give said department all information necessary to review and pass upon the matters before it. [1917, ch. 14, § 1, p. 31; reen. C.L. 128:1; C.S., § 3034; I.C.A., § 41-1801.]

Compiler’s notes. The name of the department of water administration (formerly the department of reclamation) has been changed to the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a). Carey Act Laws, see 43 U.S.C., § 641.
Cross ref. Carey Act system not a public utility, § 61-124.

ANALYSIS

Delivery of water.
Estoppel.
Maintenance assessments.
Payment of assessments.
Priority of liens.
Repayment of assessments.
Tentative approval.

Delivery of Water.

Carey Act construction company could be compelled to satisfy rights of contract holder by the delivery of water out of a later appropriation, if no prior rights had attached, where it could not deliver the required amount out of the appropriation made by it when the contract was executed. *Vinyard v. North Side Canal Co.*, 38 Idaho 73, 223 P. 1072 (1923).

Estoppel.

Estoppel was not available against a Carey Act operating company when it attempted to assert a lien for maintenance assessment on land and water purchased by a Carey Act construction company at a foreclosure sale as both companies had agreed to abide by decision of United States courts determining priority of liens. *North Side Canal Co. v. Idaho Farms Co.*, 60 Idaho 748, 96 P.2d 232 (1939). See also *Portneuf-Marsh Valley Canal Co. v. Brown*, 274 U.S. 630, 71 L. Ed. 1243, 47 S. Ct. 692 (1927).

Maintenance Assessments.

On the foreclosure of a construction lien by Carey Act construction company where it became the purchaser, such lands were subject to maintenance assessments by Carey Act operating company, and such company could enforce its lien by foreclosure. *North Side Canal Co. v. Idaho Farms Co.*, 60 Idaho 748, 96 P.2d 232 (1939).

Payment of Assessments.

Where a Carey Act construction company repossessed lands, after failure of a purchaser under a contract to pay the price therein provided for, it was required to pay assessments, and the value of the land, and the fact that no water was used upon it, was immaterial. *North Side Canal Co. v. Idaho Farms Co.*,

60 Idaho 748, 96 P.2d 232 (1939).

Priority of Liens.

Liens created by statute are inferior to other liens prior in time. *Carlson-Lusk Hdw. Co. v. Kammann*, 39 Idaho 654, 229 P. 85 (1924).

In case of Carey Act company which was not controlled by water users and ultimate stockholders, lien of its assessments did not have priority over preexisting liens. *Carlson-Lusk Hdw. Co. v. Kammann*, 39 Idaho 654, 229 P. 85 (1924).

An operating company's assessments or lien therefor or its enforcement did not affect the lien of a construction company or its statutory enforcement or satisfaction. *North Side Canal Co. v. Idaho Farms Co.*, 60 Idaho 748, 96 P.2d 232 (1939).

Repayment of Assessments.

Where assessment for operation and maintenance did not receive required approval of state board, settlers entitled to water should be repaid amount of assessment. *Twin Falls Salmon River Land & Water Co. v. Caldwell*, 266 U.S. 85, 45 S. Ct. 22, 69 L. Ed. 178 (1924).

Right of settlers under Carey Act to repayment of assessment wrongfully collected may be adjudicated in the courts. *Twin Falls Salmon River Land & Water Co. v. Caldwell*, 266 U.S. 85, 45 S. Ct. 22, 69 L. Ed. 178 (1924).

Tentative Approval.

Tentative approval of assessment for operation and maintenance under Carey Act was held without effect. *Twin Falls Salmon River Land & Water Co. v. Caldwell*, 266 U.S. 85, 45 S. Ct. 22, 69 L. Ed. 178 (1924).

Collateral References. 45 Am. Jur. 2d, Irrigation, §§ 52-55.

94 C.J.S., Waters, § 666.

42-2102. Publication of statement. — The department of water resources shall direct the company to have published in a newspaper of general circulation deemed by the department most likely to reach the water users of such irrigation system a true copy of the statement submitted to the department by said company, and said publication shall include notice by the department of a hearing to be held by said department at a named time, date and place for the purpose of hearing any protests against said proposed expenditures, any portions thereof or any matters pertaining thereto. [1917, ch. 14, § 2, p. 31; reen. C.L. 128:2; C.S., § 3035; I.C.A., § 41-1802.]

Compiler's notes. The name of the department of water administration (formerly the department of reclamation) has been

changed to the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

42-2103. Hearing by department. — If after such hearing the department of water resources shall be satisfied that the expenditures proposed

therein are necessary for the operation and maintenance of such irrigation works and are proper charges against the water users or stockholders of such system, or both, and the amount to be levied and the means thereof is determined to be proper, the department shall approve such statement and such approval shall give the company the right to assess, levy or enforce a lien for the collection thereof; or the department may reject such statement, in whole or in part, and if in part, the operating company shall have the authority to levy assessments only for the collection of whatever portion thereof is approved by said department. [1917, ch. 14, § 3, p. 31; reen. C.L. 128:3; C.S., § 3036; I.C.A., § 41-1803.]

Compiler's notes. The name of the department of water administration (formerly the department of reclamation) has been changed to the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

42-2104. Operating regulations subject to review. — All rules and regulations under which water is furnished by such companies shall be subject to review by said department, which said department may nullify or amend such rules and regulations or any portion thereof as said department deems expedient and wise to best serve the interests of the water users on such projects or the stockholders in such companies. [1917, ch. 14, first part of § 4, p. 32; reen. C.L. 128:4; C.S., § 3037; I.C.A., § 41-1804.]

42-2105. Operation matters subject to review. — All acts of such companies, all matters pertaining to the operation of canal works under the control of such companies and all matters pertaining to the financial affairs of such companies shall be subject to the jurisdiction of said department, which shall have full power and authority to provide for hearings, pass upon and review all such matters and take whatever steps may be necessary to enforce its decisions. [1917, ch. 14, last part of § 4, p. 32; reen. C.L. 128:5; C.S., § 3038; I.C.A., § 41-1805.]

CHAPTER 22

OPERATING COMPANIES — LIEN FOR MAINTENANCE CHARGES

- SECTION.
- 42-2201. Maintenance charges — Right to collect — Basis of assessment — Lien.
 - 42-2201A. Authorization for other assessment.
 - 42-2202. Statement to be filed with county recorder.
 - 42-2203. Filing of claim of lien.
 - 42-2204. Duties of county recorder.
 - 42-2205. Limitation of lien.
 - 42-2206. Foreclosure proceedings relate only to water or water rights.

- SECTION.
- 42-2207. Foreclosure of lien.
 - 42-2208. Interest on delinquent assessments.
 - 42-2209. Release of lien.
 - 42-2210. Interpretation.
 - 42-2211. Securing supplemental water — Annual levies — Delivery of water upon payment.
 - 42-2212. Condemnation funds for future expenses — Permanent trust fund — Investment.
 - 42-2213. Accumulated surplus funds — Investment.

42-2201. Maintenance charges — Right to collect — Basis of assessment — Lien. — Any corporation heretofore organized or any corporation that shall hereafter be organized for the operation, control or

management of an irrigation project or canal system, or for the purpose of furnishing water to its shareholders, and not for profit or hire, the control of which is actually vested in those entitled to the use of the water from such irrigation works for the irrigation of the lands to which the water from such irrigation works is appurtenant, shall have the right to levy and collect from the holders or owners of all land to which the water and water rights belonging to or diverted by said irrigation works are dedicated or appurtenant regardless of whether water is used by such owner or holder, or on or for his land; and also from the holders or owners of all other land who have contracted with such company, corporation or association of persons to furnish water on such lands, regardless of whether such water is used or not from said irrigation works, reasonable administrative charges, tolls, assessments and charges for the purpose of maintaining and operating such irrigation works and conducting the business of such company, corporation or association and meeting the obligations thereof, which tolls, assessments and charges shall, after projecting the revenue to be derived from an administrative charge of not to exceed ten dollars (\$10.00) to be levied against each holder of a stock certificate of the company:

(1) Be equally and ratably levied and may be based upon the number of shares or water rights held or owned by the owner of such land as appurtenant thereto; or

(2) May be based upon the amount of water used or said tolls, assessments and charges may be based on:

(a) A combination of a charge of a fixed amount per share for annual operation and maintenance and a charge for a fixed minimum amount of water per share, whether used or not, plus an additional charge based on the estimated amount of water to be delivered over the minimum, as requested by the farmer, including the energy costs of said excess delivery; or

(b) A combination of a charge for energy costs, based on the amount of water delivered, and a separate charge for all other operation and maintenance costs, based on the number of shares or water rights; or

(3) May be based upon any other method of assessment fairly allocating the costs of operating and maintaining the irrigation works which has been approved by the affirmative vote of at least two-thirds ($\frac{2}{3}$) of the shares entitled to vote at any annual, regular or special meeting of the shareholders at which the question of approving the method of assessment is brought properly before the meeting.

Such company, corporation or association of persons shall have a first and prior lien, except as to the lien of taxes, upon the land to which such water and water rights are appurtenant, or upon which it is used, said lien to be perfected, maintained and foreclosed in the manner set forth in this chapter: provided, that any right to levy and collect tolls, administrative charges, assessments and charges by any person, company of persons, association or corporation, or the right to a lien for the same, which does or may hereafter otherwise exist, is not impaired by this chapter. [1913, ch. 120, § 1, p. 464; reen. C.L. 129:2; am. 1919, ch. 115, § 1, p. 401; C.S., § 3040; am. 1925, ch. 107, § 2, p. 153; I.C.A., § 41-1901; am. 1980, ch. 196, § 1, p. 432; am. 1993, ch. 108, § 1, p. 276.]

Compiler's notes. Carey Act Laws, see 43 U.S.C., § 641.

C.S., § 3039, repealed by S.L. 1925, ch. 107, § 1.

Section 3 of amendatory act of S.L. 1925, ch. 107 declared an emergency.

Cross ref. Carey Act system not a public utility, § 61-124.

Report of assessments and liens on land mortgaged to secure loan of state endowment funds, § 43-2007.

Sec. to sec. ref. This chapter is referred to in §§ 42-2302 and 43-404A.

This section is referred to in §§ 42-2201A and 42-2302.

ANALYSIS

Benefits received.

Constitutionality.

Construction.

Contract with construction company.

Enforcement of charges.

Forfeiture.

Issue and claim preclusion.

Levy of assessment.

Priorities.

Status of lien.

Benefits Received.

Because this section clearly authorizes companies to levy and collect assessments from landowners within the canal system regardless of whether or not water is used by those owners, the adjudication court did not err in determining that "benefits received" did not mean "water received." *Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 982 P.2d 917 (1999).

Constitutionality.

Amendment of S.L. 1925, ch. 107, is complete in itself and not subject to objection that it contains improper classification or is denial of equal protection of laws. *Sanderson v. Salmon River Canal Co.*, 45 Idaho 244, 263 P. 32 (1927) (chapter no longer restricted to companies operating under Carey Act).

There was no constitutional violation where the common interest created in a viable water delivery system and the costs of maintaining a canal system served as a rational basis for assessments, and where a meaningful opportunity to be heard and contest the amount due was provided. *Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 982 P.2d 917 (1999).

Construction.

This section was not in conflict with C.S., §§ 4733-4736 (§ 30-156, repealed) authorizing assessments upon corporate stock within certain prescribed limitations. *Sanderson v. Salmon River Canal Co.*, 45 Idaho 244, 263 P. 32 (1927).

Contract with Construction Company.

Contract between state and construction company fixing the rate to be charged purchasers of water rights was not binding on an operating company subsequently obtaining control of the system. *Vinyard v. North Side Canal Co.*, 38 Idaho 73, 223 P. 1072 (1923).

Contract between settlers and construction company was not binding on operating company if control of project had, in effect, passed to operating company. *Blaine County Canal Co. v. Hansen*, 49 Idaho 649, 292 P. 240 (1930).

Enforcement of Charges.

Water right could not be severed from land to which it was appurtenant merely to allow owner to avoid his share of maintaining and operating irrigation works, where such water right was not capable of being transferred to and applied to other lands, and water not otherwise available was still used on the land. *Strong v. Twin Falls Canal Co.*, 44 Idaho 427, 258 P. 173 (1927).

Statutory methods for recovering irrigation maintenance charges by operating company are cumulative and not exclusive, therefore they may be recovered by action in quantum meruit. *Blaine County Canal Co. v. Hansen*, 49 Idaho 649, 292 P. 240 (1930).

Forfeiture.

Where stockholders wished to use forfeiture only to avoid paying maintenance assessments, the adjudication court's determination that no water rights were forfeited was affirmed; a finding of forfeiture by an appropriator who did nothing to cause the nonuse of the water would have done nothing to advance the policy behind the statute to secure the maximum use and benefit of the state's water resources. *Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 982 P.2d 917 (1999).

Issue and Claim Preclusion.

Utility was not barred from attempting to collect 1992 assessments as the 1992 assessments were not ripe for adjudication at the time of an earlier trial involving the parties when the trial court had ruled that assessments for prior years were illegal and uncollectible, and therefore claim preclusion did not bar the present claim, and as the trial court had not been presented with the issues of the legality of the assessment under § 30-308A (repealed), but had been reviewing whether the assessments violated this section in the earlier trial, issue of preclusion did not bar the present claim. *Bell Rapids Mut. Irrigation Co. v. Hausner*, 126 Idaho 752, 890 P.2d 338 (1995).

Levy of Assessment.

It was held, under facts of case, that assessment could be levied only when water was

requested and actually delivered. *Aberdeen-Springfield Canal Co. v. Bashor*, 36 Idaho 818, 214 P. 209 (1923).

Levies may be for reasonable amount based upon number of shares or in proportion to amount of water used or owned or by both of said methods for purposes stated in this section, but procedure to be followed must be in compliance with this chapter. *Sanderson v. Salmon River Canal Co.*, 45 Idaho 244, 263 P. 32 (1927).

An assessment against lateral water users in an amount greater than the other lateral users was void, since assessment was not equally prorated among all lateral stockholders, even though some of the lateral water users signed an agreement under which corporation was given the right to maintain and repair the laterals. *Hale v. McCammon Ditch Co.*, 72 Idaho 478, 244 P.2d 151 (1952).

Stockholders of ditch company must be assessed pro rata on maintenance of system, but such assessment should not include special benefits conferred on lateral users. *Hale v. McCammon Ditch Co.*, 72 Idaho 478, 244 P.2d 151 (1952).

Priorities.

Where there were separate liens for purchase of stock in Carey Act company and for maintenance of project, and each lien set out a stipulation in consideration of the other, priority between such liens could have been ascertained from these stipulations. *Portneuf-Marsh Valley Canal Co. v. Brown*, 274 U.S. 630, 47 S. Ct. 692, 71 L. Ed. 1243 (1927).

Purchase money liens for stock in construc-

tion company had priority in point of time over maintenance liens. *Portneuf-Marsh Valley Canal Co. v. Brown*, 274 U.S. 630, 47 S. Ct. 692, 71 L. Ed. 1243 (1927).

In case of Carey Act company which was actually controlled by water users themselves, lien of maintenance and operation assessments was prior to all other liens save taxes. *Carlson-Lusk Hdw. Co. v. Kammann*, 39 Idaho 654, 229 P. 85 (1924).

Status of Lien.

A construction company taking over land and water rights where a default had been made by the purchaser, did not free such land and water from the statutory lien of the operating company for water furnished. *North Side Canal Co. v. Idaho Farms Co.*, 107 F.2d 481 (9th Cir. 1939).

In absence of express provision, lien created by statute was subsequent to other liens which were prior in time. *Carlson-Lusk Hdw. Co. v. Kammann*, 39 Idaho 654, 229 P. 85 (1924).

Lien laws are in derogation of common law and persons invoking such remedies must clearly prove facts necessary to constitute lien. *Carlson-Lusk Hdw. Co. v. Kammann*, 39 Idaho 654, 229 P. 85 (1924).

Collateral References. 45 Am. Jur. 2d, Irrigation, §§ 52-55, 106, 107.

94 C.J.S., Waters, §§ 666, 723-728.

Irrigation company as a public utility. 8 A.L.R. 268; 15 A.L.R. 1227.

Inclusion of amount to cover delinquencies in assessment for public improvement as contrary to constitutional guaranties. 40 A.L.R. 1352; 42 A.L.R. 1185.

42-2201A. Authorization for other assessment. — The board of directors of a corporation which utilizes section 42-2201, Idaho Code, as the basis of their water stock assessments, after direction by a resolution of a majority of the stockholders at the annual meeting, may:

(1) Make no assessment, or a lesser assessment against:

(a) Shares of corporate stock representing water appurtenant to acres contracted in a federal cropland set-aside program;

(b) Shares of stock appurtenant to parcels of five (5) acres or less where the stockholder maintains his principal residence and where water cannot be delivered through no fault of the irrigation entity or the stockholder; or

(c) Accept an assignment of up to five (5) shares of the corporation's stock appurtenant to parcels of five (5) acres or less where the stockholder maintains his principal residence and where water cannot be delivered through no fault of the irrigation entity or the stockholder, provided the stockholder will assign ownership of the shares to the corporation together with a title insurance policy or an executed indemnification protecting the corporation from outstanding liens.

(2) To assess and collect for extra water diverted over and above the amount originally estimated and paid for pursuant to the corporation's

assessment pursuant to section 42-2201, Idaho Code, which extra water was diverted during the irrigation season, by mailing a supplemental assessment at the end of the irrigation season to collect for extra water diverted which was in excess of preseason estimates, to refund as necessary or credit against future assessments if the final charge is less than the amount previously paid. The board of directors collects or pays interest on overages and underages as appropriate from the due date of the supplemental assessment. Interest on said overages and underages shall not exceed twelve percent (12%) per annum. [I.C., § 42-2201A, as added by 1993, ch. 108, § 2, p. 276.]

Compiler's notes. Section 3 of S.L. 1993, ch. 108 declared an emergency. Approved March 22, 1993.

42-2202. Statement to be filed with county recorder. — Any company, corporation or association claiming the benefits of this chapter shall, on or before the first day of April of each year, file for record with the county recorder of the county or counties in which the land lies to be affected, a statement in writing containing the name of such company, corporation or association, the general or common name of such canal system and irrigation works, or a general description of the same sufficient for identification, the amount of such charge for such year, and the date or dates when payable. [1913, ch. 120, § 2, p. 465; reen. C.L. 129:3; C.S., § 3041; I.C.A., § 41-1902.]

42-2203. Filing of claim of lien. — On or after the first day of November and prior to the first day of January thereafter, the company, corporation or association, claiming the benefit of the lien herein provided, as against any parcel of land upon which the tolls, assessments and charges shall not have been paid, shall file for record with the county recorder for the county in which such land is situated, a statement containing the name of such company, corporation or association, the general or common name of the canal systems or irrigation works, or a general description of the same sufficient for identification, a statement of the lien claimant's demand, after deducting all just credits and offsets, a description of the particular tracts or parcels of land to be charged with the lien sufficient for identification, with the name of the owner, or reputed owner, if known, of each particular tract or parcel, which claim must be verified by the oath of the claimant or its attorney or agent, to the effect that affiant believes the same to be just: provided, that the claim or claims for liens against all land upon which the same is claimed for one year, may be made in one or more instruments, regardless of the number of owners, reputed owners or proprietors. [1913, ch. 120, § 3, p. 465; reen. C.L. 129:4; C.S., § 3042; I.C.A., § 41-1903.]

Cross ref. Limitation of lien, § 42-2205.

Sec. to sec. ref. This section is referred to in §§ 42-2205, 42-2206, 42-2209.

42-2204. Duties of county recorder. — The county recorder must record the statements mentioned in this chapter in a book kept by him for that purpose, and such record must be indexed, as deeds and other conveyances are required by law to be indexed, and for which he may receive the same fees as are allowed by law for recording deeds or other instruments. [1913, ch. 120, § 4, p. 466; reen. C.L. 129:5; C.S., § 3043; I.C.A., § 41-1904.]

Cross ref. Deed index, § 31-2404.
Fees of county recorder, § 31-3205.

42-2205. Limitation of lien. — No lien provided for in this chapter binds any land for a longer period than two (2) years after the filing of the statement mentioned in section 42-2203, unless proceedings be commenced in a proper court within that time to enforce such lien. [1913, ch. 120, § 5, p. 466; reen. C.L. 129:6; C.S., § 3044; I.C.A., § 41-1905.]

Validity of Lien.

The exclusion of evidence of the institution of suits within the statutory period was directed to a purely collateral matter, and did

not serve to import into the case any issue concerning the validity of the maintenance lien. *North Side Canal Co. v. Idaho Farms Co.*, 109 F.2d 354 (9th Cir. 1940).

42-2206. Foreclosure proceedings relate only to water or water rights. — In the event that the owner or holder or occupant of the premises upon which water has been purchased or contracted for, has not, at the time of the filing of the claim of lien provided for in section 42-2203, received title to the premises so occupied or held by him, and liens are filed as provided for in this chapter, the proceedings for foreclosure herein provided for shall relate only to the said water or water rights and the said water or water rights shall be sold in like manner as if title to the premises had been acquired by the holder or occupant of said land, or the owner or holder of the said water right or water appurtenant to said land. [1919, ch. 115, § 2, p. 402; C.S., § 3045; I.C.A., § 41-1906.]

Necessary Parties.

Where, under Carey Act contract, it appeared that less land could be irrigated than was expected at first, and limits of area had been reduced, all contract holders were nec-

essary parties to suit to foreclose lien on water rights. *Commonwealth Trust Co. v. Smith*, 273 F. 1 (9th Cir. 1921), aff'd, 266 U.S. 152, 45 S. Ct. 26, 69 L. Ed. 219 (1924).

42-2207. Foreclosure of lien. — Proceedings in the way of civil action in the district courts may be commenced and maintained to enforce the lien herein provided, which proceedings may embrace one or more parcels of land, or one or more landowners, or reputed landowners; and except as otherwise provided herein, the provisions of the Idaho laws relating to civil actions, new trials and appeals, are applicable to and constitute the rules of practice in proceedings under this chapter; and except as otherwise provided, the nature and effect of a judgment of foreclosure shall be the same as the foreclosure of a first real estate mortgage: provided, that the sale of such land under foreclosure shall pass to the purchaser, all ditch and water rights appurtenant thereto, and the interests, including corporate stock, of

the owner or holder of such land in such corporation, company or association. [1913, ch. 120, § 6, p. 466; reen. C.L. 129:7; C.S., § 3046; I.C.A., § 41-1907.]

Cross ref. Appeals, tit. 13, and I.A.R.
Civil procedure, tit. 5, and I.R.C.P.

Foreclosure of mortgages, §§ 6-101 —
6-108.

Collateral References. 45 Am. Jur. 2d,
Irrigation, §§ 85, 106, 107.

94 C.J.S., Waters, §§ 723-728.

42-2208. Interest on delinquent assessments. — All charges levied under the provisions of this chapter shall draw interest at twelve per cent (12%) per annum from the time when due and payable, to the entry of judgment of foreclosure, and the right of lien shall extend to such interest and the costs of foreclosure. [1913, ch. 120, § 7, p. 466; reen. C. L. 129:8; C. S., § 3047; I. C. A., § 41-1908; am. 1933, ch. 101, § 1, p. 162; am. 1974, ch. 28, § 1, p. 979; am. 1982, ch. 89, § 1, p. 164.]

Compiler's notes. Section 2 of S.L. 1974,
ch. 28 provided that the act should take effect
on and after July 1, 1974.

42-2209. Release of lien. — It shall be the duty of the company, corporation or association of persons filing a lien statement as provided in section 42-2203, to cause a release of the same upon the records of the county where filed, in the same manner and with like penalties for failure as is or may be provided by law in case of real estate mortgages. [1913, ch. 120, § 10, p. 467; reen. C.L. 129:9; C.S., § 3048; I.C.A., § 41-1909.]

Cross ref. Penalty for failure to release
record upon satisfaction of mortgage, § 45-
915.

42-2210. Interpretation. — This chapter shall not be held to affect the rights of any person, corporation, company or association of persons to charge or collect tolls, charges or assessments to which it may be otherwise entitled; nor the right of a corporation to make assessments upon its stock according to law; nor the obligation of a stockholder or member of any corporation or association otherwise created; nor any other lien or right of lien given by the laws of this state, or otherwise. [1913, ch. 120, § 9, p. 466; reen. C.L. 129:10; C.S., § 3049; I.C.A., § 41-1910.]

42-2211. Securing supplemental water — Annual levies — Delivery of water upon payment. — Any corporation of the character described in this chapter, in order to secure additional water for the irrigation of the lands of its stockholders to supplement their natural flow rights, by the construction of dams or other works and the storing or impounding of winter flow, or flood, or other waters, may contract with the United States bureau of reclamation, public works administration, reconstruction finance corporation, resettlement administration or any other federal agency or instrumentality, or with any person, agency or corporation, for the construction of necessary works, or the loan of moneys for such construction, and

may provide in such contract that said corporation will annually levy an assessment against its stockholders sufficient in amount to pay all obligations created by such contract, as the same mature, and will collect the same as tolls, and may provide that no part of such supplementary water shall be delivered to any stockholder until his annual toll and assessment levied with respect to such supplemental water has been paid. Any corporation so contracting shall not deliver such supplemental water to any stockholder or user except upon payment in full of such annual toll and assessment; provided, however, that no such contract may be entered into by any corporation unless and until its board of directors shall have been authorized so to do by resolution of its stockholders adopted at a regular or special meeting thereof. Nothing herein contained shall be construed to in any way affect or impair any rights such corporation now has under the law to levy and collect assessments for corporate purposes. [1937, ch. 234, § 1, p. 420.]

42-2212. Condemnation funds for future expenses — Permanent trust fund — Investment. — When any corporation organized for the operation, control or management of an irrigation project or canal system, or for the purpose of furnishing water to its shareholders and not for profit or hire, shall receive through condemnation proceedings, or by contract made under threat of such proceedings, any funded amount to meet increased maintenance and operation expenses in future years as opposed to funds received as compensation for expenses incurred or to be incurred for the reconstruction or relocation of irrigation works, such funded amount shall constitute a permanent trust fund in the treasury of such company, and as such it shall be kept separate and apart from other funds of the company and such funded amount shall be invested by the board of directors of such company under the standards specified in the Prudent Man Investment Act as set forth in chapter 5, title 68, Idaho Code. [1965, ch. 186, § 1, p. 393.]

42-2213. Accumulated surplus funds — Investment. — When any corporation organized for the operation, control or management of an irrigation project or canal system, or for the purpose of furnishing water to its shareholders and not for profit or hire, shall have accumulated, out of assessment funds or otherwise, reasonable reserves for emergency, contingent or non-recurring expenses and charges, the funds held in such reserves may be invested by the board of directors of such company under the standards specified in the Prudent Man Investment Act as set forth in chapter 5, title 68, Idaho Code. [1965, ch. 186, § 2, p. 393.]

CHAPTER 23

NOXIOUS WEEDS ON LANDS WITHIN IRRIGATION PROJECTS

SECTION.

- 42-2301. Eradication of weeds by companies.
- 42-2302. Funds for charges and expenses.
- 42-2303. Cooperation with established weed program.

SECTION.

- 42-2304. Provisions of act permissive.

42-2301. Eradication of weeds by companies. — Any company, association of persons, or corporation, engaged in the operation, control or management of any irrigation project or canal system for the purpose of furnishing water to its shareholders, not for profit or hire, shall have the right, when its articles of incorporation shall so provide, to include as a part of the service of maintenance and operation of the project or canal system the treatment and eradication of noxious weeds growing on the lands within the boundaries of said project or system, and adjacent thereto. [1945, ch. 30, § 1, p. 37.]

Sec. to sec. ref. This section is referred to in §§ 42-2302, 42-2304.

42-2302. Funds for charges and expenses. — To provide funds to meet necessary charges and expenses for the treatment and eradication of noxious weeds as provided in section 42-2301, the board of directors of such company, association of persons, or corporation, may utilize moneys available under the provisions of section 42-2201, and may also levy and collect, pursuant to title 42, chapter 22, money for necessary charges and expenses against any given piece of land according to the benefits which shall accrue to the same, to be determined by the board of directors of such company, association of persons, or corporation. [1945, ch. 30, § 2, p. 37.]

42-2303. Cooperation with established weed program. — The work to be carried on under the provisions of this act shall be in cooperation with the weed program of the constituted authorities of the state, pursuant to chapter 235 of the 1939 Session Laws, and Acts amendatory thereof, but shall not interfere with or usurp any of the powers which are now granted by the provisions of said act, or acts amendatory thereof. [1945, ch. 30, § 3, p. 37.]

Compiler's notes. Chapter 235 of S.L. 1939 was repealed by S.L. 1970, ch. 149, § 1. Now see §§ 22-2401 et seq.

42-2304. Provisions of act permissive. — The provisions of this act shall not be construed as mandatory, but permissive only as to any company, association of persons, or corporation, referred to in section 42-2301. [1945, ch. 30, § 4, p. 37.]

CHAPTER 24

CONFORMATION OF OPERATING COMPANIES TO DISTRICT SYSTEM

SECTION.
42-2401. Additional rights and powers granted irrigation or canal companies.
42-2402. Purposes of organization determined from charter.

SECTION.
42-2403. Validation of proceedings under 1921 act.
42-2404. Powers vested in stockholders.

42-2401. Additional rights and powers granted irrigation or canal companies. — Any corporation heretofore organized or any corporation that shall hereafter be organized for the operation, control or management of an irrigation project or canal system, or for the purpose of furnishing water to its shareholders and not for profit or hire, shall have and exercise all the rights, powers, and privileges in addition to those already granted and existing.

1. To divide into districts the territory included in such project or system and to change from time to time the number and boundaries of such districts.

2. To elect its directors from such districts by a vote in which all the stockholders of the corporation may participate, determine the number of directors to be elected from each district, fix their terms of office and prescribe the times and manner of choosing their successors.

3. To hold regular annual meetings at which the stockholders who are represented in person or by proxy shall constitute a quorum for the transaction of business and shall have the power by a majority vote of the stock so represented to elect directors and transact any other business of the corporation proper to be done.

4. To provide for the appointment of an executive committee from the board of directors, to be composed of not less than three (3) thereof. Such committee shall have all the powers, rights and privileges of the board of directors and may meet at such times and places as the bylaws may provide or the board of directors may determine, and the acts of such committee shall in all matters be valid as against the corporation.

5. To provide by amendment to its articles of incorporation or by adopting new articles of incorporation for the treatment and eradication of noxious weeds growing on the lands within the boundaries of said irrigation project and adjacent thereto and to drain excess water from said lands.

6. To change or amend its articles of incorporation or bylaws or adopt new articles or new bylaws, by a two-thirds ($\frac{2}{3}$) vote of the stock represented, at any regular meeting of the stockholders, or at any special meeting duly called for that purpose in accordance with the provisions of sections 30-310 and 30-311, Idaho Code: provided, that any proposed changes in the articles of incorporation or bylaws or any new articles of incorporation or bylaws shall be either proposed at a meeting of the stockholders or approved by at least one-third ($\frac{1}{3}$) of the board of directors; and before being finally adopted the board of directors shall cause such proposed articles, bylaws, or changes therein (or a summary of them) to be published in a newspaper of general circulation published in the county in which the main office of the canal company is situated, for at least once each week for four (4) weeks prior to the meeting at which such articles, bylaws, or changes therein are finally adopted and said notice shall state the time and place at which the vote on final adoption will be taken.

7. To prohibit any officer, director, manager or employee of the corporation from acting as proxy for any other person at any meeting of the stockholders.

8. To prescribe by its articles of incorporation or bylaws the manner in which the powers given by law shall be exercised.

9. To provide by amendment to its articles of incorporation or by adoption of new articles of incorporation that the directors be divided into two (2) or three (3) classes, each class to be as nearly equal in number as possible; the term of office of directors of the first class to expire at the first annual meeting of directors after their election, that of the second class to expire at the second annual meeting after their election, and that of the third class, if any, to expire at the third annual meeting after their election. At each annual meeting after such classification the number of directors equal to the number of the class whose term expires at the time of such meeting shall be elected to hold office until the second succeeding annual meeting, if there be two (2) classes, or until the third succeeding annual meeting, if there be three (3) classes. Immediately after the first election following such amendment or adoption as herein provided, each such class shall be selected by lot by the elected directors at their organizational meeting.

10. To provide for a notice of a meeting of the stockholders or the election of directors which notice may be given by an advertisement thereof for two (2) weeks in a newspaper of general circulation within the canal company service area and the county in which the principal place of business of the corporation is located or which notice may be given by written notice, placed in the United States mail, postage prepaid, and addressed to the stockholder at his last known post office address. [1923, ch. 133, § 1, p. 194; I.C.A., § 41-2001; am. 1943, ch. 150, § 1, p. 296; am. 1980, ch. 197, § 32, p. 433; am. 1982, ch. 63, § 1, p. 125; am. 1989, ch. 350, § 1, p. 877.]

Compiler's notes. Section 30-310 and 30-311, referred to in subdivision 6., were repealed by S.L. 1993, ch. 220, § 1.

Section 31 of S.L. 1980, ch. 197 is compiled as § 41-3906, § 33 was repealed, and § 34 contained an effective date clause.

Section 34 of S.L. 1980, ch. 197 read: "(1) Section 1 and sections 3 through 33 of this act shall be in full force and effect on and after July 1, 1980.

"(2) Section 2 of this act shall be in full force and effect on and after July 1, 1981."

Collateral References. Irrigation district as municipality within tax laws. 17 A.L.R. 81; 55 A.L.R. 639.

De facto corporation, organization sought to be incorporated under unconstitutional statute as. 136 A.L.R. 193.

42-2402. Purposes of organization determined from charter. — The purposes for which said corporation has been organized shall be determined from the articles of incorporation of any such corporation. [1923, ch. 133, § 2, p. 194; I.C.A., § 41-2002.]

42-2403. Validation of proceedings under 1921 act. — Any and all elections and any and all things done and performed by any such corporation organized under the laws of this state, not otherwise invalid, had, done or performed in pursuance of, or in reliance upon, chapter 65 of the General Laws of the state of Idaho, passed at the sixteenth session of the state legislature of 1921, approved March 12, 1921, are hereby validated. [1923, ch. 133, § 3, p. 194; I.C.A., § 41-2003.]

Compiler's notes. See Compiler's notes, § 42-2401.

Section 4 of S.L. 1923, ch. 133 declared an emergency.

42-2404. Powers vested in stockholders. — The rights, powers and privileges herein created and granted shall vest in and be held and exercised by the stockholders except insofar as they may be expressly delegated to the directors by the articles of incorporation or by-laws of the corporation. [1917, ch. 46, § 2, p. 106; reen. C.L. 129:12; C.S., § 3051; I.C.A., § 41-2004.]

Compiler's notes. This section was part of the same act as C.S., § 3050, and it may have fallen with that section when it was declared

unconstitutional in *Crom v. Frahm*, 33 Idaho 314, 193 P. 1013 (1920).

CHAPTER 25

TRANSFER AND LEASE OF CAREY ACT WATER RIGHTS

SECTION.

- 42-2501. Right to transfer recognized.
 42-2502. Instrument of conveyance — Execution — Recordation.
 42-2503. Consent of Carey Act operating company to transfer.
 42-2504. Transfer of water right — Approval by director of the department of water resources.
 42-2505. Appeal from decision of director of

SECTION.

- the department of water resources.
 42-2506. Fee for decision on application for transfer of water right.
 42-2507. Transfer of stock certificates evidencing water right.
 42-2508. Effect of lease upon appurtenancy.
 42-2509. Rights of lienholders protected.

42-2501. Right to transfer recognized. — The owner of any lands to which a water right has been made appurtenant pursuant to the provisions or operation of the act of congress of the United States known as the Carey Act may transfer such water right, in whole or in part, to other land owned by him which can be served and irrigated by the same Carey Act irrigation system and may, by sale, or by lease for a period not exceeding one (1) year, transfer such water right or any portion thereof to another for use upon or in connection with any such other lands, in the manner or on the condition set forth in this chapter. [1917, ch. 159, § 1, p. 484; reen. C.L. 130:1; am. 1919, ch. 171, § 1, p. 544; C.S., § 3052; am. 1925, ch. 94, § 1, p. 134; I.C.A., § 41-2101.]

Compiler's notes. Carey Act, see 43 U.S.C. § 641.

Section 2 of S.L. 1925, ch. 94 declared an emergency.

Sec. to sec. ref. Sections 42-2501 — 42-2509 are referred to in § 42-223.

Cited in: *Idaho Irrigation Co. v. Gooding*, 285 F. 453 (9th Cir. 1922).

ANALYSIS

Change of place of use.
 Forfeiture of water right.
 Realty.
 Restriction on severance.
 Taxation.

Change of Place of Use.

An owner of land and water rights under a Carey Act project may change the place of use of such water if it can be done without mate-

rial injury to other appropriators. In re *Robinson*, 61 Idaho 462, 103 P.2d 693 (1940).

Forfeiture of Water Right.

Where individual user of water under the Carey Act allowed portions of his land to lie idle and sold, leased, or used his water on other lands, in absence of intent to abandon his right, he did not forfeit or lose same. *Rayl v. Salmon River Canal Co.*, 66 Idaho 199, 157 P.2d 76 (1945).

Realty.

While shares of water stock may be personally, the water right which such shares control is real property. *Bothwell v. Keefer*, 53 Idaho 658, 27 P.2d 65 (1933).

Restriction on Severance.

Water right could not be severed from land to which it was appurtenant merely to allow owner to avoid his share of expense of main-

taining and operating irrigation works, where such water right was not capable of being transferred to and applied to other lands, and water not otherwise available was still used on land. *Strong v. Twin Falls Canal Co.*, 44 Idaho 427, 258 P. 173 (1927).

Taxation.

As to change of place of use, or transfer of water within a Carey Act system, the only injury which another user may set up to prevent the same is an injury to his water right and the use thereof, and a question of

taxation will not be considered in connection therewith. In *re Robinson*, 61 Idaho 462, 103 P.2d 693 (1940).

Collateral References. 78 Am. Jur. 2d, Waters, §§ 305-310.

Deed or mortgage foreclosure as passing rights in a ditch company. 70 A.L.R. 1008.

Divisibility of an easement in gross or license in respect to water. 130 A.L.R. 1253.

Deed involving water rights as conveying a fee or easement. 136 A.L.R. 404.

42-2502. Instrument of conveyance — Execution — Recordation.

— The transfer of a water right, in whole or in part, made by such person to other lands so owned by him shall be evidenced by a written instrument executed and acknowledged by such person as other conveyances of real estate, reciting therein the facts, stating the amount of the right transferred and describing the land from which and the land to which the transfer is to be made, and the transfer of a water right or any portion thereof from one person to another shall be evidenced by a written instrument containing similar recitals and executed and acknowledged in like manner by the grantor or lessor.

All of such instruments shall be recorded in the office of the county recorder of the county or counties where the land is situated from which such right is transferred and also in the office of the county recorder of the county or counties where the land is situated to which such right is transferred, and to all of such instruments the recording acts of the state shall apply. [1917, ch. 159, § 2, p. 484; reen. C.L. 130:2; C.S., § 3053; I.C.A., § 41-2102.]

Compiler's notes. Section 3 of S.L. 1917, ch. 159 provided for the appointment of an irrigation engineer and specified his annual salary.

Sec. to sec. ref. This section is referred to in § 42-2503.

42-2503. Consent of Carey Act operating company to transfer. —

Before the transfer of a water right shall take effect under this chapter a person interested therein must apply to the board of directors of the corporation operating such Carey Act irrigation system for consent to the making of such transfer, and if such consent is given a resolution showing the same and the extent or portion of the right to be transferred shall be adopted by said board and a copy thereof, with proper reference to the date of its passage, shall be incorporated in the instrument evidencing such transfer, and upon the recording of such instrument, as provided in section 42-2502, such transfer shall be complete. [1917, ch. 159, § 4, p. 484; compiled and reen. C.L. 130:4; C.S., § 3054; I.C.A., § 41-2103.]

ANALYSIS

Change of place of use.
Real party in interest.

Change of Place of Use.

An owner of land and water rights under a Carey Act project may change the place of use of such water if it can be done without mate-

rial injury to other appropriators. In re Robinson, 61 Idaho 462, 103 P.2d 693 (1940).

Real Party in Interest.

Where there was an agreement in contract for purchase of land providing that the purchaser could not carry out the contract unless he obtained a permit to transfer water from

one tract of land to another, this did not prevent such purchaser from being the real party in interest in litigation in connection with the water right in a Carey Act project. In re Robinson, 61 Idaho 462, 103 P.2d 693 (1940).

42-2504. Transfer of water right — Approval by director of the department of water resources. — If the board of directors of the corporation operating such Carey Act systems shall refuse its consent to the transfer of such water right, a written application for permission to make the same, showing the description of the land from which and of the land to which it is proposed to transfer such water right and the amount of the water right to be so transferred and the reasons for such transfer, shall be presented to the director of the department of water resources who shall promptly make an investigation of the matter and determine whether and to what extent the canal system and the other water users thereunder shall be affected or prejudiced if such transfer is allowed.

If said director of the department of water resources finds that such transfer of water right, in the manner and to the extent applied for, will not be prejudicial to said corporation or to the other water users under said irrigation system he shall issue his certificate approving the transfer, the same to be in duplicate, one part of which shall be filed with the secretary of such corporation; the other shall be delivered to the persons applying for such transfer and recorded in connection with the instrument of conveyance or lease, and if he find that such transfer should be made only upon certain terms and conditions, then he shall prescribe and specify the terms and conditions, upon which the transfer shall be allowed, and if they are complied with to his satisfaction, he shall issue his certificate to that effect, the same being in duplicate as herein provided.

If said director of the department of water resources decides against such transfer, then he shall make his written report, giving the reasons for such decision. Any person or the board of directors of such Carey Act corporation may contest the decision of the director pursuant to section 42-1701A(3), Idaho Code. [1917, ch. 159, § 5, p. 484; reen. C.L. 130:5; am. 1919, ch. 171, § 3, p. 544; C.S., § 3055; I.C.A., § 41-2104; am. 1980, ch. 238, § 19, p. 526.]

Compiler's notes. Section 18 of S.L. 1980, ch. 238 is compiled as § 42-1766.

ANALYSIS

Change of place of use.
Real party in interest.

Change of Place of Use.

An owner of land and water rights under a Carey Act project may change the place of use of such water if it can be done without material injury to other appropriators. In re Robinson, 61 Idaho 462, 103 P.2d 693 (1940).

Real Party in Interest.

Where there was an agreement in contract of purchase of land providing that the purchaser could not carry out the contract unless he obtained a permit to transfer water from one tract of land to another, this did not prevent such purchaser from being the real party in interest in litigation in connection with the water right in a Carey Act project. In re Robinson, 61 Idaho 462, 103 P.2d 693 (1940).

Collateral References. 78 Am. Jur. 2d, Waters, §§ 305-310.

42-2505. Appeal from decision of director of the department of water resources. — If any person or the board of directors of such Carey Act corporation shall feel aggrieved by the final decision of the director following a hearing held pursuant to section 42-1701A(3), Idaho Code, such person or board may seek judicial review pursuant to section 42-1701A(4), Idaho Code. [1917, ch. 159, § 6, p. 484; am. C.L. 130:6; am. 1919, ch. 171, § 4, p. 545; C.S., § 3056; I.C.A., § 41-2105; am. 1980, ch. 238, § 20, p. 526.]

Compiler's notes. Section 21 of S.L. 1980, ch. 238 is compiled as § 42-3805.
Section 25 of S.L. 1980, ch. 238 read: "The provisions of this act are hereby declared to be severable and if any provision of this act or

the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of remaining portions of this act."

42-2506. Fee for decision on application for transfer of water right. — For his services in passing upon an application for the transfer of a water right under this chapter and making his certificate or report based thereon said director of the department of water resources shall be entitled to receive from the applicant the sum of ten dollars (\$10.00) for each day or portion thereof necessarily required by him to do the work besides his actual and necessary expenses incurred in connection therewith, but shall receive no other compensation. [1917, ch. 159, § 7, p. 484; reen. C.L. 130:7; am. 1919, ch. 171, § 5, p. 545; C.S., § 3057; I.C.A., § 41-2106.]

Compiler's notes. The name of the director of the department of water administration (formerly the state reclamation engineer, successor to the commissioner of reclamation)

has been changed to the director of the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 31 (§ 42-1804).

42-2507. Transfer of stock certificates evidencing water right. — When a transfer of a water right or of a portion thereof is made effectual under this chapter otherwise than by lease the certificate or certificates evidencing the ownership thereof shall be surrendered to the corporation, and the officers of the corporation shall issue new certificates to the person or persons entitled thereto, specifying the land or lands to which the water right is appurtenant after such transfer and the amount of such right which is appurtenant to any of said lands. [1917, ch. 159, § 8, p. 484; reen. C.L. 130:8; C.S., § 3058; I.C.A., § 41-2107.]

Realty.

While shares of water stock may be personally, the water right which such shares con-

trol is real property. *Bothwell v. Keefer*, 53 Idaho 658, 27 P.2d 65 (1933).

42-2508. Effect of lease upon appurtenancy. — A lease of a water right or of a portion thereof shall not change the appurtenancy of such right, but the same shall remain an appurtenant of the land of the lessor, subject only to the rights of the lessee to make use of the same. [1917, ch. 159, § 9, p. 484; reen. C.L. 130:9; C.S., § 3059; I.C.A., § 41-2108.]

42-2509. Rights of lienholders protected. — No water right or any portion thereof shall be transferred from one tract of land to another under the provisions of this chapter where there is a valid existing mortgage or

other lien or encumbrance on the land to which such water right is appurtenant without the consent of the holder of such mortgage or other lien or encumbrance, which consent shall be evidenced by an instrument in writing executed and acknowledged as other instruments relating to the conveyance of real estate. [1917, ch. 159, § 10, p. 484; reen. C.L. 130:10; C.S., § 3060; I.C.A., § 41-2109.]

Cited in: *Andrews v. North Side Canal Co.*, 52 Idaho 117, 12 P.2d 263 (1932).

CHAPTER 26

SALE OF WATER RIGHTS

SECTION.

- 42-2601. Petition for certificate of authority to sell water rights.
- 42-2602. Examination of works by department of water resources.
- 42-2603. Jurisdiction of department of water resources.
- 42-2604. Water contracts and deeds.

SECTION.

- 42-2605. Penalties for unauthorized sale of water rights.
- 42-2606. Expenses payable from Carey Act trust fund.
- 42-2607. Irrigation districts exempted.
- 42-2608. Annual statement.

42-2601. Petition for certificate of authority to sell water rights.

— All persons, copartnerships, associations of persons, companies and corporations now owning or hereafter acquiring or constructing any irrigation works or reservoirs, dams, canals or other structures designed or used wholly or in part for storing, carrying or otherwise conserving or furnishing water for irrigation purposes, shall, before selling any water right therein or right to use water from such works, file with the department of water resources of the state of Idaho a map showing the location of such works and the lands to be reclaimed therefrom and the plans and specifications of construction, duly certified under oath as true and correct by a licensed engineer of the state of Idaho, and such other information as may be necessary to enable the department of water resources to determine the capacity of such irrigation works and the number of acres which may be irrigated therefrom, together with a petition for a certificate of authority to sell water rights in such works. Such petition shall state the name and address of the owner of such works, and the terms upon which water rights will be sold, and the lands which can be irrigated from such system, and there shall be attached to such petition a copy of the form of contract or deed which it is proposed to give to the purchasers of water rights in such works as evidence of their title to such water and of their interest in such works. [1909, p. 335, § 1; reen. C.L. 241:1; C.S., § 3061; I.C.A., § 41-2201.]

Compiler's notes. The name of the department of water administration (formerly the department of reclamation) has been changed to the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

Cross ref. Administration of this chapter excepted from powers of department of lands, § 58-119.

Cited in: *Faris v. Blaine County Inv. Co.*, 3 F. Supp. 381 (D. Idaho 1933); *Childs v. Neitzel*, 26 Idaho 116, 141 P. 77 (1914).

Application.

This section was inapplicable to formal conveyance of a certain amount of water to one, seeking to procure a permit to appropriate water, to enable him to make final proof of

reclamation on his desert entry. *Sarret v. Hunter*, 32 Idaho 536, 185 P. 1072 (1919).

Constitutionality of statutes affecting riparian rights. 56 A.L.R. 277.

Collateral References. 78 Am. Jur. 2d, Waters, §§ 305-310.

42-2602. Examination of works by department of water resources. — The department of water resources upon receipt of such petition shall proceed to make a report as early as the same can conveniently be made, showing the capacity of said system, the water supply and the amount of water per acre required for the proper irrigation of such lands. For the purpose of making such report and determining the capacity of the said system and the amount of land which can reasonably be irrigated therefrom, the department of water resources shall make such examination of such irrigation works, lands and water supply as in its judgment may be necessary to make a full report thereon, and it may make such examination by a duly appointed assistant or assistants. [1909, p. 335, § 2; reen. C.S. 241:2; C.S., § 3062; I.C.A., § 41-2202.]

Compiler's notes. The name of the department of water administration (formerly the department of reclamation) has been

changed to the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

42-2603. Jurisdiction of department of water resources. — The report of the department of water resources shall be considered at the first meeting of the department held thereafter, together with such other information and data in relation to such irrigation works as has been filed with the department, and the said department shall thereupon determine the number of water rights, units or shares of water which may be sold in such works or irrigation system, and the number of acres which may be irrigated therefrom, and the form of contract or deed which shall be given to the purchasers thereof; and the department shall issue to the owners of such irrigation works a certificate in appropriate form, certifying or showing the number of water rights, units or shares of water which may be sold in such works, as then constructed, and the number of acres which may be irrigated therefrom, and the form of contract or deed which shall be given to the purchasers of water rights therein. Such certificate, or a duly certified copy thereof, shall be recorded in the county recorder's office in each county in which lands are situated for which water rights are sold in such irrigation works, prior to the sale of any water rights therein, provided that no such certificate shall be issued unless and until the department of water resources has had available and has considered reliable data and records of stream flow and water supply appertaining to the water desired to be sold, covering a period of at least five (5) years. [1909, p. 335, § 3; reen. C.L. 241:3; C.S., § 3063; I.C.A., § 41-2203; am. 1935, ch. 138, § 1, p. 334.]

Compiler's notes. The name of the department of water administration (formerly the department of reclamation) has been changed to the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and

S.L. 1974, ch. 20, § 28 (§ 42-1801a).

Section 2 of S.L. 1935, ch. 138 is compiled herein as § 42-2607.

Sec. to sec. ref. This section is referred to in §§ 42-2604, 42-2608.

42-2604. Water contracts and deeds. — All contracts and deeds for the sale of water rights shall be of the form approved by the department of water resources, as provided in section 42-2603, and all such contracts or deeds shall be numbered plainly and consecutively; and it shall be the duty of the owner of such irrigation works to file for record in the proper county recorder's office all such contracts or deeds, or duplicate copies thereof, in the order in which the same are issued to purchasers. [1909, p. 335, § 4; reen. C.L. 241:4; C.S., § 3064; I.C.A., § 41-2204.]

Compiler's notes. The name of the department of water administration (formerly the department of reclamation) has been changed to the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

Sec. to sec. ref. This section is referred to in § 42-2605.

Collateral References. Deed involving water rights as conveying a fee or easement. 136 A.L.R. 404.

42-2605. Penalties for unauthorized sale of water rights. — Any pretended deed, contract or other instrument conveying or pretending to convey water rights in such irrigation works prior to the filing of such certificate in the county recorder's office or in excess of the water rights or amount of water authorized to be sold by the department, as shown by the certificate or certificates so issued and filed for record, shall be absolutely null and void, and the owner of such irrigation works, or those claiming to be the owner thereof and the officers, agents and representatives of any such owner or claimant, or those claiming to be the officers, agents or representatives of any such owner or claimant, who shall make or attempt to make any deed, contract or agreement relative to the sale of water rights in such irrigation works, or for the furnishing of water therefrom, prior to the filing of such certificate, or in excess of the capacity of such irrigation works, as shown by the certificate or certificates of the department of water resources, or who shall violate any of the provisions of section 42-2604, shall be jointly, severally and personally liable upon and for all such contracts and agreements and for any and all damages, directly or indirectly sustained by the purchasers of water rights or interests in such irrigation works, through the failure of such owner or claimant, or of the officers, agents and representatives of such owner or claimant or of those claiming to be the officers, agents or representatives of the owner or claimant, to comply with the provisions of this chapter, and in addition thereto, every such owner, claimant, officer, agent or representative shall be guilty of a misdemeanor, punishable by a fine of not less than \$100 nor more than \$300, or by imprisonment in the county jail not exceeding six (6) months, or by both such fine and imprisonment. [1909, p. 335, § 5; reen. C.L. 241:5; C.S., § 3065; I.C.A., § 41-2205.]

Compiler's notes. The name of the department of water administration (formerly the department of reclamation) has been changed to the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

ANALYSIS

Effect on innocent purchaser.
Extinguishment of rights of promoter.
Priorities.
Proportionate sharing of water.

Effect on Innocent Purchaser.

Fact that the statute declares the contracts of noncomplying company void does not prevent innocent party contracting with such company from recovering money paid on such void contract. *McDuffee v. Hayden-Coeur d'Alene Irrigation Co.*, 25 Idaho 370, 138 P. 503 (1913).

Extinguishment of Rights of Promoter.

Where funds were advanced for the construction and repair of a water system by landowner acquiring title from entryman and by redemption under the state law, such facts did not authorize his water rights being extinguished on the theory he was a promoter selling water rights to settlers where the water supply was inadequate to fulfill contracts. *Faris v. Blaine County Inv. Co.*, 3 F.

Supp. 381 (D. Idaho 1933).

Priorities.

This act contemplates that only ample water rights shall be sold and as between settlers there is no priority of right, each settler being entitled to his proportionate share of the water rights. *Faris v. Blaine County Inv. Co.*, 3 F. Supp. 381 (D. Idaho 1933).

Proportionate Sharing of Water.

Where one sold more water than he was able to supply, he was required to relinquish to the purchasers the water acquired or retained for his own use until the amount called for by the sales contracts was complied with, and, as among the individual owners, the water right conveyed was shared proportionately. *Faris v. Blaine County Inv. Co.*, 3 F. Supp. 381 (D. Idaho 1933).

42-2606. Expenses payable from Carey Act trust fund. — All expenses incurred by the department of water resources and its assistant or assistants in carrying out the provisions of this chapter shall be paid out of the fund created from the sale of lands under the act of congress commonly known as the Carey Act. [1909, p. 335, § 6; reen. C.L. 241:6; C.S., § 3066; I.C.A., § 41-2206.]

Compiler's notes. The name of the department of water administration (formerly the department of reclamation) has been changed to the department of water resources

on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

Carey Act, see 43 U.S.C. § 641.

42-2607. Irrigation districts exempted. — Irrigation districts organized under the laws of the state of Idaho, are hereby exempted from the provisions of this chapter. [1909, p. 335, § 7; reen. C.L. 241:7; C.S., § 3067; I.C.A., § 41-2207; am. 1935, ch. 138, § 2, p. 334.]

Compiler's notes. Section 1 of S.L. 1935, ch. 138 is compiled herein as § 42-2603.

42-2608. Annual statement. — All parties authorized to sell water rights or shares in irrigation works under a certificate or certificates issued as provided in section 42-2603 shall file annually on or before the first day of January with the department of water resources an annual report showing the number of water rights or shares of water sold in such irrigation works and the number of acres irrigated therefrom, until the full capacity of such irrigation works as shown by such certificate or certificates, has been sold. [1909, p. 335, § 8; reen. C.L. 241:8; C.S., § 3068; I.C.A., § 41-2208.]

Compiler's notes. The name of the department of water administration (formerly the department of reclamation) has been

changed to the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

CHAPTER 27

STATE COOPERATION WITH UNITED STATES RECLAMATION SERVICE

SECTION.

- 42-2701. Sales under government irrigation works.
- 42-2702. Sales under government irrigation works — Limitation of time to apply for water.
- 42-2703. Contracts with federal government for irrigation of state lands.
- 42-2704. Continuing appropriation of Carey Act trust fund.

SECTION.

- 42-2705. Funds expended under direction of secretary of the interior.
- 42-2706. Reimbursement of Carey Act trust fund.
- 42-2707. Conveyance of property to United States authorized.
- 42-2708. Procedure for making conveyance.
- 42-2709. Determination of consideration.

42-2701. Sales under government irrigation works. — Whenever the United States shall, through its proper officers, authorize the construction of any irrigation works in this state under the provisions of the Reclamation Act of June 17, 1902, no lands belonging to the state whose irrigation depends upon the construction of such works shall, after such authorization for construction shall have been publicly announced or communicated by such proper officer to the governor of the state, be sold except in conformity with the classification of farm units by the United States, and the title to such lands shall not pass from the state, until the applicant therefor shall have fully complied with the provisions of the laws of the United States, and the regulations thereunder, concerning the acquisition of the right to use water from such works, and shall produce the evidence thereof duly issued. [1905, p. 373, § 2; reen. R.C., § 1583; reen. C.L. 131:1; C.S., § 3069; I.C.A., § 41-2301.]

Compiler's notes. For Reclamation Act of June 17, 1902, see 43 U.S.C. §§ 372, 381, 383, 391, 392, 411, 416, 419, 421, 424, 431, 432, 439, 461, 476, 491, 498.

Cross ref. Irrigation districts cooperating with federal government, § 43-1801 et seq.
Irrigation districts cooperating with state under Carey Act, § 43-1701 et seq.

42-2702. Sales under government irrigation works — Limitation of time to apply for water. — In all contracts for the sale of lands, hereafter made, the irrigation of which depends upon the construction of irrigation works under the provisions of the Reclamation Act of June 17, 1902, it shall be provided that the purchaser shall apply for a water right from the government works, and subscribe such lands in the water users' association of the project in which they are located, within one (1) year after said contract of purchase is made, or in case there should be no association, at the time of the sale of the state lands, to which such subscription can be made, it shall be provided in said contract, that such application and subscription shall be made within one (1) year after such association is formed, and upon failure of the purchaser or purchasers to comply with the provisions of this section, the lands so purchased shall revert to the state together with the payment or payments made thereon, as fully and completely as if no sale had ever been made. [R.C., § 1583a, as added by 1909, p. 70; reen. C.L. 131:2; C.S., § 3070; I.C.A., § 41-2302.]

Compiler's notes. For Reclamation Act of June 17, 1902, see compiler's note, § 42-2701.

Assessment Liens.

The fact that a stockholder held land under a state land sale certificate and title was in

the state did not prevent him from providing for an assessment lien in a stock subscription contract for stock in a water user's association. *Michaelson v. Miller*, 53 Idaho 617, 26 P.2d 378 (1933).

42-2703. Contracts with federal government for irrigation of state lands. — The state land board is hereby authorized and directed on behalf of the state to make and enter into suitable contracts with the secretary of the interior to provide for the irrigation of state lands within or adjacent to the national irrigation projects constructed or to be constructed in this state under the provisions of the act of congress of June 17, 1902, known as the reclamation act, and to provide for increasing the capacity of the irrigation works of such projects and extending them and perfecting them to provide for the irrigation of such state lands. [1909, p. 331, § 1; reen. C.L. 131:3; C.S., § 3071; I.C.A., § 41-2303.]

Compiler's notes. For Act of Congress of June 17, 1902 (Reclamation Act), see compiler's note, § 42-2701.

State Land Sales Certificates.

Where a subscriber for stock in a water user association held his land, affected thereby,

under a state land sales certificate and the legal title to said land was in the state, that does not disqualify him, or prevent him from executing a stock subscription contract for water on said land. *Michaelson v. Miller*, 53 Idaho 617, 26 P.2d 378 (1933).

42-2704. Continuing appropriation of Carey Act trust fund. — The funds accumulated and to be accumulated under the provisions of section 42-2018 are hereby appropriated for the purpose of carrying out the provisions of such contracts between the state land board and the secretary of the interior and for making the payments provided for therein: provided, that no obligations shall be incurred under this chapter in excess of the amount available in said fund. [1909, p. 331, §§ 2, 3; reen. C.L. 131:4; C.S., § 3072; I.C.A., § 41-2304.]

Compiler's notes. For Carey Act, see 43 U.S.C. § 641.

42-2705. Funds expended under direction of secretary of the interior. — It may be provided in such contracts that the fund appropriated herein may be used under the direction of secretary of interior to supplement such funds as may be available for this purpose from the national reclamation fund under the act of congress of June 17, 1902, for the irrigation of said state lands. [1909, p. 331, § 4; reen. C.L. 131:5; C.S., § 3073; I.C.A., § 41-2305.]

Compiler's notes. For Act of Congress of June 17, 1902 (Reclamation Act), see compiler's note, § 42-2701.

42-2706. Reimbursement of Carey Act trust fund. — Provision shall be made for the collection of all sums expended by the state under this chapter and their return to the state is not to exceed ten (10) annual

instalments, said instalments to be collected and returned to the state at the same times and in similar manner as may be provided for the collection of the instalments due to the national government. Such instalments when returned to the state shall constitute a trust fund in the hands of the state treasurer to be used only for the reclamation of other arid lands. [1909, p. 331, §§ 5, 6; reen. C.L. 131:6; C.S., § 3074; I.C.A., § 41-2306.]

Compiler's notes. For Carey Act, see 43, statutes), was repealed by S.L. 1925, ch. 12, U.S.C., § 641. § 1.
C.S., §§ 3075-3085 (chapter 142, compiled

42-2707. Conveyance of property to United States authorized. —

Whenever the board of county commissioners of any county shall adjudge that it is desirable and for the general welfare and benefit of the people of the county and for the interest of the county to convey real property belonging to the county, however acquired, whether by tax foreclosure or in any other manner, not necessary for the use of the county, to the United States of America for use in connection with federal projects within the scope of the federal Reclamation Act of June 17, 1902, and federal acts amendatory thereof and supplemental thereto, for the reclamation and irrigation of arid lands, such board of county commissioners, by majority vote, are hereby authorized to convey such property to the United States of America for use in connection with such federal projects as aforesaid for the reclamation and irrigation of arid lands. [1943, ch. 108, § 1, p. 210; am. 1945, ch. 28, § 1, p. 35.]

Compiler's notes. For Act of Congress of June 17, 1902 (Reclamation Act), see compiler's note, § 42-2701.

Section 2 of S.L. 1945, ch. 28 declared an emergency. Approved Feb. 15, 1945.

Collateral References. Right of owner of

land within reclamation projects in respect to which water right was allowed upon application pursuant to reclamation act, to perpetual right beyond control of federal government for sufficient amount beneficially to irrigate land. 115 A.L.R. 1320.

42-2708. Procedure for making conveyance. — Before making any such conveyance, the board of county commissioners shall enter a resolution declaring the intention of such board to make a conveyance of real property under authority of this act, and shall cause notice thereof to be published for at least two (2) weekly issues of the official newspaper of said county before final action shall be taken, specifying the time and place where objections to such action may be filed and the time when such objections will be considered. Provided: that if no newspaper is published in said county, such notice may be given by posting such notice in three (3) public places in the county, one (1) of which shall be at the county courthouse, in the place provided for posting similar notices, for a period of at least ten (10) days immediately preceding the time fixed for hearing objections. [1943, ch. 108, § 2, p. 210.]

Compiler's notes. The words "this act" refer to S.L. 1943, ch. 108, compiled herein as §§ 42-2707 — 42-2709.

42-2709. Determination of consideration. — If no objections are filed or objections are overruled, the board may then convey the real property proposed in said resolution to be conveyed, as herein authorized; such conveyance may be for such consideration as may be determined by said board. [1943, ch. 108, § 3, p. 210.]

Compiler's notes. Section 4 of S.L. 1943, ch. 108 declared an emergency. Approved Mar. 2, 1943.

CHAPTER 28

COUNTY IRRIGATION, DRAINAGE, AND RECLAMATION PROJECTS

SECTION.

- 42-2801. Board of county commissioners — Authority in irrigation and drainage proceedings.
- 42-2802. Enlargement of existing works — Purchase and completion of incomplete works — Purchase and completion of payments on partially paid storage rights.
- 42-2803. Election procedure same as in other county bond elections.
- 42-2804. Petition — Deposit of petitioners.
- 42-2805. Director of the department of water resources — Examination and report on practicability of plan — Calling of election — Procedure upon approval of bond issue — Appeal.
- 42-2806. Contracts — Procedure for making similar to that in irrigation districts — Exception — Approval of director.
- 42-2807. Lands assessed — State lands.
- 42-2808. Cooperation with state under Carey Act.
- 42-2809. Counties authorized to act as irrigation district.
- 42-2810. Cooperation with federal government under federal reclamation laws.
- 42-2811. Bonds to be issued after lien state-

SECTION.

- ment filed — Direct obligation of county — Form, terms, and conditions — Provisions for payment.
- 42-2812. Sinking fund.
- 42-2813. Lien statement — Contents.
- 42-2814. Lien statement — Execution — Filing — Effect.
- 42-2815. Interest — Premium on bonds.
- 42-2816. Liens — How paid — Taxes.
- 42-2817. Liens and payments — Subdivisions of lien.
- 42-2818. Repairs — Assessments — Lands in other counties.
- 42-2819. Distribution of reservoir or other water through existing canal systems — Cooperation with companies and districts.
- 42-2820. Operating districts — When created — Vested with powers of irrigation districts — Board of directors.
- 42-2821. Payment of interest for five years out of proceeds of sale of bonds.
- 42-2822. Assessment of state lands — Separable portion of chapter.
- 42-2823. Compensation of county commissioners — Employment of assistance.

42-2801. Board of county commissioners — Authority in irrigation and drainage proceedings. — The boards of county commissioners of the several counties of the state of Idaho are hereby authorized and empowered to make all necessary orders for and cause to be constructed and maintained public drainage or irrigation systems, reservoirs, drains and ditches and other irrigation or drainage works for the irrigation or drainage of lands lying in said counties, and for such purposes, to enter into contracts for the construction or use of reservoirs and other irrigation or drainage works, constructed or to be constructed by the United States under the provisions of the federal reclamation laws, or for such works built or to be

built by other parties or agencies and to take all steps and do all acts necessary or proper to secure an ample water supply for the lands in the county requiring irrigation and adequate drainage works for the lands requiring drainage, and to promote the beneficial use of the public waters of the state and the health and general welfare of the county by means of such works: provided, that nothing herein contained shall be construed to give such board of county commissioners authority over irrigation works except those acquired or constructed by the several counties under the provisions of this chapter: provided, also, that no county bonds shall be issued or sold for such purposes until such indebtedness has been authorized by two-thirds ($\frac{2}{3}$) of the electors of the county (having the qualifications provided in section 42-2803, Idaho Code,) voting at an election to be held, subject to the provisions of section 34-106, Idaho Code, for such purpose. [1921, ch. 222, § 1, p. 492; I.C.A., § 41-2401; am. 1995, ch. 118, § 59, p. 417.]

Compiler's notes. The words enclosed in parentheses so appeared in the law as enacted.

Sections 58 and 60 of S.L. 1995, ch. 118 are compiled as §§ 42-1767 and 42-3115, respectively.

Cross ref. Drainage districts, see ch. 29 of this title.

Irrigation districts, see tit. 43.

Soil conservation districts, §§ 22-2714 — 22-2733.

Opinions of Attorney General. The legislature has not given Idaho counties author-

ity to produce and sell electric power. Therefore, Idaho counties lack authority to enter into an agreement with counties of other states to develop a joint water project for the production and sale of hydroelectric power. OAG 89-1.

Idaho counties have authority to join in an agreement with counties of Utah and Wyoming to develop a joint water project on the Bear River. Under Idaho law, however, the purposes of the water project must be limited to the irrigation or drainage of lands in the respective counties. OAG 89-1.

42-2802. Enlargement of existing works — Purchase and completion of incomplete works — Purchase and completion of payments on partially paid storage rights. — The board of county commissioners may enlarge, improve or extend existing reservoirs, canals and other irrigation and drainage works to provide for the irrigation or drainage of additional lands in such county, or to improve the water supply or drainage for such lands, and may contract with the owners of existing irrigation or drainage works to provide for such enlargement, improvement or extensions, and may purchase and complete incomplete irrigation or drainage works and may purchase assignments of partially paid reservoir or storage rights and the assignment of such contracts, and may complete payment thereon and acquire such storage and reservoir rights for the reclamation or more complete irrigation of lands in such county, and in so doing shall proceed in similar manner as in the case of entirely new works but subject to the same condition as to approval of the bond issue by the electors of the county. [1921, ch. 222, § 2, p. 492; I.C.A., § 41-2402.]

Cross ref. Fishways in dams, § 36-906.

Abatement of flooding highways, court action, § 40-2323.

Soil conservation districts, prevention of impairment of dams and reservoirs, §§ 22-2714 — 22-2727.

Collateral References. 45 Am. Jur. 2d, Irrigation, §§ 83-86.

94 C.J.S., Waters, §§ 760-766.

42-2803. Election procedure same as in other county bond elections. — In calling and holding such elections and canvassing the vote and in all other proceedings not otherwise provided herein, the board of county commissioners shall follow the procedure prescribed by law for county bond elections, and at such elections to authorize indebtedness, the electors shall have the qualifications prescribed by section 31-1903 for other county bond elections, and in addition thereto must be taxpayers in said county. [1921, ch. 222, § 3, p. 492; I.C.A., § 41-2403.]

Sec. to sec. ref. This section is referred to in § 42-2801.

42-2804. Petition — Deposit of petitioners. — Before any public irrigation or drainage work specified in this chapter shall be established, a petition signed by one hundred (100), or twenty-five per cent (25%) of the owners of the land described in such petition, as the land proposed to be benefited, setting forth the necessity therefor, that the same will be a public benefit and will promote the public welfare or public health, the description of the proposed irrigation or drainage works in general terms, together with a description of the land intended to be benefited thereby, shall be filed with the county auditor. Upon the filing of such petition, one or more of such petitioners shall deposit with the county treasurer of such county from time to time sums of money in an amount to be determined and fixed by the board of county commissioners to be used by them to defray all costs and expenses incurred under the provisions of this chapter to and including all expenses of the bond election and until such time as funds for said work are otherwise available: provided, that the amount of such deposits shall be included in the cost of the works in the event the indebtedness for the same shall be authorized at such election and reimbursement shall thereafter be made to the parties depositing the same. [1921, ch. 222, § 4, p. 492; I.C.A., § 41-2404.]

42-2805. Director of the department of water resources — Examination and report on practicability of plan — Calling of election — Procedure upon approval of bond issue — Appeal. — Upon the filing of the petition, and the making of the cash deposit, as herein provided, the board of county commissioners shall within thirty (30) days thereafter file a copy of said petition with the director of the department of water resources of the state of Idaho, and request him to examine into and report to said board, all matters necessary and essential to disclose the practicability, necessity or advisability of the construction of the proposed works or improvement, or the proposed contract for the use or benefit of the works constructed, and thereupon said director of the department of water resources shall, without delay, proceed and examine all matters named and referred to in said petition and make such survey of the territory likely to be affected by the proposed improvement as will enable him to fully determine whether the same is necessary or practicable, and report accordingly, and if some other or different plan than that described in the petition is found practicable, said director of the department of water resources shall so

report giving such details and information as will be necessary to fully inform the board of county commissioners on all matters pertaining to the practicability or feasibility of the proposed plan, either as outlined in said petition, or according to some other or different plan that may be designated and recommended by said director of the department of water resources, but it shall be his duty to outline and designate all changes, whether by extension, enlargement, additions, or otherwise, that may be necessary to make the plan of the proposed improvement practicable and feasible, showing the probable size, character and cost of such proposed work, and if he finds the improvement petitioned for is feasible, he shall include in his report a map of the proposed improvement and also give the description of the tracts of land which he deems would be benefited thereby, and the probable area that is likely to be irrigated or drained or provided with a supplemental water supply, or otherwise affected by the proposed improvement, and such other information as the board may request. The director of the department of water resources is authorized to employ such assistance as the character of the work requested of him may require, but before incurring any expense he shall file with the county commissioners an estimate of the amount of money required to perform such work and upon the approval by the county commissioners of such estimate, said amount shall be required to be deposited with the county treasurer as other deposits are herein required, the same to be used in paying the expense incurred by said director of the department of water resources in the performance of said work. Upon the filing of the report of the director of the department of water resources as herein provided, and upon receipt of notice of approval of the project by the director of the department of water resources said board shall within ten (10) days proceed in like manner as provided by law for the procedure of the board of county commissioners in calling and conducting other county bond elections, and in like manner as provided in the laws governing county bond elections for other purposes, shall canvass the returns of said election, and if two thirds ($\frac{2}{3}$) of the qualified electors, as in this chapter provided, voting at such election shall be found to have voted in favor of authorizing such indebtedness or bond issue, then the board of county commissioners shall make and file for record in the office of the county recorder an order establishing such county irrigation or drainage project; shall proceed to apportion and assess the benefits of such proposed irrigation or drainage works or such proposed contract, to the lands to be benefited thereby and in making such apportionment of benefits shall proceed in like manner as provided by law for the proceedings of the directors of irrigation districts in apportioning benefits in irrigation districts, and in like manner as in the case of similar proceedings in irrigation districts shall file a petition in the district court for the confirmation of the apportionment of benefits, and the validity of the bond issue or contract, and the proceedings in connection with the holding of the election, and the apportionment of benefits; whereupon the district court shall proceed to set such petition for hearing and to hear the evidence in connection therewith and to decide the same in like manner and with like effect as provided by statute in the case of similar proceedings in irrigation districts. The said

petition and decree may be either for the confirmation of all of said proceedings in one (1) decree or there may be separate and successive petitions and decrees for confirmation of any part of said proceedings and if the court finds the apportionment as made by the board of county commissioners to be equitable and just the court shall confirm the same and if the court finds the said apportionment or any part thereof to be inequitable or unjust the court shall itself make an equitable and just apportionment and file a decree confirming the same. An appeal may be taken from such decision of the district court to the Supreme Court either by the board of county commissioners or any of protesting landowners who have appeared in said proceedings in the district court in like manner as in similar cases in irrigation districts. The said decree of the district court may not be collaterally attacked, and if not set aside or modified by the Supreme Court, shall be final and conclusive as to the validity of the bond issue and the apportionment of benefits so confirmed, and the regularity and validity of all proceedings in connection with or leading up to the same. [1921, ch. 222, § 5, p. 492; I.C.A., § 41-2405.]

Compiler's notes. The name of the director of the department of water administration (formerly the state reclamation engineer, successor to the commissioner of reclamation) has been changed to the director of the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 31 (§ 42-1804).

Cross ref. Apportionment and assessment of benefits in irrigation districts, §§ 43-404, 43-405.

Confirmation of proceedings in irrigation districts, § 43-406.

Procedure in other county bond elections, § 31-1905.

Qualifications of electors, § 42-2803.

42-2806. Contracts — Procedure for making similar to that in irrigation districts — Exception — Approval of director. — In making contracts for the construction or purchase of irrigation or drainage works or the right to the use of works constructed or to be constructed, the county commissioners shall proceed in similar manner as provided by law for the making of similar contracts by irrigation districts, but no election shall be required to authorize any such contract: provided, however, that the aggregate of all contracts entered into for the purchase or construction of works on any project under the provisions of this chapter shall provide for the ultimate completion of the project in accordance with the approved plans referred to herein at a total cost not exceeding the total sum of money derived from the sale of bonds issued for such project, and the contractor or contractors (except in cases where the United States government is the contractor) shall give the bond required by section 45-502.

The plans and specifications and all contracts for construction work contracted for by boards of county commissioners under this chapter shall first be approved by the director of the department of water resources, and any construction contract entered into by such boards shall by its terms provide that such construction work shall be completed in accordance with such plans and specifications to the approval of the director of the department of water resources except in the case of contracts with the United States government. It shall be the duty of the director of the department of water resources, upon the completion of the work under any contract entered into under the provisions of this chapter to issue a certificate of such

completion to the board or boards of county commissioners. [1921, ch. 222, § 6, p. 492; I.C.A., § 41-2406.]

Compiler's notes. The name of the director of the department of water administration (formerly the state reclamation engineer, successor to the commissioner of reclamation) has been changed to the director of the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 31 (§ 42-1804).

The words enclosed in parentheses so appeared in the law as enacted.

Section 45-502, referred to at the end of the first paragraph of this section, has been repealed.

Cross ref. Irrigation district construction contracts, §§ 43-901 — 43-904.

42-2807. Lands assessed — State lands. — All lands directly benefitted by any irrigation or drainage project, or any irrigation or drainage works established under this chapter, and all public or corporate roads or railroads so benefitted in whole or in part, shall be assessed in proportion to the benefits for the construction thereof. All lands owned by the state of Idaho benefitted by such project may be assessed for such benefit the same as taxable land, provided a notice of the filing of the petition and of the time and place of hearing and notice of hearing shall have first been served on the state agency responsible for the management of such state owned lands: provided, that instead of paying the said assessments so levied against the state lands, the state may promptly offer said state lands for sale at public sale in the manner provided by law, and as rapidly as permitted by the provisions of the state constitution, until the entire acreage of state land in such project shall have been sold and if the state does not make appropriations for the payment of such assessments against such state lands, then the sale of such state land, when made, shall be made under contract requiring the purchaser as a condition to receiving title to such lands from the state, or to receiving any contract right or interest therein, to pay all assessments duly levied against such lands under the provisions of this chapter, and to pay to the proper county officer at the time of such sale such annual assessments as may have come due prior to the time of such sale, with interest thereon as hereinafter provided, and to continue the payment of such assessments until title passes from the state to such purchaser, which conveyance shall be made from the state to the purchaser subject to the liens herein provided for. [1921, ch. 222, § 7, p. 492; I.C.A., § 41-2407; am. 1994, ch. 180, § 86, p. 420; am. 2003, ch. 32, § 24, p. 94.]

Compiler's notes. Section 241 of S.L. 1994, ch. 180 provided that such act should become effective on and after the first Monday in January, 1995 [January 2, 1995] if the amendment to the Constitution of Idaho changing the names of the state auditor to state controller [1994 S.J.R. No. 109, p. 1493] was adopted at the general election held on November 8, 1994. Since such amendment was adopted, the amendment to this section by § 86 of S.L. 1994, ch. 180 became effective January 2, 1995.

Sections 85 and 87 of S.L. 1994, ch. 180 are compiled as §§ 42-2024 and 46-719, respectively.

Sections 23 and 25 of S.L. 2003, ch. 32, are compiled as §§ 42-1718 and 50-1047, respectively.

Cross ref. Provision for assessment of state lands declared separable portion of chapter, § 42-2822.

Collateral References. 94 C.J.S., Waters, §§ 806-834.

42-2808. Cooperation with state under Carey Act. — All counties in which irrigation projects shall be established under the provisions of this chapter by order of the board of county commissioners and all counties containing part or portion of the lands to be irrigated or reclaimed under any such project, are hereby authorized to cooperate with the state of Idaho and with the national government under the provisions of the Carey Act laws of the United States and of the state of Idaho, and all such counties are authorized and empowered to exercise and do all acts granted or authorized to irrigation districts under the provisions of chapter 17 of title 43, and sections 43-1701 to 43-1712 inclusive, of the Idaho Code, and the board of county commissioners of every such county is authorized and empowered to exercise all powers granted under said chapter and sections to the boards of directors of irrigation districts in providing for the irrigation and reclamation of lands segregated under the Carey Act, and the collection and enforcement of the liens provided for such purpose. [1921, ch. 222, § 8, p. 492; I.C.A., § 41-2408.]

Compiler's notes. Carey Act, see 43 U.S.C. § 641.

42-2809. Counties authorized to act as irrigation district. — For the purpose of performing the acts and exercising the powers granted by section 43-1801 of the Idaho Code and the act of Congress of August 11, 1916, entitled "An Act to Promote Reclamation of Arid Lands," (39 Stat. 506), counties in which irrigation projects have been duly established by order of the board of county commissioners under the provisions of this chapter, shall be considered to be irrigation districts of the state of Idaho and vested with all the powers and authority granted to irrigation districts by said section 43-1801 of the Idaho Code, and by the said act of Congress of August 11, 1916, entitled "An Act to Promote the Reclamation of Arid Lands," and the board of county commissioners of such counties are authorized to act as the directors of such district for such purpose and to exercise all the powers granted to the directors of irrigation districts. [1921, ch. 222, § 9, p. 492; I.C.A., § 41-2409.]

Compiler's notes. Act of congress of August 11, 1916, see 43 U.S.C., §§ 621-630.

The reference enclosed in parentheses so appeared in the law as enacted.

42-2810. Cooperation with federal government under federal reclamation laws. — Any county in which any irrigation or drainage project shall have been established under the provisions of this chapter by order of the board of county commissioners, or which contains any part of the irrigable lands of such projects so established, is hereby authorized to cooperate with the United States and the officers of the interior department and reclamation service for the purpose of furnishing irrigation or drainage, or a more complete or ample water supply by means of reservoirs, canals, or other works, to lands in such county, is authorized to exercise all powers which are granted by chapter 18 of title 43, sections 43-1803 to 43-1828 inclusive of the Idaho Code to irrigation districts, and the board of county

commissioners of such county are granted all powers and authorized to do all acts granted or authorized under said sections to be done, exercised or performed by the board of directors of an irrigation district. [1921, ch. 222, § 10, p. 492; I.C.A., § 41-2410.]

Collateral References. Right of land-owner within reclamation project in which a water right was allowed upon application pursuant to reclamation act, to perpetual

right, beyond control of the federal government, for a sufficient amount to beneficially irrigate the land. 115 A.L.R. 1320.

42-2811. Bonds to be issued after lien statement filed — Direct obligation of county — Form, terms, and conditions — Provisions for payment. — The board of county commissioners of each and every county wherein any irrigation or drainage projects are proposed to be wholly or partially located and established, or wherein lands are located which are assessed for benefits by reason of the construction thereof, is hereby authorized after the filing of the decree of the district court confirming the election and other proceedings authorizing a bond issue of said county, to issue the bonds of their respective counties, and to be designed as “_____ county improvement bonds” in such amounts as may be necessary to fully meet and discharge the expenses authorized by this chapter. All such bonds shall be the direct and primary obligations of the county for the full principal and interest thereof. The faith, credit, and all taxable property within the limits of the county, as constituted at the time of such issue, are, and must continue, pledged to the payment of said bonds. All such bonds shall be in the form provided in section 3524 of the Idaho Compiled Statutes and shall be sold negotiated as provided in section 3525 of the Idaho Compiled Statutes, and the board of county commissioners shall provide for the payment of such bonds and interest thereon in like manner as in the case of other county bonds and as set out and provided in section 3522 of the Idaho Compiled Statutes, but shall reimburse the county by enforcing all liens and collecting all assessments from the lands against which benefits have been assessed or apportioned under the provisions of this chapter. The word “expenses” shall be construed to mean and cover every item of cost of said irrigation or drainage project from the filing of the petition to the completion of work and all fees and expenses to be incurred in pursuance thereof. Such bonds shall be payable at such time or times not to exceed twenty (20) years from their date and shall bear such rate of interest payable annually or semiannually as the board of county commissioners shall by resolution determine. Each bond shall contain a recital that it is issued by authority of and in conformity with the provisions of this chapter and such bond may otherwise be in such form as the board of county commissioners may determine, but not in conflict with the requirements of section 3524 of the Idaho Compiled Statutes. Said board of county commissioners shall have power to sell and negotiate said bonds as hereinbefore provided. The proceeds from the sale of all such bonds shall be placed in a general reclamation fund which is hereby created in the county treasury. The county auditor shall keep a separate account with each irrigation or drainage project so established in such county, which account shall be

credited with all moneys arising from the sale of bonds, all moneys received as interest or penalties upon liens, charges, assessments, and all other sources on account of such irrigation or drainage system, and which account shall be debited with every item of expenditure made on account of such irrigation or drainage project. Such board of county commissioners shall provide moneys for the payment of principal and interest of said bonds as they severally mature, which money shall be placed in the general reclamation fund into which fund it may transfer any surplus moneys remaining in the general revenue fund, or other funds of the county, which can be properly used for the purpose of this chapter, into which fund shall be paid all moneys received from the payment of any liens created under the provisions of this chapter, and such board is hereby authorized to pay such bonds issued under the provisions of this chapter, or the interest thereon, out of any available funds in the county treasury when the moneys on hand in the general reclamation fund of the treasury are insufficient to meet the payment of the bonds issued in irrigation or drainage proceedings under this chapter when the same mature. But the fund from which such moneys have been taken or used for the payment of bonds after they mature, shall be replenished with interest from the collections of unpaid assessments for irrigation or drainage works constructed under any proceedings had hereunder, as authorized in this chapter. [1921, ch. 222, § 11, p. 492; I.C.A., § 41-2411; am. 1970, ch. 176, § 2, p. 508.]

Compiler's notes. Sections 3522, 3524 and 3525 of the Compiled Statutes were repealed by S.L. 1929, ch. 262, § 12. For similar provisions of the present law, see §§ 57-204 — 57-218.

Section 1 of S.L. 1970, ch. 176 is compiled herein as §§ 31-1901, and § 3 of S.L. 1970, ch. 176 has been repealed.

Collateral References. 94 C.J.S., Waters, §§ 543-581, 795, 853-855.

42-2812. Sinking fund. — The board of county commissioners of any county in which any irrigation or drainage project is established under this chapter are authorized to provide by resolution for a sinking fund for the payment of the bonds issued under the provisions of this chapter and for such purpose and in order to provide a fund to meet all payments of the principal and interest on such bonds as the same come due and to cover deficiencies or delays in collections shall provide an assessment each year, ten per cent (10%) in excess of the amount of the principal and interest coming due the following year on the bonds issued by such county under this chapter until such time as a reserve fund shall have been accumulated in the county treasury from such excess assessments to an amount of at least ten per cent (10%) of the bonds issued by such county for such irrigation or drainage project. [1921, ch. 222, § 12, p. 492; I.C.A., § 41-2412.]

42-2813. Lien statement — Contents. — At the earliest practicable time after the letting of the contract for the construction or use of any irrigation or drainage works as herein provided, the auditor of each county affected thereby shall make in tabular form a list and statement showing the following facts and in the order named, viz:

1. The names of the owners of all lands and the names of all public or corporate roads or railroads within their respective counties benefited by the

construction of such proposed work as appears from the apportionment of benefits made by the board of county commissioners modified (if at all) by the order of confirmation of the district court.

2. The description of said lands as the same appears in such apportionment of benefits so affected, together with the total number of acres in each tract according to the assessment rolls or tax lists of such county.

3. The estimated number of acres benefited in each tract of said land as shown as aforesaid.

4. The amount that each of said tracts of land and that each of said corporate roads or railroads so benefited will be liable for and must pay into the treasury of each county for the said works. [1921, ch. 222, § 13, p. 492; I.C.A., § 41-2413.]

Compiler's notes. The words enclosed in parentheses so appeared in the law as enacted.

42-2814. Lien statement — Execution — Filing — Effect. — Such statement shall then be signed by the county auditor in the presence of two (2) attesting witnesses and be duly acknowledged by him, and shall then be duly filed and recorded by the county recorder of such county. The amount which each tract of land and each public or corporate road, or railroad, will be liable for and the interest thereon as hereinafter provided, shall be and remain the first and paramount lien on such land, public or corporate roads or railroads until fully paid, and shall take precedence of all mortgages, charges, encumbrances or other liens whatsoever. Such payments may be made as hereinafter provided. Such findings shall be deemed notice to all parties interested of the existence of such lien. The fees of such county recorder for such recording shall be paid by the county on the allowance of the board of county commissioners and said statement after the same has been recorded shall be returned to the county auditor to be by him placed with the other papers relating to such project and carefully preserved by him. [1921, ch. 222, § 14, p. 492; I.C.A., § 41-2414.]

42-2815. Interest — Premium on bonds. — The amount that each tract of land, public or corporate road or railroad shall be liable for on account of the establishment of any irrigation or drainage project under the provisions of this chapter shall bear interest from the date of the filing of the auditor's statement in the county recorder's office at a rate of interest not exceeding six per cent (6%) per annum until paid, such rate of interest to be fixed and determined by the board of county commissioners at the time of establishing such project: provided, that when bonds are issued by the county for the construction or establishment of such project, the same rate of interest shall be charged as said bonds so issued bear: provided, further, that in any case and at any time after the establishment of any project and in the event there is not sufficient money in the sinking fund for the purpose the board of county commissioners may upon such notice as shall be ordered and upon a showing of the necessity to provide funds to meet payments due or maturing on the bonds issued under this chapter, either change or modify

any order previously made fixing and determining a rate of interest or fix the rate of interest in the case the same has not been previously fixed or change the existing rate of interest, the same to remain in effect until such time as the amount in the sinking fund is sufficient for such purpose. All interest shall constitute an additional lien on said land or lots until fully paid, which said interest when about to be paid shall be computed by the county auditor. If bonds are sold at a premium, such premium shall become a part of the sinking fund herein provided. [1921, ch. 222, § 15, p. 492; I.C.A., § 41-2415.]

42-2816. Liens — How paid — Taxes. — The payment of such liens shall be made to the same county officer to whom other county taxes are required by law to be paid and become due and delinquent on the same day of the year as other county taxes. The date of the maturity of said lien shall be fixed by resolution of the county commissioners at the time of the issue of said bonds, and shall correspond to the maturity of said bonds. The said principal lien shall bear interest at a rate not to exceed six per cent (6%) per annum, payable annually on the same day of the year provided by law for the payment of the other county taxes, such interest to be reckoned from the date of the filing of the lien statement in the office of the county recorder and interest on the whole of the principal of such lien remaining from time to time unpaid shall be paid annually on the same day of each year except as hereinafter in this section otherwise provided. In case bonds shall be issued by the county then the lien shall bear the same rate of interest as such bonds. On or before the first day of October next following such filing of the lien in the office of the county recorder, the county auditor shall for the purpose of enforcing payment of such lien, enter on a project lien record of said county the whole amount of such lien remaining unpaid against each respective tract of land subject thereto, and shall at the same time, or before tax lists or tax rolls are turned over to the county tax collector, compute interest as in this chapter provided on such unpaid amount to the first day of July following and shall enter such interest on the tax list and tax rolls for such year and the instalments of such lien and interest thereon together with such amount as may be required for the sinking fund as herein provided shall be collected in the same manner as real estate taxes for that year on the tract in question are collected, and the county auditor shall in the same manner each year thereafter compute interest on the amount of such lien remaining unpaid and not previously entered on the tax rolls of prior year, or years, together with interest to the first of July and enter the same together with the instalment, if any, together with such amount as may be required for the sinking fund as herein provided then due on the tax lists and tax rolls, said instalment, interest and sinking fund to be collected in like manner as the first payment until the whole amount of any such lien and accumulated interest shall have been so entered on the tax rolls and tax lists of such county, and all of the provisions of law now or hereafter existing in relation to the collection of real estate taxes so far as applicable hereto are hereby adopted for the purpose of enforcing payment of such liens and instalments thereof and of the interest thereon, and each of the same shall

be subject to the same penalties for delinquency in payment as provided by law for other county taxes. When payment of the full amount of such liens with accumulated interest shall thus, or at any one time, be made, the auditor upon presentation of a receipt from the treasurer to that effect, shall issue under his hand and official seal a certificate of such payment and the same when recorded in the office of the county recorder shall release and discharge said lien of record. If any item of cost of an irrigation or drainage project established under this chapter from the inception of such project to its completion has been, or shall be omitted from the original tabular statement for assessments made and filed by the auditor with the county recorder, then a supplementary statement or assessment shall be made by said auditor in the same form and manner as the original statement so far as practicable showing such omitted costs, which supplementary statement or assessment shall be filed for record in the office of the county recorder and shall be due and payable and collectible in the same manner, time and form as if a part of the last annual instalment of the original assessment. [1921, ch. 222, § 16, p. 492; I.C.A., § 41-2416.]

Cross ref. Payment and collection of taxes,
§§ 63-1001 — 63-1006.

42-2817. Liens and payments — Subdivisions of lien. — In all cases in which a lien has been established against any tract or tracts of land comprising more than one government lot or forty-acre subdivision by reason of benefits assessed thereon in any irrigation or drainage project established under this chapter, and no instalment of such assessment or interest thereon shall be in default, any person or corporation having an interest in said land, or any part thereof, may petition the district court of the county wherein such land is situated to have such lien apportioned between or among specified portions of such tract or tracts. Upon the filing of such petition the court shall by its order fix a time and place at which said petition shall be heard and requiring personal service of a notice of such hearing to be served upon the county auditor, the occupants of such premises and on all parties having an interest in said premises as shown by the records in the office of the county recorder of such county at least ten (10) days before such hearing, or if for any reason personal service cannot be made upon all of said persons, notice shall be given by two (2) weeks publication in a newspaper published in said county in lieu of personal service. At the time and place appointed by the court for hearing upon such petition, or at the time to which such hearing may have been adjourned, the court shall hear any and all evidence bearing upon the matters set out in said petition and as to what will be a proper and equitable apportionment of said lien between or among the portions of such original tract which it is desired shall be encumbered by separate liens, and shall thereafter by its order apportion such lien among such tracts, but in no case shall the aggregate of said separate liens be different from the amount of the unpaid portion of the original lien. A certified copy of the order apportioning said lien shall be recorded in the office of the county recorder of such county and filed in the office of the clerk of the district court, which shall operate as a

division and apportionment of such original lien between such various tracts of land originally covered thereby, and shall operate as a release of each of said tracts from said lien, except the amount so apportioned against it and thereafter the amount apportioned to each of such respective tracts shall be entered separately against such tract upon the tax list and tax roll and so reported to the proper county officer for collection and no reduction or abatement of the amount so apportioned shall be thereafter made. [1921, ch. 222, § 17, p. 492; I.C.A., § 41-2417.]

42-2818. Repairs — Assessments — Lands in other counties. —

After the construction of any such public drainage or irrigation project within the state of Idaho under this chapter, and until the board of county commissioners shall have made a suitable contract with some existing irrigation or drainage district, or ditch or irrigation company for the operation and maintenance of said project, and in the case of irrigation projects for the distribution of the water supply made available from the reservoirs or other irrigation structure constructed or provided under this chapter to the lands in said county assessed for the benefits of such improvement, or in case no such contract is made with such district or company to act as the agency of the county for the distribution of the water and the maintenance and operation of the works, then until such time as the operating district herein provided for shall have taken over the operation and maintenance of said works in the distribution of water therefrom in the case of irrigation works and shall have provided the necessary funds for such operation, maintenance and distribution, the board of county commissioners of the county in which the lands assessed for the benefits of such irrigation or drainage project are located shall keep such works and all parts thereof in proper repair and shall make proper contracts and take all necessary steps to maintain and operate the same and pay the cost of such maintenance and operation, and in the case of irrigation projects to distribute the water made available by such works and provide for and pay the cost of such maintenance and operation, and in case there are public funds to the credit of the drainage or irrigation project so to be operated or maintained, to make such repairs and pay for such maintenance and operation, such fund may be expended by the board of county commissioners for such purpose without further assessment. In case there are no public funds to the credit of such irrigation or drainage project so to be operated and maintained, then except as hereinafter otherwise provided, the board of county commissioners shall pay for the same out of the general revenue funds of the county, and to raise the necessary money to reimburse that fund it is hereby authorized to apportion and assess the cost thereof upon all lands originally assessed for benefits by reason of the construction of said project, said apportionment and assessment to be in the same proportion as was the original assessment for benefits. Such board of county commissioners shall make a written statement of such assessment and deliver the same to the auditor of the county, who shall put the same upon the next succeeding tax record and tax roll of said county and who shall make and file in the office of the county recorder the lien statement covering the cost and

expenses of such operation, maintenance and repair, and such assessment shall be a first and paramount lien upon the lands affected, the same as state and county taxes and shall be collected in like manner as the liens for the construction of the project, except that the same shall not be payable in instalments, but such operation and maintenance expense shall be provided for in each year's assessments. In case such assessment, or any part thereof is chargeable against lands in another county, then the amount thereof chargeable against such other county shall be the board of county commissioners of the county which has paid the same, be certified to the county auditor of such other county chargeable therewith, and such last-mentioned county auditor shall thereupon draw his warrant therefor in favor of and deliver the same to the county treasurer of the county which has paid the same, and such auditor drawing such warrant shall thereupon apportion and assess and file for the amount thereof upon all lands in said county originally assessed for benefits by reason of the construction of said project in the same proportion as was the original assessment of benefits. [1921, ch. 222, § 18, p. 492; I.C.A., § 41-2418.]

42-2819. Distribution of reservoir or other water through existing canal systems — Cooperation with companies and districts. — In all cases where the lands assessed for any water supply or any reservoir or reservoir capacity constructed or made available under the provisions of this chapter lie in whole or in part under any existing canal system, or are so located that the same can be irrigated through such canal system or any part or extension or enlargement thereof, the board of county commissioners of the county in which such lands, or any part thereof, are located are authorized to enter into a contract on behalf of such county, with the company, irrigation district, or individual owning or operating any such canal system under which such district, company or individual shall become the agency of the county for the distribution and delivery of such reservoir or other water to the lands of such county lying under or so located that they can be irrigated from such existing canal system, and as such agent of the county to provide for the operation and maintenance and repair of the irrigation works constructed or made available under the provisions of this chapter and authorizing such canal owners or operators to collect from the landowners under said canal system an operation and maintenance charge, toll, fee or assessment sufficient to pay the cost of such operation, maintenance and distribution including the cost of operating and maintaining the reservoir or the proportionate part thereof properly chargeable to such land, and to require the payment of such operation and maintenance charges as a condition to the delivery of such reservoir or other water supply and to withhold delivery of such reservoir or other water until all such operation and maintenance charges for past years have been paid, and when so provided in the contract between such canal owner and the county or when so ordered by the board of county commissioners, shall withhold the delivery of such water supply so provided or made available by the county under the provisions of this chapter, from any lands on which any instalment of the principal, or interest of the said liens provided for in this chapter, or the

amount due the sinking fund as herein provided, or any assessment levied by the county for the purpose of paying any such instalment or annual interest charge or sinking fund remains delinquent, delivery to such lands, however, to be resumed upon payment of all assessments then due and payable or delinquent, but no part of the water supply provided or made available by the county under the provisions of this chapter shall be delivered to lands against which benefits have not been assessed. [1921, ch. 222, § 19, p. 492; I.C.A., § 41-2419.]

42-2820. Operating districts — When created — Vested with powers of irrigation districts — Board of directors. — The lands assessed for benefits of any irrigation or drainage project established under this chapter and not lying under or within the area capable of irrigation from an existing canal system with the owners of which system the board of county commissioners of the county or counties in which such lands are located shall within one year after the establishment of such project by order of the board of county commissioners have made an operation and maintenance contract pursuant to the provisions of the preceding section of this chapter, shall be and become upon the expiration of said year an operating district, and such operating district shall be and is hereby vested with all the powers and authority and charged with all the duties of an irrigation district organized under the laws of the state of Idaho and shall have the power and duty to act as the agency of the county for the operation, repair and maintenance of such project, and in the case of irrigation works also for the distribution and delivery of the water made available thereby, and to enter into contracts with the board or boards of county commissioners for such purposes, and to provide for the cost of such operation, maintenance and repair of such works, and the distribution of the waters thereof by levying and collecting tolls, charges or assessments upon the lands of such operating district in like manner and with like effect as in the case of irrigation districts under the laws of this state and the board of directors of such operating district shall have all the powers and authority of a board of directors of an irrigation district and shall be elected in like manner and follow a like procedure as provided by the laws of this state relating to directors of irrigation districts, except that the first board of directors shall be appointed by the governor who shall designate in his appointments which of such directors is appointed for the one (1) year, which the two (2) year, and which the three (3) year term, said directors to be each a resident respectively of one (1) of the three (3) divisions of the district, which divisions shall also be established by the order of the governor at or prior to the time of said appointments. [1921, ch. 222, § 20, p. 492; I.C.A., § 41-2420.]

Cross ref. Irrigation districts, tit. 43.

42-2821. Payment of interest for five years out of proceeds of sale of bonds. — The board of county commissioners, by a suitable order duly made and recorded in the office of the county recorder, may, when they deem

it advisable, provide for payment of interest on such county bonds for a period of not to exceed five (5) years out of the proceeds of the sale of such bonds and in that event no assessments need be collected for the payment of such interest charges until the expiration of said period of not to exceed five (5) years, and in such event the amount of the estimates, and the liens, instalments to be paid, and bonds to be issued and sold, shall be increased to a sufficient extent to provide for such funding of interest and to provide the funds required for such interest payments as well as for construction purposes and for payment of the amounts due or to become due on contracts entered into in pursuance hereof. But such order for the payment of interest for not to exceed five (5) years out of the proceeds of the sale of bonds shall be conditional upon there being available in the county treasury a sufficient amount of money from the proceeds of such bond sales to complete the construction of the proposed work, in addition to the amounts to be paid out for such interest payments and should the funds available in the county treasury for the sale of such bonds be insufficient to make such interest payments, and also complete the proposed construction and the payments of the county's obligations on its contract or contracts in connection with such project, then, notwithstanding any such order or orders for payment of interest out of the proceeds of the sale of bonds, the county officers shall proceed to collect by taxation and the enforcement of liens as provided in this chapter, the funds necessary to make interest payments and shall use the funds derived from the sale of bonds for the purpose of completing the project and completing payment of the county's contract obligations insofar as the proceeds of the sale of bonds may be required for such purpose. [1921, ch. 222, § 21, p. 492; I.C.A., § 41-2421.]

42-2822. Assessment of state lands — Separable portion of chapter. — The provisions of this chapter providing for the assessment of state lands shall be considered a separable portion of this chapter, and it is hereby declared to be the intention of the legislature that the remainder of this chapter remain in full force and effect, even if the said provisions in regard to assessment of state lands should be held unconstitutional. [1921, ch. 222, § 22, p. 492; I.C.A., § 41-2422.]

42-2823. Compensation of county commissioners — Employment of assistance. — The county commissioners in addition to their compensation otherwise provided by law shall be entitled to compensation for their services required under this chapter at the rate of five dollars (\$5.00) per day for each and every day necessarily spent in the performance thereof, and shall be paid out of the funds provided for by this chapter and be a part of the expense as herein provided. The county commissioners shall have the power to employ such assistance and fix the rate of pay therefor in the performance of their duties under this chapter as the nature of the work may require the same to be a part of the expense herein provided for. [1921, ch. 222, § 23, p. 492; I.C.A., § 41-2423.]

CHAPTER 29

DRAINAGE DISTRICTS

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42-2901. Corporate powers of drainage districts. — Any portion of a county requiring drainage or diking, or both, may be organized into a drainage district, and when so organized such district and the board of commissioners hereinafter provided for shall have and possess the power herein conferred by law upon such district and board of commissioners, and said district shall be known and designated as drainage district No. _____ (here insert number) of the county of _____ (here insert name of county), of the state of Idaho, and shall have the right to sue and be sued by and in the name of its board of commissioners hereinafter provided for, and shall have perpetual succession and shall adopt and use a seal. The commissioners hereinafter provided for and their successors in office shall, from the time of the organization of such drainage district, have the power and it shall be their duty, to manage and conduct the business and affairs of the district, and make and execute all necessary contracts, employ and appoint such agents, officers and employees as may be required, and prescribe their duties, and perform such other acts as herein provided, or that may hereafter be provided by law. [1913, ch. 16, § 1, p. 58; reen. C.L. 168:1; C.S., § 4493; I.C.A., § 41-2501.]

Compiler's notes. The words enclosed in parentheses so appeared in the law as enacted.

History and Validity of Chapter.

The first drainage district law in this state was enacted 1903, p. 256, H. B. 154, amended 1907, p. 98, H. B. 109, and embodied in R. C., §§ 2444-2483. The law was modeled after the Washington law, Bal. Ann. Code, §§ 3715-3754 (For present law see Rem. Rev. Stat., §§ 4298-4346). See *In re Drainage Dist. No. 3*, 40 Idaho 549, 235 P. 895 (1925). The law was declared unconstitutional in *Ferbrache v. Drainage Dist. No. 5*, 23 Idaho 85, 128 P. 553, 44 L.R.A. (n.s.) 538, 1915C Ann. Cas. 43 (1912).

The present law was passed 1913, ch. 16, p. 58. The validity of the manner of its passage by legislature was upheld. *In re Drainage Dist. No. 1*, 26 Idaho 311, 143 P. 299, 1915A L.R.A. 1210 (1914).

The law was amended by 1915, ch. 42, p. 123. By 1913, ch. 17, p. 79, warrants issued under the former law were legalized (§ 42-

2951). The sections of the original act were subdivided and rearranged in the compilation of Compiled Laws.

Cross ref. Drainage by irrigation districts, § 43-305.

Irrigation districts authorized to exercise powers of drainage districts, §§ 43-306, 43-307.

Sec. to sec. ref. This chapter is referred to in § 59-1101.

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Validity of law.
Water users as stockholders.

Contractual Relationship Between Bondholder and Property Owners.

The issuance and sale of bonds by a drainage district and the purchase thereof by bondholders ipso facto created a contractual relationship between the bondholders and the property owners within the district. *Straus v. Ketchen*, 54 Idaho 56, 28 P.2d 824 (1933).

Defense of Suits.

A water user who acquired his right through sale, rental, or distribution agreement from a ditch or canal company, or an irrigation or drainage district, possessed no water right which he could assert against any other appropriators where their rights were acquired from the ditch or canal company, or irrigation or drainage district, which was the appropriator and owner, and it was the district's business to protect the appropriation and defend it in any litigation that arose. *Nampa & Meridian Irrigation Dist. v. Barclay*, 56 Idaho 13, 47 P.2d 916, 100 A.L.R. 557 (1935).

Drainage District As Special Improvement District.

Drainage district is a special improvement district. *McDonald v. Pritzl*, 60 Idaho 354, 93 P.2d 11 (1939).

Drainage District Is Local Improvement District.

Because of the mere fact that the drainage district was not included within the local improvement code, it did not necessarily follow that it was not a local improvement district if it was such in fact. *Straus v. Ketchen*, 54 Idaho 56, 28 P.2d 824 (1933).

Legislative Control.

Methods of organizing drainage districts are addressed solely to legislative discretion, which discretion is not subject to review by courts except to determine whether some constitutional inhibition is violated. *Burt v. Farmers Coop. Irrigation Co.*, 30 Idaho 752, 168 P. 1078 (1917).

Liability of Drainage Commissioner.

Drainage commissioners were held to be liable in damages for injuries to land resulting from the negligent construction of dam causing water to overflow onto land. *Chandler v. Drainage Dist. No. 2*, 68 Idaho 42, 187 P.2d 971 (1947).

Lien.

The assessments of benefits for the costs for construction of works in a drainage district became an undivided lien against each piece

of property within the district to the extent of the assessment against it, and each bond had as its security an undivided lien against each piece of property to the extent of the amount of the assessment against it, and the security continued until each bond was paid. *Straus v. Ketchen*, 54 Idaho 56, 28 P.2d 824 (1933).

Nature of Districts.

Drainage districts are quasi corporations. *Burt v. Farmers Coop. Irrigation Co.*, 30 Idaho 752, 168 P. 1078 (1917); *Chandler v. Drainage Dist. No. 2*, 68 Idaho 42, 187 P.2d 971 (1947).

Authority to create irrigation and drainage districts is granted by entirely separate and distinct statutes, and proceedings for their creation differ in many particulars (§ 43-101). *Nampa & Meridian Irrigation Dist. v. Petrie*, 37 Idaho 45, 223 P. 531 (1923).

Drainage district is the creature of statute, its powers are limited to those granted by the statute, and it has no authority to represent landowners within its boundaries in the application or appropriation of water. *Sebern v. Moore*, 44 Idaho 410, 258 P. 176 (1927).

Parties to Suits.

Where water owned by an irrigation district was involved in litigation, it was not necessary that the water users in such district be joined as parties litigant thereto. *Nampa & Meridian Irrigation Dist. v. Barclay*, 56 Idaho 13, 47 P.2d 916, 100 A.L.R. 557 (1935).

Rights of Water Users.

A water user who had acquired his right through a sale, rental, or distribution agreement or contract from a ditch or canal company, or an irrigation or drainage district, did not acquire the rights of an appropriator of water, and was not entitled to the same consideration in litigation involving the original appropriation to which the canal or ditch company, or irrigation or drainage district was entitled. *Nampa & Meridian Irrigation Dist. v. Barclay*, 56 Idaho 13, 47 P.2d 916, 100 A.L.R. 557 (1935).

Validity of Law.

Various provisions of the law have been attacked but uniformly upheld. *Elliott v. McCrea*, 23 Idaho 524, 130 P. 785 (1913); *In re Drainage Dist. No. 1*, 29 Idaho 377, 161 P. 315 (1916); *In re Drainage Dist. No. 1*, 30 Idaho 351, 164 P. 1018 (1917); *Burt v. Farmers Coop. Irrigation Co.*, 30 Idaho 752, 168 P. 1078 (1917).

Water Users As Stockholders.

An irrigation district is a corporation organized under the authority of law, and is the owner of the appropriation, and the landowners in the district, for all practical purposes, sustain the same relation to the corporation that stockholders in a private corporation sustain to the corporation. *Nampa & Merid-*

ian Irrigation Dist. v. Barclay, 56 Idaho 13, 47 P.2d 916, 100 A.L.R. 557 (1935).

Collateral References. 25 Am. Jur. 2d, Drains and Drainage Districts, §§ 1-6, 19.

28 C.J.S., Drains, §§ 1-24.

Irrigation company as a public utility. 8 A.L.R. 268; 15 A.L.R. 1227.

42-2902. Appropriation of water available for irrigation purposes. — The boards of commissioners of drainage districts are hereby authorized and empowered to file upon and appropriate in the manner provided by law, waters created or made available for irrigation purposes, by the construction of drainage works within such district, whenever the same can be applied to a beneficial use upon lands within the district, without impairing prior existing rights, which waters shall be equitably and ratably distributed in the manner provided by law to lands within the district which may beneficially use the same in the proportion that the assessment for drainage of each tract of said land bears to the whole assessment within the district: provided, that where lands within the district have an adequate water right and the water made available for irrigation by the construction of such works, may be beneficially used upon other lands within the district, the board of commissioners may supply such lands with water, upon their assuming to pay their proportionate share of the drainage assessments, and credit other lands within the district creating such water supply with their ratable proportion, of the actual cost of the delivery thereof. [1923, ch. 134, § 1, p. 195; I.C.A., § 41-2502.]

Sec. to sec. ref. This section is referred to in § 42-2903.

Cited in: Nampa & Meridian Irrigation Dist. v. Barclay, 56 Idaho 13, 47 P.2d 916, 100 A.L.R. 557 (1935).

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Purpose of act.

Subject to prior appropriation.

Purpose of Act.

The primary object of this act is the creation of a drainage district and its government in the same manner as similar organizations such as irrigation districts, good road

districts and improvement districts. Chandler v. Drainage Dist. No. 2, 68 Idaho 42, 187 P.2d 971 (1947).

Subject to Prior Appropriation.

Appropriation by commissioners of drainage district of surface and seepage waters collected in district drain was subject to rights of one who appropriated them before construction of ditch. Sebern v. Moore, 44 Idaho 410, 258 P. 176 (1927).

Collateral References. Constitutionality of statutes affecting riparian rights. 56 A.L.R. 277.

42-2903. Appropriation of irrigation waters — Assessments for expenses. — The board of commissioners of drainage districts are hereby authorized and empowered to assess upon lands within the district, benefited by such filing and appropriation as provided in section 42-2902, a sufficient amount to pay the expenses thereof, which shall be levied and collected in the same manner as funds are now levied and collected for the maintenance of the drainage works and the funds so obtained may be expended for the purposes authorized by this act. [1923, ch. 134, § 2, p. 195; I.C.A., § 41-2503.]

Compiler's notes. The words "this act" refer to §§ 42-2902, 42-2903.

Cross ref. Assessments for maintenance of drainage works, §§ 42-2934 — 42-2937.

Collection of Assessment.

Tax collector must receive general taxes tendered, although taxpayer refuses to pay drainage district assessment. Booth v. Clark,

42 Idaho 284, 244 P. 1099 (1926).

Collateral References. 25 Am. Jur. 2d, Drains and Drainage Districts, §§ 34-40. 28 C.J.S., Drains, §§ 79-131.

Right of a governmental unit, or officers thereof, to compensation for collecting assessments levied by, or owed to, an irrigation district. 114 A.L.R. 1098.

42-2904. Municipality may act as drainage district. — Any village or city already incorporated, or which may hereafter be incorporated, may exercise the functions of a drainage district under the provisions of this chapter, or the whole or any portion of any such village or city may be included with other territory in a common district under the provisions for the establishment thereof as provided for herein. [1913, ch. 16, § 34, p. 58; compiled and reen. C.L. 168:2; C.S., § 4494; I.C.A., § 41-2504.]

Collateral References. Irrigation district as a municipality within tax laws. 17 A.L.R. 81; 55 A.L.R. 639.

42-2905. Petition for organization. — For the purpose of the formation of such drainage district a petition shall be presented to the clerk of the district court of the county in which a greater portion of the lands of said proposed district are located, which petition shall set forth the object of the organization of said district, shall designate temporary boundaries thereof and shall set forth approximately the number of acres of land therein, and shall contain a description of the proposed system of drainage or diking or both, designating the point or points, if any there may be, which shall be the outlet or outlets for the drainage of said district, the general route over which the main ditch or ditches are to be constructed, together with the proposed spurs or branches, and the general location of the dikes or levees, if any there may be, and set forth the further fact that the establishment of said district and the proposed system of drainage will be conducive to the public health, convenience and welfare, or increase the public revenue, or that the establishment of said district and the said system of drainage and reclamation is a proper and advantageous method of accomplishing the relief sought. Said petition shall be signed by such number as own at least one third ($\frac{1}{3}$) of the acreage in the proposed district, and shall pray that the same be organized under the provisions of this chapter. Community property may be represented by either the husband or the record owner. [1913, ch. 16, part of § 2, p. 58; reen. C.L. 168:3; am. 1919, ch. 183, § 1, p. 558; C.S., § 4495; am. 1927, ch. 36, § 1, p. 48; I.C.A., § 41-2505.]

Compiler's notes. Section 2 of S.L. 1927, ch. 36 declared an emergency.

Cited in: Booth v. Groves, 43 Idaho 703, 255 P. 638 (1927); Field v. Drainage Dist. No. 1, 46 Idaho 248, 267 P. 443 (1928).

ANALYSIS

Contract for attorney's fees.
Inception of organization.
Nature of districts.
Withdrawal of names.

Contract for Attorney's Fees.

In action to recover attorney's fees under contract with drainage district providing for payment of such charges as court should provide, it was error to refuse jury trial. Neal v. Drainage Dist. No. 2, 42 Idaho 624, 248 P. 22 (1926).

Inception of Organization.

The organization of a drainage district has its inception in the filing of a petition under this section. Straus v. Ketchen, 54 Idaho 56, 28 P.2d 824 (1933).

Nature of Districts.

Drainage districts are quasi corporations. *Burt v. Farmers Coop. Irrigation Co.*, 30 Idaho 752, 168 P. 1078 (1917).

Withdrawal of Names.

Original signers may withdraw their names at any time prior to determination by court that petition contains signatures of owners of at least one fifth of acreage in proposed dis-

trict. *Maxwell v. Terrell*, 37 Idaho 767, 220 P. 411 (1923).

Collateral References. 25 Am. Jur. 2d, Drains and Drainage Districts, §§ 3-23.

28 C.J.S., Drains, §§ 25-57.

Scope and import of term "owner" in statutes relating to formation of irrigation districts. 2 A.L.R. 791; 95 A.L.R. 1085.

42-2906. Petition — Bond — Condition for withdrawal of names.

— Said petitioners shall, at the time of the filing of the petition, file a bond with the clerk of the district court of the county in which said proposed district is located, running to the state of Idaho, in the penal sum of \$500, with two (2) or more sureties, to be approved by the judge of the district court, conditioned that they will pay all costs in case said district for any reason shall not be established.

In case said district be not established, then all costs and expenses shall be collectible on the bond hereinbefore provided for, and any person having a charge against said district shall have a right of action thereon: provided, that when said petition is filed with the clerk of said court no petitioner shall be allowed to withdraw his name or land therefrom without tendering into court his pro rata share of all costs and expenses incurred by petitioners to the date of said withdrawals. [1913, ch. 16, part of § 2, p. 58; reen. C.L. 168:4; C.S., § 4496; am. 1927, ch. 225, § 1, p. 329; I.C.A., § 41-2506.]

Cited in: *Booth v. Groves*, 43 Idaho 703, 255 P. 638 (1927).

42-2907. Action on petition — Notice of hearing. — After the filing of said petition the judge of the court shall fix a time for the hearing of said petition by order made by him, which order shall provide that said petition be published for at least three (3) successive weeks in some weekly newspaper or newspapers, printed and published in said county or counties in which the lands are situated, and in case no such paper is published in such county, then in some paper of general circulation therein; together with a notice of the time and place at which said judge will consider said petition. [1913, ch. 16, part of § 3, p. 58; reen. C.L. 168:5; am. 1919, ch. 183, § 2, p. 559; C.S., § 4497; I.C.A., § 41-2507.]

Cited in: *Burt v. Farmers Coop. Irrigation Co.*, 30 Idaho 752, 168 P. 1078 (1917); *Booth v. Groves*, 43 Idaho 703, 255 P. 638 (1927).

Collateral References. 28 C.J.S., Drains, §§ 28, 31.

42-2908. Hearing — Objections — Findings. — Upon the day fixed for the hearing of said petition, any persons or corporation interested therein, may appear before said court and make objections to the organization and incorporation of said district, but such objections shall be limited to determining whether or not the organization of such drainage district is a proper and advantageous method of accomplishing the reclamation and protection of the swamped, bogged or water-logged lands, or lands subject to

overflow therein, and whether or not there is a reasonable probability that the objects sought by the formation of the district may be accomplished, and whether or not said proposed drainage system will be conducive either to the public health, welfare or convenience or increase the public revenue; and at the hearing the court shall hear and consider such evidence only as may be presented for or against the petition or objections thereto. Thereupon the court shall make its findings upon the facts alleged in the petition and objections and any other facts necessary and proper for the determination of the propriety of the organization of such district, and if said district be organized, the judge of said court shall cause an order to be entered and recorded in the judgment record of each of the counties in which the lands within said district are situated, setting forth the facts found by the said judge upon the hearing of said petition, and said order shall define the temporary boundaries of said district and describe the lands included therein by township, range and section only, and shall have the effect of a lis pendens.

Any district may be established even if it is shown that the outlet for the drainage system is without the county or counties in which said district is located, or without the boundaries of the state of Idaho, or is in any other state or territory, or in a foreign country; the work for the drainage of said district may be contracted for and performed either entirely or partially within the limits of any other state, territory or foreign country. [1913, ch. 16, part of § 3, p. 58; reen. C.L. 168:6; am. 1919, ch. 183, § 3, p. 559; C.S., § 4498; I.C.A., § 41-2508.]

Cited in: Boone v. District Court, 38 Idaho 688, 224 P. 429 (1924).

ANALYSIS

Appeal.

Effect of order.

Hearing part of organization proceedings.

Inclusion of lands.

Special assessments.

Valid objections.

Withdrawal of names.

Appeal.

This section does not provide for appeal from order of district court declaring district duly organized, as such order does not finally adjudicate any of the rights involved in proceedings. In re Drainage Dist. No. 1, 30 Idaho 351, 164 P. 1018 (1917); Rhodenbaugh v. Stingel, 31 Idaho 594, 174 P. 604 (1918).

Effect of Order.

After order was entered declaring drainage district organized, such order had effect of lis pendens. Maxwell v. Terrell, 37 Idaho 767, 220 P. 411 (1923).

Hearing Part of Organization Proceedings.

The inception of the organization of a drainage district has as one of its elements the

hearing of a petition filed under section 42-2905. Straus v. Ketchen, 54 Idaho 56, 28 P.2d 824 (1933).

Inclusion of Lands.

Inclusion of land in drainage district was distinct from power of district after formation to levy assessments. Burt v. Farmers Coop. Irrigation Co., 30 Idaho 752, 168 P. 1078 (1917).

Special Assessments.

To justify special assessment there must be determination of benefits accruing, and, unless legislature determines such fact, landowner must have opportunity to appear at some stage of proceedings to contest or be heard. Booth v. Groves, 43 Idaho 703, 255 P. 638 (1927).

Assessment for improvements was not justified unless benefit resulted to property assessed, as it would have constituted taking of property without due process. Booth v. Groves, 43 Idaho 703, 255 P. 638 (1927).

Special assessment for drainage purposes is not tax within meaning of constitutional provisions for levying taxes. Booth v. Groves, 43 Idaho 703, 255 P. 638 (1927).

Assessments in excess of the amount confirmed by the court are voidable. McDonald v. Pritzl, 60 Idaho 354, 93 P.2d 11 (1939).

Valid Objections.

It was not valid objection to establishment of drainage district that minority of acreage within boundaries may receive no special benefit. *Burt v. Farmers Coop. Irrigation Co.*, 30 Idaho 752, 168 P. 1078 (1917).

Withdrawal of Names.

Signers of petition to inaugurate proceedings had right to withdraw their names from

petition at any time prior to determination by court that it contained signatures of one fifth of owners of acreage in proposed district. *Maxwell v. Terrell*, 37 Idaho 767, 220 P. 411 (1923).

Collateral References. 25 Am. Jur. 2d, Drains and Drainage Districts, §§ 12-18.

28 C.J.S., Drains, §§ 36-41.

42-2909. Decree. — Upon the entry of the findings of the final hearing of said petition, as set forth in the last preceding section, said judge of the district court of the county in which the proposed drainage district is located, if he finds said proposed drainage system to be conducive either to the public health, welfare or convenience, or will increase the public revenue, or be of special benefit to the majority in acreage of the lands included in said boundaries, shall declare said district duly organized, and to be known as drainage district No. _____ (here insert number) of the county of _____ (here insert name of county), in the state of Idaho. The clerk of said district court shall cause a copy of the order declaring said district to be organized, duly certified, to be filed in the office of the secretary of state, and from and after the date of said filing, said organization shall be deemed complete. [1913, ch. 16, parts of § 4, p. 58; reen. C.L. 168:7; C.S., § 4499; I.C.A., § 41-2509.]

Compiler's notes. The words enclosed in parentheses so appeared in the law as enacted.

Cited in: *Burt v. Farmers Coop. Irrigation Co.*, 30 Idaho 752, 168 P. 1078 (1917); *Boone v. District Court*, 38 Idaho 688, 224 P. 429

(1924); *Drainage Dist. No. 2 v. Ada County*, 38 Idaho 778, 226 P. 290 (1924); *Booth v. Groves*, 43 Idaho 703, 255 P. 638 (1927); *Straus v. Ketchen*, 54 Idaho 56, 28 P.2d 824 (1933).

Collateral References. 28 C.J.S., Drains, § 42.

42-2910. Appointment of drainage commissioners — Qualification — Bond — Oath — Organization of board. — The judge of the district court within ten (10) days thereafter shall appoint three (3) drainage commissioners. The commissioners shall be appointed from among those living in the county where said proposed district is located.

The board of drainage commissioners appointed as aforesaid shall be entitled to enter upon the duties of their office upon qualifying as county officers are required to qualify, and upon each drainage commissioner giving a bond to the state of Idaho, for the benefit of said drainage district, for the faithful performance of his duties as such drainage commissioner, in the penal sum of \$5000, with one or more sureties to be approved by the judge of the district court. Provided that the judge of the district court, upon application and proper showing by the board of drainage commissioners, may enter an order reducing the penalty of the bond to such sum as may appear to him to be reasonable and adequate under the showing made. The drainage commissioners shall take the oath of office and file their bonds within fifteen (15) days after they are appointed; and they shall hold office until their successors are duly appointed and qualified. Each drainage commissioner thereafter who may be appointed shall enter into a like bond and of like effect upon entering upon his duties, which bond shall be

approved by the judge of the district court of the county in which said drainage district is located. The bonds of the drainage commissioners shall be filed with the clerk of the district court and kept in his custody. Immediately after their appointment and their bonds have been filed and approved, the drainage commissioners shall organize themselves into a board, and they shall by lot determine the terms of their office, which shall be one (1), two (2) or three (3) years respectively. Annually thereafter the judge of the district court of the county in which said district is located shall appoint one (1) drainage commissioner whose term of office shall be for three (3) years. [1913, ch. 16, parts of §§ 4 and 5, p. 58; reen. C.L. 168:8; C.S., § 4500; I.C.A., § 41-2510; am. 1933, ch. 21, § 1, p. 27.]

Compiler's notes. Section 2 of S.L. 1933, ch. 21 declared an emergency. Approved Feb. 2, 1933.

Cited in: Ingard v. Barker, 27 Idaho 124, 147 P. 293 (1915); Burt v. Farmers Coop. Irrigation Co., 30 Idaho 752, 168 P. 1078 (1917); Booth v. Groves, 43 Idaho 703, 255 P. 638 (1927).

Constitutionality.

Provision authorizing district judge of judicial district in which drainage district was

located to appoint drainage commissioners for district was not in violation of the constitution and was not an infringement by the judicial department of the state government upon the functions of the executive branch of the government. Elliott v. McCrea, 23 Idaho 524, 130 P. 785 (1913).

Collateral References. 25 Am. Jur. 2d, Drains and Drainage Districts, §§ 11, 19, 28 C.J.S., Drains, §§ 8-24.

42-2911. Officers — Meetings. — The board of commissioners of such district shall elect one (1) of their number chairman and one (1) secretary, and shall keep minutes of all their proceedings. The drainage commissioners shall hold their meetings for the transaction of business at any place in the county or counties in which the district is located. [1913, ch. 16, parts of §§ 6, 7, p. 58; reen. C.L. 168:9; C.S., § 4501; I.C.A., § 41-2511.]

Cited in: Drainage Dist. No. 2 v. Ada County, 38 Idaho 778, 226 P. 290 (1924).

Collateral References. 28 C.J.S., Drains, § 14.

42-2912. Vacancies. — In case a vacancy or vacancies occur in said board by death, failure to appoint, failure to qualify, or resignation of one or more of the members thereof, such vacancy or vacancies shall be filled at once by appointment by the judge of the district court of the county in which said district is located, and said appointee shall serve for the unexpired term, or until his successor is appointed and his bond approved. [1913, ch. 16, part of § 8, p. 58; reen. C.L. 168:10; C.S., § 4502; I.C.A., § 41-2512.]

42-2913. Compensation. — The drainage commissioners shall receive for their services such sum as the board of drainage district commissioners fix by resolution, but not greater than the amount allowed in section 59-509(h), Idaho Code, for each day they shall actually be engaged in the business of their office. In addition, the commissioners shall each receive a mileage allowance computed at the rate established by the state board of examiners for employees of the state for each mile driven and such allowance shall be the full amount allowed for travel expense. [1913, ch. 16, part of § 7, p. 58; am. 1915, ch. 42, part of § 1, p. 124; reen. C.L. 168:11;

C.S., § 4503; I.C.A., § 41-2513; am. 1957, ch. 78, § 1, p. 127; am. 1967, ch. 22, § 1, p. 39; am. 1974, ch. 160, § 1, p. 1394; am. 1986, ch. 62, § 1, p. 179; am. 1992, ch. 52, § 1, p. 156.]

Compiler's notes. Section 2 of S.L. 1957, ch. 78 declared an emergency. Approved February 27, 1957.

Cited in: In re Drainage Dist. No. 1, 29 Idaho 377, 161 P. 315 (1916).

42-2914. Examination of lands — Report of commissioners — Apportionment of benefits and damages. — As soon as may be after their appointment, or within such time as the court may direct, the commissioners shall examine the lands described in the petition and proposed to be drained and protected, and the lands over and upon which the work is proposed to be constructed and shall determine and report:

1. Whether the starting point, route and terminus of the proposed work and the proposed location thereof, is or are in all respects proper and feasible, and if not, what is or are so.

2. The estimated cost of the proposed work, including all incidental expenses and the cost of proceedings therefor.

3. The probable cost of keeping the same in repair after the work is completed.

4. What lands will be injured thereby and the aggregate amount of such injuries; and they shall award to each tract or lot, by whomsoever held, the amount of damage so determined by them.

5. What lands will be benefited by the construction of the proposed work, whether the benefits will equal or exceed the aggregate cost of constructing such work, including all incidental expenses, costs of proceedings and damages; and they shall apportion and assess the estimated cost of the same on the lands so benefited by setting opposite the correct description of each tract, lot or easement, the portion of such cost assessed as benefits thereon. And if any particular part of the work so proposed to be done shall be assessed upon any particular tracts or lots of land or upon any municipality or corporation they shall so specify; and if any municipality or corporation should in their judgment bear a part of the expense or as such will derive a public or special benefit from the whole or any part of such proposed work, they shall so report and assess the amount of such benefits.

6. Whether the proposed district, as set out in the petition filed, will embrace all the lands that may be damaged or benefited by the proposed work, and if not, what additional lands will be benefited or damaged and the amount of the benefits or damages in the same manner as though such lands were included in such original petition. [1913, ch. 16, § 9, p. 58; reen. C.L. 168:12; C.S., § 4504; I.C.A., § 41-2514.]

Sec. to sec. ref. This section is referred to in §§ 42-2923, 42-2952.

Cited in: Neal v. Drainage Dist. No. 2, 42 Idaho 624, 248 P. 22 (1926).

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Amount of assessments.
Assessments against land.

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Amount of Assessments.

"There is," the court held, "no merit in a contention that the property owners within the district can be called upon and required to pay assessments equal to the amount of the actual benefits inuring to the respective parcels of land by reason of the improvements made in a drainage district." *Straus v. Ketchen*, 54 Idaho 56, 28 P.2d 824 (1933).

Assessments Against Land.

Assessment must be made against tracts of land in district and not against owners. *Burt v. Farmers Coop. Irrigation Co.*, 30 Idaho 752, 168 P. 1078 (1917).

Canals.

Canal and ditch companies, though not organized for profit, were not exempt from assessment. *In re Drainage Dist. No. 1*, 29 Idaho 377, 161 P. 315 (1916).

It was intention of legislature that rights of way for canals should be assessed same as other high land. *Burt v. Farmers Coop. Irrigation Co.*, 30 Idaho 752, 168 P. 1078 (1917).

Conclusiveness of Decree.

One who had been notified but made no protest against confirmation, but paid assessments thereunder, could not complain in proceedings to enjoin issuance of bonds that notice was insufficient unless defect was one rendering proceedings void. *Field v. Drainage Dist. No. 1*, 46 Idaho 248, 267 P. 443 (1928).

Constitutionality.

This section satisfies requirements that private property shall not be taken for public use without just compensation or due process of law. *Drainage Dist. No. 2 v. Extension Ditch Co.*, 32 Idaho 314, 182 P. 847 (1919).

Description.

Statute does not require that each right of way or easement shall be divided up into small parcels and assessment fixed against each parcel. *In re Drainage Dist. No. 1*, 29 Idaho 377, 161 P. 315 (1916).

Elements of Benefit.

There were two grounds for assessments, first against lands benefited generally, second against municipalities or corporations specially benefited. *In re Drainage Dist. No. 1*, 29 Idaho 377, 161 P. 315 (1916); *In re Drainage Dist. No. 3*, 43 Idaho 803, 255 P. 411 (1927).

In determining acreage benefited, responsibility of high lands to low lands may be considered. *Burt v. Farmers Coop. Irrigation Co.*, 30 Idaho 752, 168 P. 1078 (1917).

Enhanced value of low lands should be taken into consideration in determining pro-

portion of cost. *Burt v. Farmers Coop. Irrigation Co.*, 30 Idaho 752, 168 P. 1078 (1917).

Assessments referring to municipalities and corporations in subd. 5 are not to be made as benefits to any tract of land, but upon theory of public benefit. *Burt v. Farmers Coop. Irrigation Co.*, 30 Idaho 752, 168 P. 1078 (1917).

Liability of Owner.

The liability of each particular landowner became fixed and determined at the time of the confirmation of the assessment for costs, and the assessments thus imposed became the limit of his liability for construction costs. *McDonald v. Pritzl*, 60 Idaho 354, 93 P.2d 11 (1939).

Limit of Liability.

Where assessments were confirmed by the court, but an amount in excess of such confirmed amount was levied by drainage district, but due to failures to pay, the amount actually received did not equal the confirmed amount, a landowner could not be subjected to additional assessments for the difference between the amount collected and the amount proved. *McDonald v. Pritzl*, 60 Idaho 354, 93 P.2d 11 (1939).

Procedure Optional.

In taking property within drainage district for right of way, it was optional with district to invoke proceedings provided for under the general statute governing eminent domain, or to exercise that right under this chapter. *Drainage Dist. No. 2 v. Extension Ditch Co.*, 32 Idaho 314, 182 P. 847 (1919).

Property Not Assessable.

No assessment can be levied against easement belonging to United States government and it is properly excluded from district. *In re Drainage Dist. No. 3*, 43 Idaho 803, 255 P. 411 (1927).

While right of settler to receive water through ditch was easement, it was not such easement subject to assessment as was contemplated by this section. *In re Drainage Dist. No. 3*, 43 Idaho 803, 255 P. 411 (1927).

Railroad Right of Way.

Railroad right of way situated on high and dry land above area to be drained and receiving no direct benefit could not be assessed under this section. *In re Drainage Dist. No. 3*, 43 Idaho 803, 255 P. 411 (1927).

Review of Assessments.

Supreme Court could not determine whether assessments were arbitrary or unjust without the evidence that commissioners had before them. *In re Drainage Dist. No. 1*, 29 Idaho 377, 161 P. 315 (1916).

Collateral References. Failure of a property owner to avail himself of a statutory or

ordinance remedy as precluding an attack based on the improper inclusion or exclusion of property from assessment. 100 A.L.R. 1298.

42-2915. Assessment of benefits against high lands. — In determining the amount which each tract of land will be benefited by such proposed drainage system the commissioners shall consider the damage done to low land from seepage and saturation by irrigation water from high land, and the necessity for the carrying off of waste water, and such high lands shall be considered as being benefited to the extent and in the amount that such lands are responsible for damage to low lands from seepage and saturation by irrigation water. [1913, ch. 16, § 9a, as added by 1915, ch. 42, § 2, p. 124; reen. C.L. 168:13; C.S., § 4506; I.C.A., § 41-2515.]

Sec. to sec. ref. This section is referred to in § 42-2952.

Cited in: *Nampa & Meridian Irrigation Dist. v. Petrie*, 37 Idaho 45, 223 P. 531 (1923).

ANALYSIS

Basis of assessment.

Canals and ditch companies.

Constitutionality.

Construction.

"High lands" and "low lands" defined.

"Responsible" defined.

Basis of Assessment.

Prior to this section, benefits were to be assessed upon the principles governing special assessment in local improvement districts, that is, on basis of benefits received but this section authorizes assessments also based on the responsibility for injuries inflicted. *Burt v. Farmers Coop. Irrigation Co.*, 30 Idaho 752, 168 P. 1078 (1917).

Benefits to low lands are to be determined in accordance with the enhanced value thereof and benefits to high lands are to be determined in accordance with the extent to which lands are responsible for damages to low lands by reason of seepage of irrigation water which contributes to the water-logged condition of such low lands and the amount of such responsibility is the proportion which the amount of water contributed by such high lands bears to the combined contribution of water from all sources by irrigation. *Drainage Dist. No. 2 v. Extension Ditch Co.*, 32 Idaho 314, 182 P. 847 (1919).

Any portion of the benefits to low lands from construction of drainage works arising from enhancement of value of such lands if they were in their natural state, or by changing conditions other than the damage caused by seepage and saturation from irrigation water, could not be considered in determining the assessment to be charged to the high lands. *Drainage Dist. No. 2 v. Extension Ditch Co.*, 32 Idaho 314, 182 P. 847 (1919).

After determination of the proportion of the cost of drainage works which should be borne by high lands, the remainder should be apportioned and assessed to various tracts of low lands according to benefits. *Drainage Dist. No. 2 v. Extension Ditch Co.*, 32 Idaho 314, 182 P. 847 (1919).

Rights of way for canals were assessable with other high lands. *Burt v. Farmers Coop. Irrigation Co.*, 30 Idaho 752, 168 P. 1078 (1917).

Canals and Ditch Companies.

Canal or ditch company which permitted water to escape from its canal, either by overflow or percolation, to injury of another, could be required to assist in the construction of drainage system that would protect lower lands from such damage. *In re Drainage Dist. No. 1*, 29 Idaho 377, 161 P. 315 (1916).

Constitutionality.

Legislature has power to provide that lands which, by artificial irrigation, contribute by seepage to swampy condition of low lands should contribute proportion of cost of reclaiming low lands. *In re Drainage Dist. No. 1*, 29 Idaho 377, 161 P. 315 (1916); *Burt v. Farmers Coop. Irrigation Co.*, 30 Idaho 752, 168 P. 1078 (1917).

Construction.

This section, by permitting assessments against upper lands for construction of drainage system made necessary by irrigation of and consequent seepage from such uplands, is a partial return to the common-law rule by which one who diverted water was liable for all damages resulting therefrom, even though not the result of negligence. *In re Drainage Dist. No. 1*, 29 Idaho 377, 161 P. 315 (1916); *Burt v. Farmers Coop. Irrigation Co.*, 30 Idaho 752, 168 P. 1078 (1917).

"High Lands" and "Low Lands" Defined.

Term "high lands" means lands which will not be enhanced in value by construction of drainage works, but which contribute by seepage of irrigation water therefrom to saturation or water-logged condition of "low lands,"

and term "low lands" means lands which will be benefited in the ordinary sense of enhancement of value. *Drainage Dist. No. 2 v. Extension Ditch Co.*, 32 Idaho 314, 182 P. 847 (1919).

Term "high lands" may include canals, intention of law being to provide that if water escapes by seepages from irrigation canal and contributes to water-logged condition of land in drainage district, right of way of such canal should be assessed its proportion of the cost of construction of the drainage works the same as other lands. *Drainage Dist. No. 2 v. Extension Ditch Co.*, 32 Idaho 314, 182 P. 847 (1919).

"Responsible" Defined.

"Responsible" means physical responsibility, whether or not owner of upland is legally

liable for damages under law of the arid states, where legal responsibility is limited to negligence in construction or operation of irrigation system. *In re Drainage Dist. No. 1*, 29 Idaho 377, 161 P. 315 (1916); *Burt v. Farmers Coop. Irrigation Co.*, 30 Idaho 752, 168 P. 1078 (1917).

Collateral References. 25 Am. Jur. 2d, *Drains and Drainage Districts*, §§ 34-52.

28 C.J.S., *Drains*, §§ 79-131.

Tax sale as freeing property from possibility of further assessments for benefits to land. 11 A.L.R.2d 1133.

42-2916. Duties of engineers and surveyors — Preliminary survey. — For the purpose of compiling the data to be presented to the court as set forth in the preceding sections, the board of commissioners of said drainage district may employ one or more competent engineers, surveyors and other helpers, and such legal assistance as may be necessary, with full power to bind said district for the compensation of such assistants or employees employed: provided, however, that all maps, profiles, surveys, plans, specifications or other data heretofore made or property acquired under laws heretofore enacted on the subject may be purchased and used under the provisions of this chapter. [1913, ch. 16, part of § 10, p. 58; compiled and reen. C.L. 168:14; C.S., § 4507; I.C.A., § 41-2516.]

42-2917. Changes in original plans. — The commissioners shall not be confined to the point of commencement, route or terminus of any drain or ditch, or the number, extent or size of the same, or the location, plan or extent of any levee, ditch or other work as proposed by the petitioners, but shall locate, lay out and plan the same in such manner as to them shall seem best designed to promote the public health or welfare and to drain or protect the lands of the parties interested with the least damage and the greatest benefit to all lands to be affected thereby; any plan proposed by the commissioners may, on the application of any person interested, on the hearing hereinafter provided for, or on the application of the commissioners, be altered by the court, by written order, in such manner as shall appear to the court to be just. [1913, ch. 16, part of § 12, p. 58; reen. C.L. 168:15; C.S., § 4508; I.C.A., § 41-2517.]

Cited in: *Boone v. District Court*, 38 Idaho 688, 224 P. 429 (1924).

42-2918. Alteration of boundaries. — If the commissioners find that the proposed district, as described in the petition filed, will not embrace all of the lands that will be benefited by the proposed work, or that it will include lands that will not be benefited and not necessary to be included in said district for any purpose, they may extend or contract the boundaries of

the proposed district so as to include or exclude all such lands, as the case may be; and the boundaries adopted and reported by them may, upon the hearing of their report as hereinafter provided, upon their application or that of any person interested, be altered by the court in such manner as shall appear to be just: provided, the alteration of boundaries as aforesaid shall not have the effect of so far enlarging or contracting the proposed district as to render such petition void or dismissable. [1913, ch. 16, part of § 12, p. 58; reen. C.L. 168:16; C.S., § 4509; I.C.A., § 41-2518.]

Cited in: In re Drainage Dist. No. 1, 30 Idaho 351, 164 P. 1018 (1917); Boone v. District Court, 38 Idaho 688, 224 P. 429 (1924); Field v. Drainage Dist. No. 1, 46 Idaho 248, 267 P. 443 (1928).

42-2919. Report of intention to do work — Notice of hearing on confirmation. — If the commissioners shall find after the investigation referred to that the cost, expenses and damages are more than equal to the increased value which will accrue to the lands within the district, they shall so report and the proceedings shall be dismissed. But if the commissioners shall report that the whole cost of the work including preliminary surveys and expenses, legal assistance and court costs will be less than the increase in value to accrue therefrom, they shall so report to the court, and the court shall then make and enter an order fixing a time and place when and where all persons interested may appear and contest the confirmation thereof, and the clerk of the court shall cause notices of the time and place of said hearing to be given to all parties interested by the publication of a notice thereof for at least three (3) successive weeks prior to the date set for such hearing in one or more newspapers published in said county or counties which notice shall contain a description of all land affected and the amount of the assessments and damages awarded in said report and by personally serving or sending by registered mail a copy of said notice to each landowner at his post-office address insofar as the same can be ascertained, and if not known, then to their last known post-office address, at least twenty (20) days before the date appointed for said hearing, but failure to receive such notice shall not invalidate any assessment. [1913, ch. 16, part of § 10; p. 58; reen. C.L. 168:17; am. 1919, ch. 183, § 5, p. 558; C.S., § 4510; I.C.A., § 41-2519.]

Sec. to sec. ref. Sections 42-2919 — 42-2929 are referred to in § 42-2952.

Cited in: Maxwell v. Terrell, 37 Idaho 767, 220 P. 411 (1923); Neal v. Drainage Dist. No. 2, 42 Idaho 624, 248 P. 22 (1926); Johnston v. Boise City, 87 Idaho 44, 390 P.2d 291 (1964).

ANALYSIS

"Benefits" defined.
Liability of owner.
Limitation on amount of assessments.
Objection to sufficiency of notice.
Sufficiency of notice.

"Benefits" Defined.

Even if conceded that for determining whether drainage district shall be organized the term "benefits" shall mean enhancement

of value, it does not follow that same meaning must be applied in determining how cost of construction shall be levied. Burt v. Farmers Coop. Irrigation Co., 30 Idaho 752, 168 P. 1078 (1917).

Liability of Owner.

The liability of each particular landowner became fixed and determined at the time of the confirmation of the assessment for costs, and the assessments thus imposed became the limit of liability for construction costs. McDonald v. Pritzl, 60 Idaho 354, 93 P.2d 11 (1939).

Limitation on Amount of Assessments.

Where assessments were confirmed by the court, but an amount in excess of such con-

firmed amount was levied by drainage district, but due to failures to pay, the amount actually received did not equal the confirmed amount, a landowner could not be subjected to additional assessments for the difference between the amount collected and the amount proved. *McDonald v. Pritzl*, 60 Idaho 354, 93 P.2d 11 (1939).

Objection to Sufficiency of Notice.

Where objection is made to sufficiency of notice prior to confirmation of proceedings, there must be a more stringent compliance with statutory requirements than when sought to be contested later by one, who properly notified, has waived objection thereto, at time afforded by statute for such objection. *Field v. Drainage Dist. No. 1*, 46 Idaho 248, 267 P. 443 (1928).

Property owner notified of hearing, under this section, could not complain that some other person was not notified, especially where such objection might have been previously urged. *Field v. Drainage Dist. No. 1*, 46 Idaho 248, 267 P. 443 (1928).

Sufficiency of Notice.

Notice addressed to "the landowners and any and all persons or corporations owning or interested in lands included in the territory within the boundaries of" designated drainage district did not substantially comply with requirements of this section of notice to "parties interested." *Boone v. District Court*, 38 Idaho 688, 224 P. 429 (1924).

Collateral References. 25 Am. Jur. 2d, Drains and Drainage Districts, § 45.

28 C.J.S., Drains, § 94.

42-2920. Objections. — Any of the landowners or any person or corporation affected by the work proposed may appear on the day set for hearing said report and remonstrate against the whole or any part of the proposed work. Such remonstrance shall be verified by affidavit, and shall set forth the objections of the affiant, whether they go to the jurisdiction of the commissioners or the court or not, or whether they rest on any other fact, as that some lands are assessed too high or too low or improperly, or that lands are assessed which ought not to be, or that lands should be assessed which are not assessed, or that the plans for said proposed work should be changed, or that the boundaries of said district should be altered so as to include or exclude certain lands, or by any persons or corporations to whom damages are allowed that they are inadequate, or by any person or municipality that the public health or welfare will not be promoted by the proposed work. [1913, ch. 16, part of § 11, p. 58; reen. C.L. 168:18; C.S., § 4511; I.C.A., § 41-2520.]

Cited in: *Boone v. District Court*, 38 Idaho 688, 224 P. 429 (1924); *Johnston v. Boise City*, 87 Idaho 44, 390 P.2d 291 (1964).

Jurisdiction.

Although this section provides right to raise question of jurisdiction, writ of prohibition will not lie to prevent district court from

proceeding to hearing on confirmation of report of drainage commissioners because of lack of jurisdiction. *Maxwell v. Terrell*, 37 Idaho 767, 220 P. 411 (1923).

Collateral References. 25 Am. Jur. 2d, Drains and Drainage Districts, § 46.

28 C.J.S., Drains, § 98.

42-2921. Hearing on confirmation. — The remonstrants shall set forth objections to the confirmation of the report of the commissioners by stating separately, first, legal objections, second, issues of fact to be tried by the court, third, issues of fact to be tried by the jury. The district court of said county shall fix a time for the hearing of the objections giving such proceedings preference over other civil actions pending, and on demand of any person or corporation assessed for the cost of construction or awarded damages, may impanel a jury and take its verdict upon the trial of such issue, whether the amount of damages awarded by the commissioners is adequate, or whether the assessment of any remonstrant demanding the

review is too high, and the court or jury may assess the same. All other issues arising on remonstrance shall be tried by the court, and if the court finds that the report requires modification the same may be referred to the commissioners who may be required to modify it in any respect. The report of the commissioners shall be prima facie evidence of the allegations therein set forth and the remonstrants shall be considered as plaintiffs and have the burden of establishing their objections thereto. In any case between the commissioners and any remonstrant the court may award and apportion the costs; costs awarded against the commissioners shall be paid out of the funds realized for the assessments made. [1913, ch. 16, part of § 11, p. 58; reen. C.L. 168:19; am. 1919, ch. 183, § 6, p. 558; C.S., § 4512; I.C.A., § 41-2521.]

Cited in: Maxwell v. Terrell, 37 Idaho 767, 220 P. 411 (1923); Straus v. Ketchen, 54 Idaho 56, 28 P.2d 824 (1933).

Procedure Optional.

In taking property within drainage district for right of way, it was optional with district whether to invoke proceedings provided for under the general statute governing eminent domain, or to exercise that right under this

chapter. Drainage Dist. No. 2 v. Extension Ditch Co., 32 Idaho 314, 182 P. 847 (1919).

Collateral References. 25 Am. Jur. 2d, Drains and Drainage Districts, §§ 44-47. 28 C.J.S., Drains, § 100.

Statutes in regard to irrigation as special or local legislation regulating practice in courts of justice. 135 A.L.R. 377.

42-2922. Findings and decree. — If the findings be awarded against the validity of the proceedings the same may be dismissed. If the findings be in favor of the validity of the proceedings, the court, after the report shall have been modified to conform to the findings, or if there be no remonstrances, shall confirm the same, and the order of confirmation shall be final and conclusive, the proposed work shall be established and authorized and the proposed assessments approved subject to the right of appeal to the Supreme Court. [1913, ch. 16, part of § 11, p. 58; reen. C.L. 168:20; C.S., § 4513; I.C.A., § 41-2522.]

Cross ref. Appeals, § 42-2924.

Cited in: Straus v. Ketchen, 54 Idaho 56, 28 P.2d 824 (1933).

ANALYSIS

Assessment of benefits.

Conclusiveness of decree.

Assessment of Benefits.

Property owners could not attack assessments of benefits as to their land in a proceeding in 1950 to enjoin tax sale where benefits were originally assessed in 1927, reassessed in 1935, and refunding bond proceeding determined in 1942 from which decrees no appeal was taken as to assessment of benefits. Kelson v. Drainage Dist. No. 10 Boundary County, 77 Idaho 320, 291 P.2d 867 (1955).

An order confirming original assessments in drainage district by the district court is final and conclusive unless an appeal is entered within 30 days of decree. Kelson v. Drainage Dist. No. 10 Boundary County, 77 Idaho 320, 291 P.2d 867 (1955).

Conclusiveness of Decree.

One who had been notified, made no protest against confirmation, and paid assessments thereunder, could not complain in proceedings to enjoin issuance of bonds that notice were insufficient unless defect was one rendering proceedings void. Field v. Drainage Dist. No. 1, 46 Idaho 248, 267 P. 443 (1928).

Collateral References. 25 Am. Jur. 2d, Drains and Drainage Districts, § 46.

42-2923. Supplemental report. — The court may also permit the commissioners to present and file a supplemental report as to any matter

which, pursuant to the provisions of section 42-2914 might have been included in the original report presented by them, and after reasonable notice given to parties adversely interested in such manner as the court may direct, the court may, upon the hearing in the matter, make such order as the same may require. [1913, ch. 16, part of § 11, p. 58; compiled and reen. C.L. 168:21; C.S., § 4514; I.C.A., § 41-2523.]

42-2924. Appeals. — Every person or corporation feeling himself or itself aggrieved by the judgment for damages or the assessment for benefits may appeal to the Supreme Court of this state in the manner provided by law for appeals in civil actions to the Supreme Court within thirty (30) days after the entry of the judgment confirming the report of the commissioners; and such appeal shall bring before the Supreme Court the propriety and justness of the amount of damages or assessment of benefits in respect to the parties to the appeal. Upon such appeal no bond shall be required and no stay shall be allowed. [1913, ch. 16, § 13, p. 58; reen. C.L. 168:22; C.S., § 4515; I.C.A., § 41-2524.]

Cross ref. Appeals in civil actions, §§ 13-201 — 13-203.

Sec. to sec. ref. This section is referred to in § 42-2925.

Cited in: *Field v. Drainage Dist. No. 1*, 46 Idaho 248, 267 P. 443 (1928).

ANALYSIS

Appeal from assessment of benefits.

Bond not required.

Conflict in evidence.

Writ of prohibition.

Appeal from Assessment of Benefits.

An order confirming original assessments in drainage district by the district court was final and conclusive unless an appeal had been entered within thirty days of decree. *Kelson v. Drainage Dist. No. 10 Boundary County*, 77 Idaho 320, 291 P.2d 867 (1955).

Property owners could not attack assessments of benefits as to their land in a proceeding in 1950 to enjoin tax sale where benefits were originally assessed in 1927, reassessed in 1935, and refunding bond proceeding determined in 1942 from which decrees no appeal was taken as to assessment of benefits. *Kelson v. Drainage Dist. No. 10 Boundary County*, 77 Idaho 320, 291 P.2d 867 (1955).

Bond Not Required.

Last sentence of this section controls over portion of first sentence providing that ag-

grieved party "may appeal to the Supreme Court of this state in the manner provided by law for appeals in civil actions to the Supreme Court." In *re Drainage Dist. No. 3*, 40 Idaho 549, 235 P. 895 (1925).

Conflict in Evidence.

There is nothing in this section to take case out of general rule that verdict or judgment in trial court will not be disturbed on account of conflicting evidence where sufficient proof remains to sustain finding. *Burt v. Stuart*, 33 Idaho 138, 190 P. 713 (1920).

Writ of Prohibition.

While it is true that an order complained of, involving waters in an irrigation district, may be reversed on appeal after a final judgment is entered, when it is made to appear that the order in question would probably entail bringing in a couple of hundred defendants and requiring that many answers, and the subsequent calling of a multitude of witnesses to sustain the issues tendered, and the consequent delay and expense it becomes apparent that the remedy by appeal is not adequate, and in these circumstances, a writ of prohibition to prevent the further proceedings under the order will issue. *Nampa & Meridian Irrigation Dist. v. Barclay*, 56 Idaho 13, 47 P.2d 916, 100 A.L.R. 557 (1935).

Collateral References. 25 Am. Jur. 2d, *Drains and Drainage Districts*, § 47. 28 C.J.S., *Drains*, §§ 103-106.

42-2925. Procedure on dismissal of proceedings. — In case the report of the commissioners hereinbefore provided for shall not be confirmed upon the hearing of the objections and remonstrances thereto, the court or judge shall dismiss such proceedings and in such case judgment shall be rendered for the costs and expenses of said proceedings against said district,

and no further proceedings shall be had or done thereon; and in that event the commissioners within thirty (30) days after such dismissal shall file with the clerk of the court a statement of all costs and expenses incurred by them which statement shall be itemized and verified by the oath of one (1) of the commissioners: provided, that in case of such dismissal the said commissioners shall have the right of appeal to the Supreme Court and such appeal shall be taken in the same manner as provided for in section 42-2924. [1913, ch. 16, § 14, p. 58; reen. C.L. 168:23; C.S., § 4516; I.C.A., § 41-2525.]

Costs.

There must be a judgment against district before tax levy can be made by the commis-

sioners to pay costs and expenses contemplated under this section. In re Drainage Dist. No. 5, 39 Idaho 477, 228 P. 881 (1924).

42-2926. Procedure for payment of damages awarded — Determination of conflicting claims. — Any person or corporation claiming to be entitled to any money ordered paid by the court, as provided in this chapter, may apply to the court therefor and upon furnishing evidence satisfactory to the court that he be entitled to the same, the court shall make an order directing the payment to such claimant of the portion of such money as he or it may be found entitled to; but, if upon application, the court or judge thereof shall decide that the title to the land, real estate or premises specified in the application of such claimants is in such condition as to require that an action be commenced to determine the title of claimants thereto, it shall refuse such order until such action is commenced and the conflicting claims to such land, real estate or premises be determined according to law. [1913, ch. 16, § 15, p. 58; reen. C.L. 168:24; C.S., § 4517; I.C.A., § 41-2526.]

Collateral References. Obstruction, diversion, or other interference with the flow of

surface water as a taking or damaging of property. 128 A.L.R. 1195.

42-2927. Lands of state and its subdivisions. — All state, county, school district or other lands belonging to other public corporations requiring drainage shall be subject to the provisions of this chapter, and such corporations, by and through the proper authorities, shall be made parties in all proceedings herein affecting said lands, and shall have the same rights as private persons, and their lands shall be subject to the rights of eminent domain the same as the lands of private persons or corporations. [1913, ch. 16, § 35, p. 58; reen. C.L. 168:25; C.S., § 4518; I.C.A., § 41-2527.]

42-2928. Lands of state and its subdivisions — Assessment. — In case lands belonging to the state, county, school district or other public corporations are benefited by any improvement instituted under the provisions of this chapter, all benefits shall be assessed against said lands, and the same shall be paid by the proper authorities of such public corporations at the same time and in the same manner as assessments are called and paid in cases of private persons, out of any general fund of such corporations. [1913, ch. 16, § 36, p. 58; reen. C.L. 168:26; C.S., § 4519; I.C.A., § 41-2528.]

Cross ref. Lands mortgaged to secure loan of state endowment funds, § 43-2007.

42-2929. Subsequent assessment of public lands. — In case there are any lands included in any drainage district which cannot be assessed because of the title being in the United States government, or because of it being land not yet proved up on [upon], or being Indian land, or for any other reason, then in that event, the drainage commissioners are, at any future date when said lands come under the jurisdiction of the drainage district, authorized to assess said lands for all benefits bestowed, the same as though said lands were originally assessable, and notice of the intention to so assess together with the amounts of assessment filed by the drainage commissioners with the recorder of the county in which said district is located, shall be notice to all subsequent purchasers and encumbrancers. [1913, ch. 16, part of § 41, p. 58; reen. C.L. 168:27; C.S., § 4520; I.C.A., § 41-2529.]

Compiler's notes. The bracketed word "upon" was inserted by the compiler.

42-2930. Additional levy — Notice. — In the event that the amount levied shall be insufficient to complete the contemplated improvement, then the board shall levy an additional assessment sufficient to complete the same, including the cost of collection, and all legal and other proceedings in connection therewith. Such additional levy shall be made against the same property, and in the same proportion against each, as was the original levy, and after approval thereof by the judge, before whom said proceedings are pending, shall be spread on the books of the auditor and tax collector in the same manner as is required in the case of the original levy. A brief general notice of the filing of the application for confirmation of such additional levy shall be published in a newspaper of general circulation in each of the counties in which such district is situate, at least once each week, for three (3) consecutive weeks prior to the date fixed for confirmation. [1919, ch. 183, § 7, p. 558; C.S., § 4521; I.C.A., § 41-2530.]

Sec. to sec. ref. This section is referred to in § 42-2952.

ANALYSIS

- Additional assessments prohibited.
- Liability of owner.
- Limitation on assessments.

Additional Assessments Prohibited.

Where assessments were confirmed by the court, an amount in excess of such confirmed amount was levied by drainage district, and, due to failures to pay, the amount actually received did not equal the confirmed amount, a landowner could not be subjected to additional assessments for the difference between the amount collected and the amount proved. McDonald v. Pritzl, 60 Idaho 354, 93 P.2d 11 (1939).

Liability of Owner.

The liability of each particular landowner became fixed and determined at the time of the confirmation of the assessment for costs, and the assessment thus imposed became the limit of his liability for construction costs. McDonald v. Pritzl, 60 Idaho 354, 93 P.2d 11 (1939).

Limitation on Assessments.

The power to levy assessments for the payment of drainage district bonds is limited as to interest as well as principal to the original assessment of benefits (except as provided by this section and § 42-2931). Breckenridge v. Johnston, 62 Idaho 121, 108 P.2d 833 (1941).

Collateral References. 25 Am. Jur. 2d, Drains and Drainage Districts, § 38. 28 C.J.S., Drains, § 114.

Inclusion of amount to cover delinquencies in assessment for public improvement as con-

trary to constitutional guaranties. 40 A.L.R. 1352; 42 A.L.R. 1185.

42-2931. Additional construction work and assessments. — In any case where the work set out in the plan for drainage as provided in this chapter, or the work or improvements and the system of diking and reclamation constructed or in process of construction, are deemed or found by the board of commissioners of any drainage district at any time before or after the completion thereof to be insufficient or inadequate for any reason or by reason of any occurrence or circumstance, said board may order and cause to be done and constructed (in the manner provided and permitted by this chapter and subject to the judicial proceedings required by this chapter) additional work and improvements for the purpose of rendering sufficient and adequate the work and improvements and system of reclamation and drainage already constructed or for the purpose of reconstructing and for the preservation of the same; and also in any case where in the judgment of said board, new, additional or separate works and improvements (in the nature of original construction or reconstruction work and improvements) shall be or become necessary for the sufficient, safe and adequate drainage and reclamation of said district or for the safety and preservation of the work, improvements and system already constructed, said board may order and cause to be done and constructed such new, additional and separate works and improvements; and a new estimate of benefits may be made in each and all of said cases based on the additional or separate additional work or construction or reconstruction work proposed; and additional assessments for each or all of such additional or separate works and improvements may be made on the lands benefits in conformity with the procedure provided in this chapter as in the case of original construction; and the lands in said district, or any part of such lands, shall be assessed in proportion to the benefits estimated as accruing to such lands because of such additional or separate work and improvements or because of such separate or additional construction and reconstruction work and improvements. The provisions of chapter 29 shall apply to all proceedings had or matters or things done pursuant to the authorization of this section, the necessary substitutions and changes being made because of any variant circumstances. [1913, ch. 16, part of § 41, p. 58; compiled and reen. C.L. 168:28; C.S., § 4522; I.C.A., § 41-2531; am. 1935, ch. 49, § 1, p. 89.]

Compiler's notes. The words enclosed in parentheses so appeared in the law as enacted.

Section 2 of S.L. 1935, ch. 49 is compiled herein as § 42-2952.

Sec. to sec. ref. This section is referred to in § 42-2952.

ANALYSIS

Additional assessments prohibited.

Estoppel to question validity.

Liability of owner.

Limitation on assessments levied.

Remedy of landowner for drainage defects.

Additional Assessments Prohibited.

Where assessments were confirmed by the court, an amount in excess of such confirmed amount was levied by drainage district, and, due to failures to pay, the amount actually received did not equal the confirmed amount, a landowner could not be subjected to additional assessments for the difference between the amount collected and the amount proved. *McDonald v. Pritzl*, 60 Idaho 354, 93 P.2d 11 (1939).

Estoppel to Question Validity.

Party was estopped to question validity of assessment to cover additional expenditures

after improvement had been completed where he was fully aware of all the circumstances of the case and had encouraged the making of such additional expenditures. *Hemenway v. Craney*, 36 Idaho 11, 208 P. 407 (1922).

Liability of Owner.

The liability of each particular landowner became fixed and determined at the time of the confirmation of the assessment for costs, and the assessment thus imposed became the limit of his liability for construction costs. *McDonald v. Pritzl*, 60 Idaho 354, 93 P.2d 11 (1939).

Limitation on Assessments Levied.

The power to levy assessments for payment of drainage district bonds was limited as to interest as well as to principal to the original assessment of benefits (except as provided by § 42-2930 and this section). *Breckenridge v.*

Johnston, 62 Idaho 121, 108 P.2d 833 (1922).

Remedy of Landowner for Drainage Defects.

A landowner was not without a remedy for existing defects in his drainage district since this section provides, where drainage work is found insufficient, for a new estimate of benefits based on additional work to be undertaken, and additional assessments imposed, in proceedings in the state district court for the county in which the district is situated. *Woldson v. Bauman*, 132 F.2d 622 (9th Cir. 1942).

Collateral References. 25 Am. Jur. 2d, Drains and Drainage Ditches, § 38.
28 C.J.S., Drains, §§ 114, 115.

Constitutionality of statutes for formation or change of irrigation districts. 69 A.L.R. 285.

42-2932. Fees for service of process. — Fees for service of all process necessary to be served under the provisions of this chapter shall be the same as for like services in other civil cases, or as is or may be provided by law. [1913, ch. 16, § 37, p. 58; reen. C.L. 168:29; C.S., § 4523; I.C.A., § 41-2532.]

Cross ref. Sheriff's fees, § 31-3203.

42-2933. District court may enforce chapter. — The district court may compel the performance of the duties imposed by this chapter, and may, in its discretion, on proper application therefor, issue its mandatory injunction for such purpose. [1913, ch. 16, § 38, p. 58; reen. C.L. 168:30; C.S., § 4524; I.C.A., § 41-2533.]

Collateral References. 25 Am. Jur. 2d, Drains and Drainage Districts, §§ 48-50.

42-2934. Assessments — When incontestable. — The collection of any assessments of benefits made by the commissioners and confirmed by the court shall not be restrained or obstructed by reason of any omission, imperfection or defect in the organization of any district or in any proceedings occurring prior to the order confirming the assessments of benefits, but such order shall be conclusive as to the regularity of all proceedings relating to the assessments of benefits unless appealed from within thirty (30) days after the entry of such order. [1913, ch. 16, part of § 40, p. 58; reen. C.L. 168:31; C.S., § 4525; I.C.A., § 41-2534.]

Sec. to sec. ref. This section is referred to in § 42-2952.

Collateral References. Failure of property owner to avail himself of remedy pro-

vided by statute or ordinance as precluding attack based on improper inclusion or exclusion of property from assessment. 100 A.L.R. 1298.

42-2935. Assessment roll. — Upon the entering of the order confirming the apportionment of costs and awarding of damages as hereinbefore provided for, the clerk of said court shall immediately prepare a transcript

which shall contain a list of all lands which are so assessed and awarded damages in said report and shall certify the same to the recorder of the county in which said lands are situated and said statement so certified shall specify the amount of the assessment upon each tract, parcel or governmental subdivision, and shall describe all rights of way or easements required by the district and the amount of damages awarded to the owners thereof; and the said county recorder shall thereupon enter such order of record and the same shall be notice of a lien of said assessment of all persons, and shall establish the right of way and easement of the district in and to the lands so described and said district shall be thereafter entitled to enter upon and occupy said lands upon the payment to the owner of the amount of damage so awarded. [1913, ch. 16, part of § 16, p. 58; reen. C.L. 168:32; am. 1919, ch. 183, § 8, p. 558; C.S., § 4526; I.C.A., § 41-2535.]

Cross ref. Right of interested person to demand statement showing amount of lien and total payments, § 42-2967.

Sec. to sec. ref. This section is referred to in § 42-2952.

Cited in: Drainage Dist. No. 2 v. Ada

County, 38 Idaho 778, 226 P. 290 (1924); Field v. Drainage Dist. No. 1, 46 Idaho 248, 267 P. 443 (1928); Straus v. Ketchen, 54 Idaho 56, 28 P.2d 824 (1933).

Collateral References. 28 C.J.S., Drains, § 95.

42-2936. Assessments entered as tax liens — Instalments. — A similar transcript duly certified by the clerk which shall contain a list of the names of all persons and corporations benefited by said improvement and the amount of the assessment upon each lot, parcel or governmental subdivision shall be by said clerk filed with the auditor of the county, who shall immediately enter the same upon the tax rolls of his office, as provided by law for the entry of other taxes, against the land of each of the said persons named in the list, together with the amounts thereof; and the same shall be subject to the same interest and penalties in case of delinquency as in case of general taxes and shall be collected in the same manner as other taxes and subject to the same right of redemption, and the lands sold for the collection of said taxes shall be subject to the same right of redemption, as the sale of land for general taxes; provided, that said assessment shall not become due and payable except at such time or times and in such amounts as may be designated by the board of commissioners of said drainage district, which designation shall be made to the county auditor by said board of commissioners of said drainage district, by serving written notice upon the county auditor designating the time and the amount of the assessment, said assessment to be in proportion to the benefits to become due and payable, which amount shall fall due at the time of the falling due of general taxes, and the amount so designated shall be added by the auditor to the general taxes of said person, persons or corporation, according to said notice, upon the assessment rolls in his said office, and collected therewith: provided further, that no one call for assessment by said commissioners shall be in amount to exceed twenty per cent (20%) of the actual amount necessary to pay the cost of proceedings, and the establishment of said district and drainage system and the cost of construction of said work. In all calls for assessments made under the provisions hereof for the payment or retirement of any bonds or warrants issued subsequent to February 25,

1935 the commissioners shall itemize the various items for which a call is made, specifying the percentage called against the assessment roll for bond interest, bond redemption, warrant interest, warrant redemption, operation and maintenance and any other purpose for which a call is made. The board by resolution shall, prior to any call for the payment or retirement of any bonds or warrants issued subsequent to February 25, 1935, determine separately the interest requirement for bonds and warrants outstanding and shall not make a call or levy for interest payment in excess of the actual amount required stated separately. Calls made for the payment of such prior bonds and warrants issued prior to September 25, 1935 as to itemization thereof, as to the specification of the percentage called against the assessment roll for the foregoing purposes and as to the separate determination of interest requirements for the payment of outstanding bonds and warrants and as to the call or levy in amount for interest or principal payments or for the payment of funding or refunding bonds issued heretofore or hereafter to fund or to refund or to pay any of said prior warrants or bonds, shall be as provided by the statutes of Idaho in effect prior to February 25, 1935. [1913, ch. 16, part of § 16, p. 58; reen. C.L. 168:33; C.S., § 4527; I.C.A., § 41-2536; am. 1935, ch. 55, § 1, p. 103; am. 1939, ch. 229, § 1, p. 512.]

Compiler's notes. Section 2 of S.L. 1935, ch. 55 is compiled herein as § 42-2958.

Section 2 of S.L. 1939, ch. 229 declared an emergency. Approved Mar. 11, 1939.

Sec. to sec. ref. This section is referred to in §§ 42-2952, 42-2962.

Cited in: Drainage Dist. No. 2 v. Ada County, 38 Idaho 778, 226 P. 290 (1924); Field v. Drainage Dist. No. 1, 46 Idaho 248, 267 P. 443 (1928).

ANALYSIS

Assessment not a tax.

Assessment rolls.

Collection of assessment.

Assessment Not a Tax.

Assessment of benefits provided for in this

section is not a tax within the purview and meaning of Const., Art. 7, § 5. *Elliott v. McCrea*, 23 Idaho 524, 130 P. 785 (1913).

Assessment Rolls.

If assessments made by drainage district commissioners are confirmed by the court, and the commissioners are authorized to proceed with the work, then an assessment roll is made up and filed, as provided in section 42-2935 and in this section. *Straus v. Ketchen*, 54 Idaho 56, 28 P.2d 824 (1933).

Collection of Assessment.

Tax officer had no right to refuse to accept payment of general taxes as penalty to enforce payment of drainage assessment. *Booth v. Clark*, 42 Idaho 284, 244 P. 1099 (1926).

42-2937. Assessment to pay judgment of dismissal. — In event of the dismissal of said proceedings, as hereinbefore provided, said drainage commissioners shall levy a tax upon all the real estate within said district, taking as a basis the last equalized assessment of said real estate for state and county purposes sufficient to pay said judgment and the cost of levying said tax, and shall cause said tax roll to be filed in the office of the clerk of the district court in which such judgment was rendered. If said tax is not paid within one (1) year after the filing of said tax roll, the court shall, upon the application of any party interested, direct said real estate to be sold in payment of said tax, said sale to be made in the same manner and by the same officer as is or may be provided by law for the sale of real estate for taxes for general purposes; and the same right of redemption shall exist as in the sale of real estate for the payment of taxes for general purposes. [1913, ch. 16, § 17, p. 58; reen. C.L. 168:34; C.S., § 4528; I.C.A., § 41-2537.]

Levy Without Judgment.

Attempted levy under this section was without authority when no valid judgment for

costs and expenses had been rendered against district. In re Drainage Dist. No. 5, 39 Idaho 477, 228 P. 881 (1924).

42-2938. Construction and maintenance of drainage works — Executive powers of commissioners. — Said board of drainage commissioners hereinbefore provided for shall have the exclusive charge of the construction and maintenance of all drainage systems which heretofore have been or may be hereafter organized under the provisions of this chapter, and shall be the executive officers thereof, with full power to bind such district by their acts in the performance of their duties as provided by law. [1913, ch. 16, part of § 8, p. 58; reen. C.L. 168:35; C.S., § 4529; I.C.A., § 41-2538.]

Appropriator's Right to Seepage.

Drainage district destroying ditch of prior appropriator of waste and seepage water by construction of its drains did not destroy appropriator's rights to such waters. *Sebern v. Moore*, 44 Idaho 410, 258 P. 176 (1927).

Collateral References. 25 Am. Jur. 2d, Drains and Drainage Districts, §§ 27-33.
28 C.J.S., Drains, §§ 58-78.

42-2939. General powers of district. — All drainage districts organized under the provisions of this chapter shall have the right of eminent domain, with power by and through their boards of commissioners to cause to be condemned and appropriated private property for the use of said corporation in the construction and maintenance of a system of drainage, and to make just compensations therefor, to employ engineers, and such other assistants as may be necessary; to survey, plan, locate and estimate the cost of the works necessary for the reclamation of the lands of the district; to acquire and to hold by purchase, condemnation or other legal means, the right of way and the right to take material for the construction of all works necessary for the accomplishment of that object; to build and maintain drains, canals, sluices, bulkheads, water gates, levees and embankments; to establish and maintain pumping plants and to construct and maintain and keep in repair all works requisite and necessary to the end that the lands in the district may be reclaimed.

For the purpose of the drainage of any such district, the whole or any portion of any natural watercourse, or river, which drains such district, may be diked, improved, enlarged, widened, deepened or straightened, or any natural obstruction may be removed therefrom.

Said board of drainage commissioners shall have power to provide by contract for the performance and payment of all or any portion of the work requisite or necessary for the drainage of the lands included within the limits of such district, or to enter into any contract whereby all or any portion of the cost of such work shall be paid, assumed or undertaken by such district, and to do all things requisite or necessary for the drainage of said lands.

Work for the drainage of said lands may be performed either entirely or partly within the limits of such district, or of the county in which such district is located, or entirely or partly within or without the boundaries of any other county, state, territory or foreign country: provided, that the

property of private corporations may be subjected to the same rights of eminent domain as that of private individuals: provided further, that the said board of commissioners shall have power to acquire by purchase all the real property necessary to make the improvements herein provided for. [1913, ch. 16, § 33, p. 58; reen. C.L. 168:36; C.S., § 4530; I.C.A., § 41-2539.]

Collateral References. 25 Am. Jur. 2d, Drains and Drainage Districts, §§ 19-26.
28 C.J.S., Drains, §§ 3-24.

Effect of combination of public and private purposes in exercise of eminent domain for irrigation purposes. 53 A.L.R. 18.

Exercise of eminent domain for purpose of irrigating land of private owner. 9 A.L.R. 583;
27 A.L.R. 519.

42-2940. Construction of works — Contracts. — After the organization of any drainage district, the commissioners of such drainage district shall proceed as soon as they may deem expedient in the construction of said improvements; and in carrying on said construction or any extensions thereof they shall have the power to employ such assistance as they may deem necessary and purchase all materials that may be necessary in the construction and carrying on of the work of said improvements, and shall have power to let the whole or any portion of said work to any responsible contractor; and shall in such case enter into all agreements with such contractor that may be necessary in the premises. [1913, ch. 16, part of § 18, p. 58; reen. C.L. 168:37; C. S., § 4531; I.C.A., § 41-2540.]

Collateral References. 28 C.J.S., Drains, §§ 61-68.

42-2941. Contractors' bonds. — In case the whole or any portion of said improvements is let to any contractor, said commissioners shall require the said contractor to give bond equal to fifty per cent (50%) of the amount of the contract price of the whole, or of the portion of said works covered by said contract, with two (2) or more sureties to be approved by the board of commissioners of said drainage district, and running to said district as obligee therein, conditioned for the faithful and accurate performance of said contract by said contractor, his executors, administrators or assigns, according to the terms and conditions of said agreement and conditioned that said contractor, his executors, administrators or assigns, performing the whole or any portion of said work under contract of said original contractor shall pay or cause to be paid all just claims for all persons performing labor or rendering services in the construction of said work under contract of said original contractor shall pay or cause to be paid all just claims of all persons performing labor or rendering services in the construction of said work, or furnishing materials, merchandise or provisions of any kind or character used by said contractor or subcontractor, or any employee thereof in the construction of said improvements: provided further, that no sureties on said bonds shall be liable thereon for labor, materials or provisions unless the persons or corporations performing said labor and furnishing said materials, goods, wares, merchandise, and provisions, shall within ninety days after the completion of said improvements, file their claim, duly verified, that the amount is just and due and remains

unpaid, with the board of commissioners of said drainage district: and, provided further, that said commissioners before advertising for bids for any work or improvement may by resolution provide that said original contractor shall pay or cause to be paid monthly all just claims for all persons performing labor or rendering services in the construction of said work, or furnishing materials, merchandise or provisions of any kind or character used by said contractor or subcontractor or any employee thereof in the construction of said improvements; and before any second or subsequent estimate is paid to the said contractor said payments as aforesaid shall be evidenced by signed vouchers or waivers, filed with the commissioners, and such other evidence by affidavit, or otherwise, as the commissioners may require, and in which event the bond required for the faithful and accurate performance of the contract shall be twenty-five per cent (25%) of the contract price, and in advertising for proposals for bids the said proposals shall set forth that the contract will be let in accordance with the terms of said resolution as to the amount of the bond and the requirement for the payment as aforesaid of all bills for labor, materials, goods, wares, merchandise and provisions, but failure to make monthly settlement of all accounts as herein provided shall not invalidate the bond so furnished by said contractor. [1913, ch. 16, part of § 18, p. 58; reen. C.L. 168:38; am. 1919, ch. 183, § 9, p. 558; C.S., § 4532; I.C.A., § 41-2541.]

42-2942. Commencement and progress of work. — The work on said improvement shall begin at a point or at points to be determined by said commissioners, and said work shall be completed with all expedition possible, and said board of commissioners of such drainage district, or any contractor thereunder, shall have no power whatever to change such route or system of improvements or the manner of doing the work therein so as to make any radical changes in said improvements, without the written consent of all of the landowners to be benefited thereby, and of the landowners who may be damaged thereby. [1913, ch. 16, part of § 19, p. 58; reen. C.L. 168:39; C.S., § 4533; I.C.A., § 41-2542.]

42-2943. Change of plans — Procedure in district court. — In case any substantial changes in said system of improvement, or the manner and construction thereof, shall be deemed necessary by said board of commissioners at any time during the progress thereof, and the written consent to such changes cannot be procured from said landowners, then said commissioners for and on behalf of said district, shall file a petition in the district court of the county within which said district is located, setting forth therein the changes which they deem necessary to be made in the plans or manner of the construction of said improvement, and praying therein to be permitted to make such changes.

Upon the filing of said petition the court shall cause a summons to be served, setting forth the prayer of said petition under the seal of the said court, which summons shall be served in the same manner as the service of summons in the case of the original petition, upon all the landowners or other persons having any lien or interest therein appearing of record in said district.

Any or all of said parties so served may appear in said cause and submit their objections thereto and after the time for the appearance of all said parties has expired, the court shall proceed to hear said petition at once, and if it appears during the course of said proceedings that the property rights of any of said landowners will be affected by such proposed change in said improvements, then the court, after having passed upon all preliminary questions as in the original proceedings, may call a jury to be impaneled in the manner provided by the Code of Civil Procedure, and upon the final hearing of said case the jury shall return a verdict finding the amount of damages, if any, sustained by all persons and corporations, the same as upon the original petition by reason of such proposed change, and the amount of compensation to be paid to any persons or corporation therefor, and for any additional right of way that may be necessary to be appropriated. [1913, ch. 16, part of § 19, p. 58; compiled and reen. C.L. 168:40; C.S., § 4534; I.C.A., § 41-2543.]

Service of Summons.

This section does not require service of summons as in civil actions, but it is sufficient if it be "served in the same manner as the

service" in case of original petition. *Field v. Drainage Dist. No. 1*, 46 Idaho 248, 267 P. 443 (1928).

42-2944. Payments to contractors. — During the construction of said improvement, said commissioners shall have the right to allow payment thereof, in instalments as the work progresses, in proportion to the amount of work completed: provided, that no allowance or payment shall be made for said work to any contractor or subcontractor to exceed ninety per cent (90%) of the proportionate amount of the work completed by such contractor or subcontractor, and ten per cent (10%) of the contract price shall be reserved at all times by said board of commissioners until said work is wholly completed, and shall not be paid upon the completion of said work until ninety (90) days have expired for the presentation of all claims for labor performed and materials, goods, wares, merchandise and provisions furnished or used in the construction of said improvements. Upon the completion of said work and the payment of all claims hereinbefore provided for according to the terms and conditions of said contract, said commissioners shall accept said improvement and pay the contract price therefor. [1913, ch. 16, § 20, p. 58; reen. C.L. 168:41; am. 1919, ch. 183, § 10, p. 558; C.S., § 4535; I.C.A., § 41-2544.]

Confirmation of Assessment Roll.

After confirmation of a drainage district assessment roll by the court, the commission-

ers had the power to proceed with construction of the works and to pay therefor. *Straus v. Ketchen*, 54 Idaho 56, 28 P.2d 824 (1933).

42-2945. Connections by private drains — Costs. — Any person or corporation owning land within said district shall have a right to connect any private drains or ditches for the proper drainage of such land with said system, and in case any person or corporation shall desire to drain such lands into said system, and shall find it necessary, in order to do so, to procure the right of way over the land of another, or others, and if consent thereto cannot be procured from such person or persons, then such land-

owner may present in writing a request to the board of commissioners of said district, setting forth therein the necessity of being able to connect his private drainage with said system, and pray therein that said system be extended to such point as he may designate in said writing, and immediately thereon said board of commissioners shall cause a petition to be filed in the district court for and in the name of said drainage district, requesting, in said petition, that said system be extended as requested, setting forth therein the necessity thereof and praying that leave be granted by the board to extend the system in accordance with the prayer of said petition, and the proceedings in such case, upon the presentation of such petition and the hearing thereof shall be, in all matters, the same as in the hearing and presentation of the original petition, for the establishment of the original system of drainage in said district, as far as applicable.

The costs in such proceedings shall be paid from the assessment of benefits to be made on the lands of the person or persons benefited by such extension, and the assessment and compensation for the right of way, damages and benefits and payment of damages and compensation, and the collection of the assessments for benefits shall be the same as in the proceedings under the original petition, and the construction of the said extension shall be made under the same provisions as the construction of the original improvement; and all things that may be done or performed in connection therewith shall be, as near as may be applicable, in accordance with the provisions already set forth herein for the establishment and construction of said original improvement: provided, that such petitioner or petitioners shall, at the time of filing such petition by said drainage commissioners, enter into a good and sufficient bond to said drainage district, in the full penal sum of \$500, with two or more sureties to be approved by the court, conditioned for the payment of all costs in case the prayer of said petitioner shall not be granted, which bond shall be filed in said court. [1913, ch. 16, § 21, p. 58; reen. C.L. 168:42; C.S., § 4536; I.C.A., § 41-2545.]

42-2946. Connection of district with lower district — Costs. — In case of the establishment of a drainage district and system of drainage under the provisions of this chapter above any other district that may theretofore have been established, and above any other system of drainage that may have theretofore been constructed in said district, and in case said district to be established above may desire to connect its drainage system with the lower or servient district, the latter district shall be made a party to the proceedings for the establishment of such system, and the petition to be filed in the district court for the establishment of the system of drainage in said upper district shall in addition to the facts hereinbefore provided and required to be set forth therein, set forth the fact that said lower system in said lower district is necessary to be used as an outlet for the system of drainage of said upper district, and that the same will be sufficient outlet and will afford sufficient capacity to carry the drainage of both said upper and lower districts; and in case said system of said lower district will be required to be enlarged by widening or deepening the same, or both, in order

to give sufficient outlet to said upper district and afford sufficient drainage for said upper and lower districts, then the plans and specifications for enlarging the system of said lower district shall be filed with said petition in addition to the other data hereinbefore provided for in this chapter.

All the landowners in said lower district, or any person claiming interest therein as mortgagee or otherwise, shall be made parties defendant in said petition, and the proceedings therein as to the assessment of damages and compensation for land taken, if any be necessary to be taken in enlarging said lower system, shall be the same as in the establishment of systems of drainage in the lower or servient district as hereinbefore provided for; but the jury, in addition to the facts to be found by them as provided for in the establishment of a drainage system in the lower district, shall find and determine whether said lower system, when improved according to the plans and specifications filed with the said petition, will afford sufficient drainage for both said upper and lower districts, which finding shall be made by the jury before considering any other question at issue in said proceedings, and in case said jury should find that the system of said lower district when improved as proposed in said petition would not be sufficient, then in that case said findings shall terminate the proceedings, and no further proceedings in said case shall be had, and the costs of said proceedings shall be paid as costs in other proceedings, as hereinbefore provided for; but in such case the finding of said jury shall not terminate the objects of said upper district or operate to disorganize the same, but said upper district may begin new proceedings for the establishment of a system of drainage with some new outlet provided therein.

All costs for the enlarging or improving of said lower system that may be required, shall be assessed to the landowners in the upper district according to the benefits to be derived from the construction of said entire system, and no additional cost shall be thrown upon the lower district, and all compensation for taking any right of way that may be necessary to be taken in enlarging said lower system and all damages occurring therefrom, if any, to the landowners of said lower district, shall be ascertained and paid in the same manner as hereinbefore provided for the adjustment of compensation and damages in the establishment of drainage systems in lower districts.

Said lower district, by and through its board of commissioners, may appear in said cause and show therein any injury it may sustain as a district by reason of the additional cost of maintenance per annum which will be sustained by said lower district by reason of said enlarging or improving of the same, and judgment shall be rendered in favor of said lower district against said upper district for such an amount as found, and the same shall be paid each year as the cost of construction is paid as provided for in this chapter, and the amount so paid shall be held by said lower district as an additional fund for the maintenance of its said system as improved and enlarged by said upper district. [1913, ch. 16, § 22, p. 58; reen. C.L. 168:43; C.S., § 4537; I.C.A., § 41-2546.]

42-2947. Use of natural watercourses and previously constructed works. — The whole or any portion of any natural watercourse which

drains any district established under this chapter, or the whole or any portion of any ditch or drainage system already constructed or partially constructed prior to the passage of this chapter, or which may be constructed subsequent thereto, may be improved and completed as a system under the provisions of this chapter: provided, that the owner or owners of any land upon or in which any drainage system has been established or constructed in whole or in part or which may hereafter be constructed in whole or in part, may take advantage of the provisions of this chapter to organize same as a drainage district, for the purpose of completing same or for the purpose of making provision for the payment or funding of any indebtedness incurred in the construction of such system, or either; and providing for the maintenance thereof. The procedure to be followed in such case shall be the same as is herein provided for the organization of a drainage district in the first instance to the extent that same is applicable to the situation: provided, that the necessary changes and substitutions therein may be made: provided further, that in the improvement of any natural watercourse, the rights of the public therein for the purpose of navigation shall not be in any wise impaired. [1913, ch. 16, § 24, p. 58; am. 1915, ch. 42, § 3, p. 123; reen. C.L. 168:44; C.S., § 4538; I.C.A., § 41-2547.]

Cited in: In re Drainage Dist. No. 1, 29 Idaho 377, 161 P. 315 (1916); Burt v. Farmers Coop. Irrigation Co., 30 Idaho 752, 168 P.

1078 (1917); Nampa & Meridian Irrigation Dist. v. Petrie, 37 Idaho 45, 223 P. 531 (1923).

42-2948. Construction of dikes along public roads. — In the construction of any diking system under the provisions of this chapter, where it is desired to construct the same along the right of way of any public road which has theretofore been legally established, said district shall have a right to construct its dikes along such road: provided, that the dikes so constructed along such road shall not destroy or impair the same for use as a public highway; and in case of the construction or improvement of any dike along any public highway, such dike shall be constructed of sufficient width and in such manner as will be of use as a public highway. [1913, ch. 16, § 39, p. 58; reen. C.L. 168:45; C.S., § 4539; I.C.A., § 41-2548.]

Compiler's notes. The words "this chapter" refer to §§ 42-2901 — 42-2964.

42-2949. Payments of claims — Option for deposit and disbursement of funds — Issuance of checks or warrants — Investment of funds. — (1) The board of commissioners may issue warrants of such district, in payment of claims of indebtedness against such district; such warrants shall be in form and substance the same as county warrants, or as near the same as may be practicable and shall draw the legal rate of interest from the date of their presentation to the treasurer for payment, as hereinafter provided, and shall be signed by the chairman and attested by the secretary of said board: provided, that no warrants shall be issued by said board of commissioners in payment of any indebtedness of such district for less than face or par value.

(2) The board of commissioners may, in the alternative and as an option to subsection (1) of this section, elect by resolution to receive moneys due the district from the levy of taxes, assessments and other sources, to provide for the safekeeping and deposit of such moneys in accordance with the provisions of chapter 1, title 57, Idaho Code, and to pay all claims of indebtedness of the district allowed and approved by either warrant or check. If a drainage district elects this option, a certified copy of said resolution shall be served upon the board of county commissioners, the county auditor and the county treasurer. Upon allowance of claims by the board of commissioners, payment may be ordered by warrant or check signed by the chairman and the secretary. The secretary may be directed by resolution or order of the board to invest surplus funds in accordance with and subject to the provisions of chapter 1, title 57, Idaho Code, and section 50-1013, Idaho Code. The board of commissioners shall cause to be kept an accurate account of all moneys received, the sources from whence received, all moneys expended and the purposes to which applied. [1913, ch. 16, part of § 6, p. 58; reen. C.L. 168:46; C.S., § 4540; I.C.A., § 41-2549; am. 1983, ch. 60, § 1, p. 139.]

Sec. to sec. ref. This section is referred to in § 42-2950.

42-2950. Warrants — Payment — Interest. — (1) All warrants issued under the provisions of this chapter shall be presented by the holder thereof to the county treasurer, who shall indorse thereon the day of presentation for payment, with the additional indorsement thereof in case of nonpayment that they are not paid for want of funds; and no warrant shall draw interest under the provisions of this chapter until it is so presented and indorsed by the county treasurer. And it shall be the duty of such treasurer, from time to time, when he has sufficient funds in his hands for that purpose, to advertise in the newspaper doing the county printing for the presentation to him for payment of as many of the outstanding warrants as he may be able to pay: provided, that thirty (30) days after the first publication of said notice of the treasurer calling in any of said outstanding warrants, said warrants shall cease to bear interest, which shall be stated in the notice. Said notice shall be published two (2) weeks consecutively, and said warrants shall be called in and paid in the order of their indorsement.

(2) If a board of commissioners has elected and complied with the provisions of section 42-2949(1), Idaho Code, and in the absence of funds to pay warrants issued, the board may by resolution order payment of warrants presented by registering such warrants as hereinafter provided, and at the same time shall prescribe the interest rate said warrants shall draw. All warrants issued shall be presented to the secretary of a drainage district by the persons holding the same. If there are insufficient funds to pay the warrants presented, the secretary must indorse thereon "not paid for want of funds," the date of indorsement, the rate of interest such warrant shall draw as fixed by resolution of the board of commissioners, and sign his name thereto; and thereafter the said warrant shall draw interest at the rate specified in such indorsement until called for payment. Warrants issued

by a drainage district shall be paid in the order of their issuance from funds accruing for the year in which they are issued. After all outstanding indebtedness for any one (1) year has been paid, any balance for that year shall be transferred to a warrant redemption fund for payment of uncalled registered warrants. Where there is no outstanding indebtedness nor any uncalled registered warrants, any balance may be used for the payment of current expenses for the next fiscal year. [1913, ch. 16, § 32, p. 58; reen. C.L. 168:47; C.S., § 4541; I.C.A., § 41-2550; am. 1983, ch. 60, § 2, p. 139.]

Cross ref. Nonpayment of warrants for want of funds, indorsement, interest rate, §§ 31-2124, 31-2125.

Issuance and Payment of Warrants.

Under this section, the commissioners have the power to issue and pay warrants. *Straus v. Ketchen*, 54 Idaho 56, 28 P.2d 824 (1933).

42-2951. Legalization of warrants issued under former act. — Whenever any territory of the state of Idaho heretofore organized as a drainage district under the provisions of sections 2444 to 2483 inclusive, of the Revised Codes, shall be hereafter organized as a drainage district under the provisions of a subsequent drainage law, all debts incurred and warrants issued by the commissioners of said drainage district as heretofore organized, shall be and hereby are made legal and valid obligations against the district as organized under such subsequent drainage law: provided, however, that all debts incurred and warrants issued shall be reported to the district court by the commissioners who incurred said indebtedness or issued said warrants, or by any one of said commissioners, under oath, and be certified to as correct by the district judge of the county in which said district was located; and after such certification said district judge shall order a levy made for the payment of said obligations, and the taxes shall be collected the same as general taxes are collected: provided, however, that any creditor of any drainage district organized under sections 2444 to 2483 inclusive, of the Revised Codes, shall have the right of suit against said district, after reasonable notice of his claim to the commissioners therein, and their neglect or refusal to report said claim to the district court for certification as to its correctness: provided further, that in cases where the district as organized under a subsequent drainage law shall include other lands than were included in the district originally organized under sections 2444 to 2483 inclusive, of the Revised Codes, upon the certification of the correctness of the debts incurred and warrants issued by the commissioners of said district, by the district judge as herein provided, such debts incurred and warrants issued shall be deemed to be obligations upon the lands embraced within the limits of the district as originally organized under said sections 2444 to 2483 inclusive, of the Revised Codes, and be collected as herein provided. [1913, ch. 17, § 1, p. 58; reen. C.L. 168:48; C.S., § 4542; I.C.A., § 41-2551.]

Sec. to sec. ref. This section is referred to in § 42-2952.

42-2952. Bonds authorized. — Upon the establishment of any drainage district under the provisions of this chapter, and the establishment of a system of drainage therein as provided for in this chapter, the board of commissioners of such drainage district are hereby authorized to issue bonds to pay for the total cost of the work and improvements incurred or to be incurred, or of the part of the work and improvements assumed or contracted for, or to be assumed or contracted for, together with the cost of the organization of said district, and the establishment thereof, including damages assessed and compensation made or to be made to landowners for right of way, and the expense and cost of the entire proceedings, payable as provided by section 42-2954: provided, that no bonds shall, under the provisions hereof, be sold for less than their par value; and, provided further, that the total amount of the foregoing bonds shall not exceed ninety per cent (90%) of the assessments levied against the lands of the district for the payment of the cost and expense of the foregoing items.

The board of commissioners of any such drainage district is also hereby authorized to issue additional bonds, in an amount equal to, and payable from, the additional assessments which may be levied pursuant to and under the authorization expressed in section 42-2930.

The board of commissioners of any such drainage district is also authorized to issue additional bonds sufficient in amount to pay the total cost of the additional work and improvements and of the separate and additional works and improvements authorized by the foregoing section 42-2931 including the cost and expense of the costs of collection of the assessments therein authorized and of all legal and other proceedings incident to or had in connection with the ordering, authorization and doing of all such works and improvements by said board of commissioners or in connection with the court proceedings which shall be had under the provisions of this chapter.

The board of commissioners of any such drainage district is also authorized to issue additional bonds sufficient in amount to pay and redeem all or any part of the outstanding warrant or other indebtedness of said district, together with interest accrued thereon. The funding hereby authorized may be accomplished by the exchange of such funding bonds for the warrant indebtedness or other indebtedness thus to be funded, if consented to by the board of commissioners and by the owners of such outstanding warrants and other indebtedness; provided that such funding bonds shall not bear a higher rate of interest than the warrants and other indebtedness thereby funded and that such funding bonds shall be exchanged at not less than their par value and accrued interest; provided, however, that no warrant or other indebtedness shall be funded under the provisions of this paragraph, except such warrants and other indebtedness which have been issued and incurred prior to July 1, 1935.

In the event that the owners of such outstanding warrants and other indebtedness shall not consent to such exchange, such funding bonds shall be sold as required by section 42-2953, and such warrants and other outstanding indebtedness and obligations shall be called and retired as provided in said section 42-2953; provided, that all funds in the treasury of such district available for the payment or redemption of such warrants and

other indebtedness shall be first applied to the payment and redemption of such warrants and other indebtedness together with the interest accrued thereon, and such funding bonds shall be issued for the retirement of the indebtedness remaining unpaid.

The foregoing bonds may be issued jointly or separately, as a unit bond issue or as separate bond issues as determined by the board of commissioners. Any or all of the bond issues authorized by this section may also be issued, if deemed advisable by the board of commissioners, as a part of a joint bond issue with drainage district refunding bonds authorized by and issued under the provisions of chapter 30 or under any other enabling acts of this state. The foregoing bonds shall be payable solely out of and from the assessments for benefits levied upon and a lien upon the lands within such drainage district, as provided elsewhere in this chapter; and all said assessments (as to the determination, apportionment and assessment thereof, objections thereto and hearing thereon and confirmation thereof, as to their nature and existence as a lien upon the lands thus assessed, as to appeals therefrom and their incontestability, as to the certification and entry thereof of record and upon the tax rolls of the county, as to collection thereof and as to tax sale of delinquent lands and redemption thereof, as to the times when such assessments shall become due and payable and be called and in what amounts, as to annual levies thereof for the liquidation of bonds at maturity and for the payment of interest thereon; and as to the mode, manner and time of doing all the foregoing, and in all other respects), shall be governed by, and shall be provided in, sections 42-2914, 42-2915, 42-2919 to 42-2929, inclusive and section 42-2934 to section 42-2936, both inclusive, and sections 42-2956 and 42-2958, and the other related provisions, of chapter 29 and as provided in this act. Provided that the foregoing funding bonds shall be paid by assessments levied upon and apportioned over the lands within the drainage district as provided by sections 42-2951 and 42-2962. [1913, ch. 16, parts of § 25, p. 58; reen. C.L. 168:49; am. 1919, ch. 183, § 11, p. 558; C.S., § 4543; I.C.A., § 41-2552; am. 1935, ch. 49, § 2, p. 89.]

Compiler's notes. The words enclosed in parentheses so appeared in the law as enacted.

The words "this act" refer to §§ 42-2901 — 42-2964.

Section 1 of S. L. 1935, ch. 49 is compiled herein as § 42-2931.

ANALYSIS

Changes after issue.

Constitutionality.

Effect of statutes and decisions.

Payment for bonds.

Power to levy assessments.

Changes After Issue.

The obligation under bonds issued in a drainage district cannot thereafter, by legislation, be changed, since to do so would im-

pair the obligation of contract as to any bonds issued prior to the passage of such legislation. *Straus v. Ketchen*, 54 Idaho 56, 28 P.2d 824 (1933).

Constitutionality.

Provisions for bonding of drainage district without vote of the people within district is not in violation of Const., Art. 8, § 3, indebtedness here provided for not being a municipal indebtedness contemplated by the constitution. *Elliott v. McCrea*, 23 Idaho 524, 130 P. 785 (1913).

Effect of Statutes and Decisions.

Drainage district bonds are governed by the statutes and decisions in force at the time of their issuance in as full and ample a manner as if the same had been written into the bonds

themselves. *Straus v. Ketchen*, 54 Idaho 56, 28 P.2d 824 (1933).

Payment for Bonds.

Where a drainage district receives par value for bonds issued, but such par value consists in exchange for its bonds and warrants, no violation of this section takes place. *McDonald v. Pritzl*, 60 Idaho 354, 93 P.2d 11 (1939).

Power to Levy Assessments.

The power to levy assessments for the payment of drainage district bonds is limited as to interest as well as principal, except as

provided by sections 42-2930 and 42-2931, to the original assessment of benefits. *Breckenridge v. Johnston*, 62 Idaho 121, 108 P.2d 833 (1940).

Where the drainage district statute confers no power upon drainage districts to pay or levy assessments for the payment of after-maturity interest, administrative construction must and will be disregarded. *Breckenridge v. Johnston*, 62 Idaho 121, 108 P.2d 833 (1940).

Collateral References. 12 Am. Jur. 2d, Bonds, §§ 1-3, 25, 49, 50.
11 C.J.S., Bonds, §§ 1-4, 31-37.

42-2953. Funding bonds. — Such commissioners may, at any time thereafter, issue such bonds in the manner and form herein prescribed for the purpose of funding any outstanding warrants or obligations of such district. In case of such last-named issue all the outstanding warrants shall immediately become due and payable upon receipt of the money by the county treasurer from the sale of said bonds, and upon a call of such outstanding obligations to be issued by him. Such call shall be made by said treasurer immediately upon the receipt of the proceeds from the sale of said bonds, by publication for two (2) consecutive weeks in the county paper authorized to do the county printing, and such warrants and outstanding obligations shall cease to draw interest at the end of thirty days after the date of the first publication. [1913, ch. 16, part of § 25, p. 58; reen. C.L. 168:50; C.S., § 4544; I.C.A., § 41-2553.]

Cross ref. Refunding bonds, §§ 42-3001 — 42-3009.

Sec. to sec. ref. This section is referred to in § 42-2952.

42-2954. Form of bonds — Interest — Maturities. — Said bonds shall be numbered from one (1) upward, consecutively, and be in denominations of not less than \$100 nor more than \$1000. They shall bear the date of issue, shall be made payable to the bearer and bear interest, payable semiannually, with coupons attached for each interest payment. The bonds shall be signed by the chairman of the board of drainage commissioners, and shall be attested by the secretary of said board, and the seal of such district shall be affixed to each bond, but not to the coupons. The coupons may be signed by the facsimile lithographed or engraved signatures of the said officers.

The board of commissioners shall fix the maturities of said bonds not exceeding forty (40) years from the date of their issuance and an amortization period which shall be not less than three-fourths ($\frac{3}{4}$) of the maximum maturity. During the first fourth of the period covered by the last maturity provision may be made, in the discretion of the board, for the payment of interest only. Maturities shall be so arranged that during at least the latter three-fourths ($\frac{3}{4}$) of the period covered by the last maturity the principal shall be amortized by payments thereof in annual or semi-annual instalments so arranged as to maturities that the combined principal and

interest payments during the amortization period shall be approximately the same each year. Said bonds shall be payable at such place within or without the state of Idaho as may be designated by the board of commissioners. The issuing drainage district may reserve the right to redeem said bonds or any of them at any time after ten (10) years from date thereof. [1913, ch. 16, § 26, p. 58; reen. C.L., 168:51; C.S., § 4545; am. 1927, ch. 179, § 1, p. 242; am. 1927, ch. 254, § 1, p. 429; am. 1929, ch. 78, § 1, p. 116; I.C.A., § 41-2554; am. 1935, ch. 49, § 3, p. 89; am. 1970, ch. 133, § 6, p. 309.]

Compiler's notes. Sections 5 and 7 of S.L. 1970, ch. 133 are compiled herein as §§ 42-1741, 42-3221.

Sec. to sec. ref. This section is referred to in §§ 42-2952, 42-2956.

ANALYSIS

Bonds payable in numerical order.
Power to levy assessments.

Bonds Payable in Numerical Order.

A statutory requirement that drainage district bonds be paid in their numerical order must be complied with, and it is a right upon which bondholders may insist. *Straus v. Ketchen*, 54 Idaho 56, 28 P.2d 824 (1933).

Power to Levy Assessments.

The power to levy assessments for the payment of drainage district bonds is limited as to interest as well as principal, except as provided by sections 42-2930 and 42-2931, to the original assessment of benefits. *Breckenridge v. Johnston*, 62 Idaho 121, 108 P.2d 833 (1940).

Where the drainage district statute confers no power upon drainage districts to pay or levy assessments for the payment of after-maturity interest, administrative construction must and will be disregarded. *Breckenridge v. Johnston*, 62 Idaho 121, 108 P.2d 833 (1940).

Collateral References. 11 C.J.S., Bonds, § 9.

42-2955. Exchange of bonds for warrants. — Said bonds may be exchanged at not less than their par value for an equal amount of the warrants of the district issuing such bonds. [1913, ch. 16, § 27, p. 58; reen. C.L. 168:52; C.S., § 4546; I.C.A., § 41-2555.]

42-2956. Levy for sinking fund. — At least one (1) year before the first principal maturity of said bonds (as fixed by the board of commissioners pursuant to section 42-2954) and thereafter annually, the drainage commissioners of such district issuing them are hereby authorized and required to levy an assessment sufficient to liquidate said bonds at their respective maturities. Such assessment shall be collected by the official whose duty it is to collect the county taxes, and kept as a separate fund for the sole purpose of liquidating said bonds in accordance with the provisions of the following section. The annual levies of assessments to pay bonds issued prior to the effective date of this amendment shall be made according to the law in existence at the time of the issuance of said prior bonds and according to the maturity needs thereof. [1913, ch. 16, § 28, p. 58; reen. C.L. 168:53; C.S., § 4547; I.C.A., § 41-2556; am. 1935, ch. 49, § 4, p. 89.]

Compiler's notes. As enacted, the figures "42-2954" read "51-2554 of Idaho Code Annotated." The figures "51-2554" were obviously erroneous since there was no such section number in the Idaho Code. It is believed that

§ 41-2554 of the Idaho Code Annotated was intended, which section is § 42-2954 herein.

The words enclosed in parentheses so appeared in the law as enacted.

Section 5 of S.L. 1935, ch. 49 declared an

emergency. Approved Feb. 25, 1935.

Sec. to sec. ref. This section is referred to in § 42-2952.

Cited in: Booth v. Clark, 42 Idaho 284, 244 P. 1099 (1926).

Power to Levy Assessments.

The power to levy assessments for the payment of drainage district bonds is limited as to interest as well as principal, except as provided by sections 42-2930 and 42-2931,

to the original assessment of benefits. Breckenridge v. Johnston, 62 Idaho 121, 108 P.2d 833 (1940).

Where the drainage district statute confers no power upon drainage districts to pay or levy assessments for the payment of after-maturity interest, administrative construction must and will be disregarded. Breckenridge v. Johnston, 62 Idaho 121, 108 P.2d 833 (1940).

42-2957. Calling of bonds. — It shall be the duty of the treasurer of any county in which there may be a district issuing bonds under the provisions of this chapter whenever he has upon hand \$5000 of the special fund for the payment of said bonds, and when said bonds shall have run for a period of three (3) years, to advertise in the newspaper doing the county printing, for the presentation to him for payment of as many of the bonds issued under the provisions of this chapter as he is able to pay with the funds in his hands, to be paid in numerical order of said bonds, beginning with the bond number one (1), until all of said bonds are paid: provided, that thirty (30) days after the first publication of said notice of the treasurer calling in any of said bonds, said bonds shall cease to bear interest. [1913, ch. 16, § 29, p. 58; reen. C.L. 168:54; C.S., § 4548; I.C.A., § 41-2557.]

Cross ref. Pro rata payment, § 42-2977.

Cited in: Drainage Dist. No. 2 v. Ada County, 38 Idaho 778, 226 P. 290 (1924).

ANALYSIS

Application of delinquent payments.

Bonds payable in numerical order.

Contract obligation of bonds.

Effect of chapter 30.

Limitation on power to levy assessments.

Application of Delinquent Payments.

If delinquencies as to assessments of costs are paid late, such funds should be paid by the drainage district on outstanding bonds in their numerical order. McDonald v. Pritzel, 60 Idaho 354, 93 P.2d 11 (1939).

Bonds Payable in Numerical Order.

A statutory requirement that drainage district bonds be paid in their numerical order must be complied with, and it is a right upon which bondholders may insist. Straus v. Ketchen, 54 Idaho 56, 28 P.2d 824 (1933).

Contract Obligation of Bonds.

Where bonds have been outstanding for five years, contract obligation thereof was not impaired by issuance of refunding bonds under chapter 30 of this title. Sebern v. Cobb, 41 Idaho 386, 238 P. 1023 (1925).

Contract obligation of bonds which could not have been paid by proceeds of assessments under this chapter was impaired by calling such bonds for refunding, although they had been outstanding for three years. Sebern v. Cobb, 41 Idaho 386, 238 P. 1023 (1925).

Effect of Chapter 30.

Session Laws 1925, ch. 21 (ch. 30 of this title) does not alter method of calling outstanding bonds which have run for period of three years. Sebern v. Cobb, 41 Idaho 386, 238 P. 1023 (1925).

Limitation on Power to Levy Assessments.

The power to levy assessments for the payment of drainage district bonds is limited as to interest as well as principal, except as provided by sections 42-2930 and 42-2931, to the original assessment of benefits. Breckenridge v. Johnston, 62 Idaho 121, 108 P.2d 833 (1940).

Where the drainage district statute confers no power upon drainage districts to pay or levy assessments for the payment of after-maturity interest, administrative construction must and will be disregarded. Breckenridge v. Johnston, 62 Idaho 121, 108 P.2d 833 (1940).

42-2958. Levy for interest. — It shall be the duty of such drainage commissioners annually to levy an assessment sufficient for the payment of

the coupons hereinbefore mentioned as they fall due. [1913, ch. 16, § 30, p. 58; reen. C.L. 168:55; C.S., § 4549; I.C.A., § 41-2558; am. 1935, ch. 55, § 2, p. 103.]

Compiler's notes. Section 1 of S. L. 1935, ch. 55 is compiled herein as § 42-2936.

Section 3 of S. L. 1935, ch. 55 declared an emergency. Approved Feb. 25, 1935.

Sec. to sec. ref. This section is referred to in § 42-2952.

Cited in: Drainage Dist. No. 2 v. Ada County, 38 Idaho 778, 226 P. 290 (1924); Booth v. Clark, 42 Idaho 284, 244 P. 1099 (1926).

ANALYSIS

Interest not construction cost.

Limitation on power to levy assessments.

Interest Not Construction Cost.

Interest does not come within the limit of construction costs, and bondholders are entitled to their interest, and levies should be

made to pay therefor. McDonald v. Pritzl, 60 Idaho 354, 93 P.2d 11 (1939).

Limitation on Power to Levy Assessments.

The power to levy assessments for the payment of drainage district bonds is limited as to interest as well as principal, except as provided by sections 42-2930 and 42-2931, to the original assessment of benefits. Breckenridge v. Johnston, 62 Idaho 121, 108 P.2d 833 (1940).

Where the drainage district statute confers no power upon drainage districts to pay or levy assessments for the payment of after-maturity interest, administrative construction must and will be disregarded. Breckenridge v. Johnston, 62 Idaho 121, 108 P.2d 833 (1940).

42-2959. Registration of bonds. — Before the bonds are delivered to the purchaser they shall be presented to the county treasurer, who shall register them in a book kept for that purpose, and known as the bond register, in which register he shall enter the number of each bond, the date of issue, the maturity, amount and rate of interest, to whom and when payable, and the proceeds derived from the sale of said bonds shall in all cases be paid by the purchaser thereof to the county treasurer. [1913, ch. 16, § 31, p. 58; reen. C.L. 168:56; C.S., § 4550; I.C.A., § 41-2559.]

Cited in: Drainage Dist. No. 2 v. Ada County, 38 Idaho 778, 226 P. 290 (1924).

42-2960. Maintenance of system — District not to be operated for profit. — Any drainage district organized under the provisions of this chapter is not to be conducted or operated for profit or with the view of paying dividends, but solely for the benefit and welfare of the residents and property owners of said district. [1913, ch. 16, § 42, p. 58; reen. C.L. 168:57; C.S., § 4551; I.C.A., § 41-2560.]

Compiler's notes. Section 43 of S.L. 1913, ch. 16 declared an emergency. Approved February 21, 1913.

Functions of Drainage Districts.

A drainage district is conducted and operated for the benefit and welfare of the resi-

dents and property owners of the district and its functions are business and economic, rather than political or governmental. Chandler v. Drainage Dist. No. 2, 68 Idaho 42, 187 P.2d 971 (1947).

42-2961. Apportionment of cost of maintenance. — The board of commissioners of any drainage district organized under the provisions of this chapter shall, on or before the third Monday of September of each year, make an estimate of the cost of maintenance of the drainage system constructed in such district, which estimate shall include the cost of making

any necessary repairs that it might become necessary to make in the maintenance of such system. Such estimate shall be made for the succeeding year, and the amount so estimated shall be certified by the board of commissioners to the auditor of the county in which such district is located, on or before said date, and the amount thereof shall be apportioned to the landowners in such district benefited by said improvement in proportion to the maximum benefit originally assessed, and such amount shall be added to the general taxes of such landowners and collected therewith; provided, however that at the option of the commissioners the amount apportioned to every landowner on any parcel or piece of land shall be not less than one dollar (\$1.00), which amount shall be a minimum assessment to be collected as a tax for the year on every such parcel or piece of land. [1913, ch. 16, § 23, p. 58; reen. C.L. 168:58; am. 1919, ch. 20, § 1, p. 82; C.S., § 4552; am. 1927, ch. 53, § 1, p. 68; I.C.A., § 41-2561; am. 1953, ch. 257, § 1, p. 411; am. 1974, ch. 118, § 1, p. 1289.]

Compiler's notes. Section 2 of S.L. 1974, ch. 118 declared an emergency and provided that this act take effect on and after its passage and approval and retroactively to January 1, 1974. Approved March 27, 1974.

ANALYSIS

Collection of assessments.
Liability of landowner.
Limit of liability.

Collection of Assessments.

Tax officer had no right to refuse to accept payment of general taxes as penalty to enforce payment of drainage assessment. Booth v. Clark, 42 Idaho 284, 244 P. 1099 (1926).

Liability of Landowner.

The liability of each particular landowner

became fixed and determined at the time of the confirmation of the assessment for costs, and assessment thus imposed became the limit of his liability for construction costs. McDonald v. Pritzl, 60 Idaho 354, 93 P.2d 11 (1939).

Limit of Liability.

Where assessments were confirmed by the court, an amount in excess of such confirmed amount was levied by drainage district, and, due to failures to pay, the amount actually received did not equal the confirmed amount, a landowner could not be subjected to additional assessments for the difference between the amount collected and the amount proved. McDonald v. Pritzl, 60 Idaho 354, 93 P.2d 11 (1939).

42-2962. Levy of and limitation on assessments. — The commissioners may also levy assessments for any expense necessarily incurred by them for construction, maintenance, repair, or any extraordinary reasons, and also may add to said assessment sufficient to pay any deficiency occurring the preceding year or any other unpaid warrant indebtedness, if any, or to pay any outstanding warrants: provided, that any assessments to be hereafter made by any drainage commissioners to pay warrants shall not exceed twenty per cent (20%) of the original cost of organization and construction in addition to the assessments which may be levied under section 42-2936, and such assessments, when made, shall be apportioned and collected as hereinbefore provided for. [1913, ch. 16, § 23, p. 58; reen. C.L. 168:58; am. 1919, ch. 20, part of § 1, p. 82; C.S., § 4553; I.C.A., § 41-2562.]

Sec. to sec. ref. This section is referred to in § 42-2952.

ANALYSIS

Liability of drainage commissioners.
 Liability of landowner.
 Limit of liability.
 Nature of assessments.

Liability of Drainage Commissioners.

Drainage commissioners are held to be liable in damages for injuries to land resulting from negligent construction of dam causing water to overflow onto land. *Chandler v. Drainage Dist. No. 2*, 68 Idaho 42, 187 P.2d 971 (1947).

Liability of Landowner.

"There is," the court held, "no merit in a contention that the property owners within the district can be called upon and required to pay assessments equal to the amount of the actual benefits inuring to the respective parcels of land by reason of the improvements made in a drainage district." *Straus v. Ketchen*, 54 Idaho 56, 28 P.2d 824 (1933).

The liability of each particular landowner was fixed and determined at the time of the confirmation of the assessment for costs, and

assessment thus imposed was the limit of his liability for construction costs. *McDonald v. Pritzl*, 60 Idaho 354, 93 P.2d 11 (1939).

Limit of Liability.

Where assessments were confirmed by the court, an amount in excess of such confirmed amount was levied by drainage district, and, due to failures to pay, the amount actually received did not equal the confirmed amount, a landowner could not be subjected to additional assessments for the difference between the amount collected and the amount proved. *McDonald v. Pritzl*, 60 Idaho 354, 93 P.2d 11 (1939).

Nature of Assessments.

Assessments levied and collected under drainage district law are exercise of power of state for general welfare. *Elliott v. McCrea*, 23 Idaho 524, 130 P. 785 (1913); *Booth v. Clark*, 42 Idaho 284, 244 P. 1099 (1926).

Drainage district assessments are laid under taxing power and in general sense are taxes. *Lister v. Riddle*, 50 Idaho 431, 296 P. 771 (1931).

42-2963. Validation of warrants heretofore issued. — Warrants or any other evidence of drainage district indebtedness heretofore issued by the board of drainage commissioners of any drainage district for such necessary construction, maintenance, repair or any extraordinary reasons, shall be and hereby are made legal and valid obligations of such drainage district. [1913, ch. 16, § 23, p. 58; reen. C.L. 168:58; am. 1919, ch. 20, part of § 1, p. 82; C.S., § 4554; I.C.A., § 41-2563.]

42-2964. Interpretation of law. — The provisions of this chapter shall be liberally construed to promote the public health and welfare by reclaiming wet or overflowed lands, building embankments or levees and the preservation of any system of drainage heretofore constructed or to be constructed according to law. [1913, ch. 16, part of § 40, p. 58; reen. C.L. 168:59; C.S., § 4555; I.C.A., § 41-2564.]

Compiler's notes. The words "this chapter" refer to §§ 42-2901 — 42-2964.

42-2965. Payment of assessments. — The assessments levied by the commissioners of the drainage districts must be paid in lawful money of the United States; provided that warrants of the district may be accepted as cash for the payment of assessments levied for warrant redemption, and that matured bonds of the district and accrued interest coupons detached from any of the bonds of the district, when presented may be accepted as cash in payment of assessment levied for bond interest and principal, and in the event that the said bonds so used are of a greater denomination than the said assessments, the tax collector shall indorse upon said bond or bonds the amount necessary to pay said assessment or assessments and the date of

said payment and take a receipt from such bondholder for the amount so credited, and either such receipt describing the bond so indorsed or such indorsement shall be prima facie evidence that the said sum so indorsed has been paid on said bond or bonds. [I.C.A., § 41-2565, as added by 1933, ch. 213, § 1, p. 447.]

42-2966. Interested persons — Right of examination. — Any person or corporation having an interest in, or lien upon, any land situate within the boundaries of a drainage district now organized or existing, or hereafter organized under the laws of the state of Idaho, and which land has been, or hereafter may be, assessed for benefits for the construction of drainage works in said district, as provided in this chapter, as shown by the assessment roll of said district, confirmed by the court, shall have the right personally, or through his agents, attorneys or auditors to examine the books, records and accounts of the drainage commissioners and to make copies thereof. [1937, ch. 86, § 1, p. 115.]

Cross ref. Assessment roll, § 42-2935.

42-2967. Interested persons — Right to demand statement showing amount of lien and total payments — Form. — Any person or corporation having an interest in, or lien upon, any land situate within the boundaries of a drainage district now organized and existing or hereafter organized under the laws of the state of Idaho, and which land has been, or hereafter may be, assessed for benefits for the construction of drainage works in said district, as provided in this chapter, as shown by the assessment roll of said district, confirmed by the court, and upon which any calls for assessments have been made against said assessment roll by the drainage commissioners of said district, and any or all of which calls shall have been paid upon said land, shall have the right to demand in writing from the commissioners of said drainage district and from the county treasurer of the county in which such land is situate, a statement giving the following information:

(a) Amount of original lien against said land as shown by the assessment roll of said district and confirmed by the court;

(b) Total payments made upon said land by reason of calls against said assessment roll;

(c) Total credit given on the original lien against said land created by the assessment, by reason of the payment made on calls by the drainage commissioners.

Said demand shall be personally served upon the secretary of the board of drainage commissioners of said district, and upon the county treasurer of said county.

Within ten (10) days after the service of said notice, the commissioners of said drainage district and said county treasurer shall furnish to the person making said demand a statement in writing giving the information required by said demand. Said statement so furnished by the drainage commissioners and the county treasurer may be in one (1) instrument or in separate instruments. The same shall be signed by the chairman of the board of

drainage commissioners of said district and attested by the secretary thereof, and shall also be signed by the county treasurer. [1935, ch. 57, § 1, p. 109.]

Cross ref. Assessment roll, § 42-2935.

Sec. to sec. ref. This section is referred to in § 42-2968.

42-2968. Right of action by interested persons for accounting. —

If such person or corporation making said demand shall be dissatisfied as to the total amount paid or the credit given on the original lien as shown by said statements furnished under the provisions of section 42-2967, he or it shall have the right to bring an action in the district court of the county in which such land is situate, against said district and the county treasurer of the county, for the purpose of securing a determination by the court as to the total amount of payments made and the amount which should have been credited upon the lien against said lands created by the assessment roll of said district as confirmed by the court. [1935, ch. 57, § 2, p. 109.]

42-2969. Access to records by interested persons for preparation of action for trial. —

Upon the filing of said complaint said plaintiff, his agents, attorneys and auditors, shall have free access to the books, records and accounts of the drainage commissioners and shall have the right to examine the same and make copies thereof, and the secretary of said drainage district shall furnish such certified copies of said records as the plaintiff may designate, said plaintiff furnishing the copies ready for certification at his own expense. He shall also have access to the records of the county treasurer insofar as they pertain to his property, including the assessment roll of the drainage district, the distribution of moneys paid by him, and such other matters as may pertain to the preparation of his case for trial. [1935, ch. 57, § 3, p. 109.]

42-2970. Method of procedure in actions by interested persons. —

The procedure provided by law for the trial and determination of other civil actions, and appeal to the Supreme Court of the state of Idaho, shall govern the procedure in any action brought under the provisions of this act; provided, however, that no costs shall be awarded to either party, either in the district court or upon appeal to the Supreme Court. [1935, ch. 57, § 4, p. 109.]

Compiler's notes. The words "this act" refer to S.L. 1935, ch. 57, which is compiled herein as §§ 42-2967 — 42-2970.

Section 5 of S.L. 1935, ch. 57 declared an emergency. Approved Feb. 25, 1935.

42-2971. Payment of annual or delinquent assessments or unpaid liens with bonds, matured interest coupons, warrants or cash. —

Any person or corporation having an interest in or title to, or recorded mortgage or other lien upon any tract, lot or parcel of land, or any part thereof, situate within the boundaries of any drainage district now organized and existing, or that may hereafter be organized, under the laws of the

state of Idaho, may at any time pay all or any part of the annual or delinquent drainage assessments due at the time of such payment, except as hereinafter otherwise provided, or may pay the whole or any part of the unpaid portion of the lien against said property as shown by the assessment roll of said district as confirmed by the court and filed with the county auditor, whether due or to become due, together with the accrued interest, if any, on any such annual or delinquent assessments, either in lawful money of the United States or with the bonds of the district at the face or par value thereof, of any date, number, series or denomination, whether original issue, funding or refunding and whether such bonds are due at the time of payment or will become due at a future date, and/or with warrants or matured interest coupons of said district at the face or par value of the same; and it shall be the duty of the county treasurer of the county in which said land is situate to accept said bonds, matured interest coupons and warrants in payment, or part payment, of any such annual or delinquent drainage assessments, or in payment of the unpaid portion of the lien against said real property created by the assessment roll of such drainage district; provided, however, that such bonds, interest coupons, and warrants hereinabove referred to shall have been issued by said drainage district subsequent to the date this act becomes effective. [1935, ch. 56, § 1, p. 105.]

Compiler's notes. The words "this act" refer to S.L. 1935, ch. 56, which is compiled herein as §§ 42-2971 — 42-2975. **Sec. to sec. ref.** This section is referred to in § 42-2972.

42-2972. Release of lands from further liability upon full payment. — Upon payment in full being made to the county treasurer of the lien against any such tract, lot or parcel of land, either in lawful money of the United States and/or drainage district bonds, matured interest coupons or warrants, as provided in section 42-2971, the county treasurer shall issue and deliver to such person or corporation making said payment a receipt for the amount of such payment, stating therein the total amount paid, the amount paid in cash, in bonds, in warrants and matured interest coupons of said district; and shall thereupon issue and deliver to such person or corporation a release and discharge releasing such tract, lot or parcel of land from all other or further liability for the payment of any of the then existing bonded indebtedness of the district, or any bonds thereafter issued to refund the same, or of any warrants theretofore, or that may thereafter be, issued for the payment of interest on any such bonds or refunding bonds, and releasing and discharging such tract, lot or parcel of land from the payment of any other or further liens created by reason of the assessment for benefits against said tract, lot or parcel of land as shown in the assessment roll of said district confirmed by the court; and such tract, lot or parcel of land shall not thereafter be assessed by such drainage district by reason of benefits theretofore assessed and confirmed by the court, except for the purpose of operation and maintenance thereof; provided, that all assessments for operation and maintenance theretofore levied or thereafter to be levied shall be payable only in lawful money of the United States or in warrants of the district issued against the operation and maintenance fund within the

calendar year in which such warrants are tendered in payment, in which event such warrants shall be accepted by the county treasurer at par or face value thereof in payment of operation and maintenance charges. [1935, ch. 56, § 2, p. 105.]

Sec. to sec. ref. This section is referred to in § 42-2973.

42-2973. Form of release and discharge. — The release and discharge provided for in section 42-2972, Idaho Code, shall be in substantially the following form:

Release and discharge from liability from payment of the bonded and warrant indebtedness of drainage district number in County, Idaho, from the lien of the assessment roll of said district as confirmed by the court.

WHEREAS, on the day of,
 (The owner, part owner, mortgagee or other lienholder, as the case may be) paid to the County Treasurer of County, Idaho, (in cash, bonds, warrants or matured interest coupons of said district, as the case may be) the sum of \$, being the total unpaid amount of the lien against the real property hereinafter described, created by the assessment roll of said district; said property being situate within Drainage District Number, in County, Idaho, and particularly described as follows, to wit:

(Insert description of property.)

and being shown on the assessment roll of said district as assessment number

NOW THEREFORE, in consideration of such payment, and pursuant to law, the undersigned does by those presents release and discharge the above described tract, lot or parcel of land from the lien against said land created by the assessment roll of Drainage District Number in County, Idaho, and from the payment of all of the bonded indebtedness now existing against the same, and from the payment of any bonds now issued or that may hereafter be issued to refund the same, or any part thereof, and from the payment of any warrants of the district heretofore issued or that may hereafter be issued in payment of interest on such indebtedness or refunded indebtedness, and releases and discharges said tract, lot or parcel of land from further payment of benefits assessed against said land as shown by the assessment roll of said district and from all liens created thereby, save and except assessments made or to be made by said district for the operation and maintenance thereof.

IN WITNESS WHEREOF, I, the County Treasurer of the county of, state of Idaho, and duly authorized by law to collect all sums of money assessed by the drainage commissioners of Drainage District Number in said county, have hereunto set my hand as such county treasurer this day of,

.....
 (Treasurer)
 County, Idaho.

Said release and discharge shall be acknowledged before an officer authorized to take acknowledgments to conveyances. The acknowledgment shall be substantially in the following form:
STATE OF IDAHO

SS.

COUNTY OF

On this day of,, before me,, (Official Character), in and for said state, personally appeared, known to me to be the person whose name is subscribed to the within instrument as the County Treasurer of the county of, state of Idaho, and acknowledged to me that he executed the same, as such treasurer.
IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

.....
(Official Character).

[1935, ch. 56, § 3, p. 105; am. 2002, ch. 32, § 15, p. 46.]

Compiler’s notes. The words enclosed in parentheses so appeared in the law as enacted. Sections 14 and 16 of S.L. 2002, ch. 32, are compiled as §§ 40-1305FF and 43-2532, respectively.

42-2974. Filing and recording of release and discharge — Effect.
— Such release and discharge, when filed for record and recorded in the office of the county recorder of the county in which such tract, lot or parcel of land is situate, shall operate as a release and discharge of the land therein described from the payment of all existing indebtedness of said district, and release the same from the lien thereof, created by the assessment roll of said district, confirmed by the court; save and except levies made or to be made for the operation and maintenance of said district. [1935, ch. 56, § 4, p. 105.]

42-2975. Cancellation of bonds and warrants upon delivery. — All bonds, together with all unmatured coupons attached, matured interest coupons and warrants delivered to the county treasurer under the provisions of this act shall be canceled in the same manner as if called for payment and paid. [1935, ch. 56, § 5, p. 105.]

Compiler’s notes. For sections in which “this act” is compiled see note to § 42-2971. Section 6 of S.L. 1935, ch. 56 declared an emergency. Approved Feb. 25, 1935.

42-2976. Payment of bonds after default. — All bonds hereafter issued by any drainage district [district] in the state of Idaho, whether original issue, funding or refunding, shall be governed by the provisions of this act in regard to the payment thereof after default as hereafter provided. [1935, ch. 54, § 1, p. 102.]

Compiler’s notes. The bracketed word “district” was inserted by the compiler. 54 which is compiled herein as §§ 42-2976, 42-2977.
The words “this act” refer to S.L. 1935, ch.

42-2977. Pro rata payment of interest and bonds. — If at any time twenty per cent (20%) or more of the entire issued, uncalled and outstanding bonds of such district shall be past due and unpaid, after the application of all funds available for the payment thereof, then the numerical order, or other provisions of law, of payment of all outstanding and uncalled bonds of such district shall immediately cease, and thereafter the county treasurer shall distribute all funds coming into his hands applicable to the payment of bonds pro rata on all outstanding and uncalled bonds, whether due or to become due, to the end that after such default in the percentage herein set out, there shall be paid on each outstanding and uncalled bond its equal and ratable proportion of all funds so collected for the payment of said bonds; provided further, that if at the time of such default there shall be matured and unpaid interest on any or all of such outstanding bonds, then all moneys thereafter available for the payment of interest shall be applied toward the payment of interest longest in default until all bonds shall have assumed the same relative position in regard to interest payment. When interest shall have been paid on all outstanding bonds to the same date, thereafter all moneys available for the payment of interest shall be paid equally and ratably to the holders of all outstanding and uncalled bonds. No payment shall be made by the county treasurer after such default, upon either principal or interest, except upon presentation of the bond and the indorsement by the county treasurer of the amount paid thereon, together with the date of payment, except in the event of full payment of interest coupons, said coupons shall be surrendered to the county treasurer. [1935, ch. 54, § 2, p. 102.]

Compiler's notes. Section 3 of S.L. 1935, ch. 54 declared an emergency. Approved Feb. 25, 1935.

42-2978. Redemption of lands from lien for unpaid assessments. — The owner of any land within any drainage district charged with the lien of any assessment under the provisions of this chapter, may redeem the same from all liability by paying the unpaid portion of the assessment lien against such land, as shown by the assessment roll of said district, plus interest to the time of such payment; provided that the bonds of the drainage district and the accrued interest coupons thereon shall be accepted by the tax collector as cash in payment of such lien and assessment; and upon payment by any landowner of such lien and assessment against any land the same shall be relieved of all further liability and shall not be subject to any further or subsequent assessment by said district except only for the maintenance and operation of the drainage works of the district; and, provided further, upon full payment being made, as hereinabove provided, in cash and/or bonds and interest coupons, the tax collector shall issue to such owner a receipt showing the lien of the assessment against such land is fully paid and satisfied; and such tax collector shall also note upon the assessment roll of said district the full payment of the assessment against such land. All bonds and interest coupons delivered to the tax collector under the provisions of this act shall be canceled in the same manner as

bonds which have been called for payment and paid. [1933, ch. 183, § 1, p. 338.]

Compiler's notes. The words "this act" refer to S.L. 1933, ch. 183 which is compiled herein as § 42-2978.

Section 2 of S.L. 1933, ch. 183 declared an

emergency. Approved Mar. 11, 1933.

Cross ref. Lien of assessments, §§ 42-2935, 42-2936.

42-2979. Sale of personal property — Procedure. — Personal property of a drainage district may be sold by its board of commissioners whenever the board finds and by resolution declares that the district no longer has use therefor.

1. If, in the opinion of the board, such property does not exceed \$500 in value, it may sell the same without independent appraisal, notice or competitive bids.

2. Personal property exceeding \$500 in value shall first be appraised by three (3) disinterested freeholders of the district, who shall be selected by the board. It may then be sold at public or private sale to the highest bidder for cash at not less than its appraised value, after due notice.

3. Notice of sale shall describe the property, the appraised value thereof (by separate items, if so appraised), and the time, place and condition of sale.

4. If the appraised value does not exceed \$1000, notice of sale shall be posted in three (3) public places in said district to be determined in the resolution of said board of commissioners (one of which shall be at the office or meeting place of said board) at least ten (10) days before the date of sale.

5. If the appraised value of the property exceeds \$1000, notice shall be posted as set forth in subdivision 4 above and in addition shall be published in a weekly newspaper, published or having a general circulation in the district, once each week during the four (4) weeks preceding the date of sale. [1951, ch. 63, § 1, p. 92.]

Compiler's notes. Section 2 of S.L. 1951, ch. 63 declared an emergency. Approved February 26, 1951.

Cross ref. Notice by mail, § 60-109A.

42-2980. Dissolution of drainage district. — A drainage district may be dissolved by the district court for the county in which the office of such drainage district was last located on complaint or petition of parties holding and owning:

(a) Fifty per cent (50%) or more of the issued, outstanding, unpaid bonds of such district; or,

(b) Fifty per cent (50%) or more of all land situated within the boundaries of such district; or,

(c) Claims, warrants, liens or other legal obligations of such district in an amount equal to not less than thirty per cent (30%) of the issued, outstanding and unpaid bonds of such district.

It must be made to appear to the satisfaction of the court, by such complaint or petition, that any one or more of the following conditions exist in or as to said district:

1. That the district has been abandoned, or for two (2) or more years last past has ceased to function, and there is little or no possibility that it ever will function in the future.

2. That no useful purpose exists for the further continuance of the organization of the district.

3. That there are not sufficient qualified voters of such district to hold a legal election.

4. That all essential functions of the district are or may be carried out and performed by another political subdivision of the state or other public or quasi public body to which all or any portion of the facilities of said district may be transferred by order of the court; provided, however, that the court, at its discretion, may require that interested persons be given further notice and opportunity to be heard with reference to any such proposed transfer. [I.C., § 42-2980, as added by 1961, ch. 173, § 1, p. 267.]

42-2981. Certain public and private lands liable for costs and expense of drainage — Collection of drainage charges. — Lands, whether public or private, which have been developed for commercial, industrial, recreational, residential, governmental or highway purposes, and from which surface water or seepage drain into the irrigation or drainage system of any person or persons, canal company, irrigation district, drainage district, or ditch owners' association, shall be liable for a proportionate share of the cost and expense of operating, maintaining, repairing and replacing the portions of such system which are used or allocated for drainage purposes. Drainage charges for any such lands which are not subject to the regular assessment powers of the person or entity owning or controlling the system shall be billed to, and shall be paid promptly by, the governmental unit owning the land. If the lands are privately owned, the drainage charges shall be billed to, and shall be paid promptly by the county in which the lands are located, and such charges shall be included in the county budget as a separate fund for drainage, the tax for which shall be levied against all privately owned lands in the county which are benefited by such drainage and which are not subject to the regular assessment powers of the owner of the irrigation or drainage system. [I.C., § 42-2981, as added by 1978, ch. 271, § 1, p. 628.]

Compiler's notes. Section 2 of S.L. 1978, ch. 271 is compiled as § 31-1603.

CHAPTER 30

DRAINAGE DISTRICT REFUNDING BONDS

SECTION.

- 42-3001. Issuance authorized.
- 42-3002. Optional procedure.
- 42-3003. Resolution specifying terms and conditions.
- 42-3004. Confirmation proceedings — Petition.
- 42-3005. Confirmation proceedings — Time

SECTION.

- and notice of hearing — Practice.
- 42-3006. Confirmation proceedings — Hearing — Decree.
- 42-3007. Exchange of bonds — Application of proceeds of sale — Effect of decree.

SECTION.	SECTION.
42-3008. Application of drainage district law.	42-3009. Assessment roll under former bond issue — Continuance in effect.

42-3001. Issuance authorized. — The board of commissioners of any drainage district organized under the laws of the state of Idaho may issue negotiable coupon bonds, to be denominated refunding bonds, for the purpose of refunding any of the bonded indebtedness of the district, whether due or not due, on which has or may hereafter become payable at the option of the district or by consent of the bondholders, or by any lawful means, whether such bonded indebtedness be now existing or may hereafter be created, and there shall not be funds in the treasury of such district available for the payment or redemption of such bonds and the accrued and unpaid interest thereon. [1925, ch. 21, § 1, p. 29; I.C.A., § 41-2601.]

ANALYSIS

Bankruptcy.
Composition of district's indebtedness.
Constitutionality.
Construction.

Bankruptcy.

The national bankruptcy act provides relief when a drainage district is unable to meet its debts as they mature, and the mere fact that the district has the power, under the state law, to continue to levy assessments to provide a fund to pay its bonds does not prevent it from having relief of composition under the bankruptcy law. In re Drainage Dist. No. 2, 28 F. Supp. 84 (D. Idaho 1939).

Composition of District's Indebtedness.

Plan for composition of drainage district's indebtedness by reconstruction finance corporation was held equitable and was confirmed.

42-3002. Optional procedure. — Whenever any drainage district has issued bonds and the same are outstanding and unpaid, and the same have been outstanding and unpaid for more than three (3) years, the district may, in the manner hereafter provided, issue and sell bonds for the purpose of paying and redeeming such outstanding bonds, and may call and pay said bonds, or at its option, may authorize the issue of sufficient bonds to pay and redeem the whole of such outstanding bonds, but may issue and sell the same in such amounts from year to year, as will pay and redeem the outstanding bonds falling due each year, and may continue to issue and sell such refunding bonds until the whole of the outstanding bond issue, which has been refunded, is paid and redeemed. [1925, ch. 21, § 2, p. 29; I.C.A., § 41-2602.]

ANALYSIS

Call of outstanding bonds.
Impairment of contract obligation.

In re Drainage Dist. No. 2, 28 F. Supp. 84 (D. Idaho 1939).

Constitutionality.

Holder of real property in drainage district was not deprived of his property without due process by issuance of refunding bonds which would encumber the property for a longer period than the outstanding issue. Sebern v. Cobb, 41 Idaho 386, 238 P. 1023 (1925).

Legislature may provide for issuance and sale of refunding bonds, even though there is an interim between their issuance and sale and the redemption of the outstanding bonds. Sebern v. Cobb, 41 Idaho 386, 238 P. 1023 (1925).

Construction.

This chapter must be construed together with provisions of chapter 29 of this title, and with the intent of § 42-2964. Sebern v. Cobb, 41 Idaho 386, 238 P. 1023 (1925).

Call of Outstanding Bonds.

This chapter does not alter method of calling outstanding bonds that have run for period of three years (§ 42-2957). Sebern v.

Cobb, 41 Idaho 386, 238 P. 1023 (1925).

County treasurer may not call bonds until they have been outstanding for more than three years and unless he has over \$5000 on hand for their payment, and he can not call more bonds than he can pay with funds in his hands. *Sebern v. Cobb*, 41 Idaho 386, 238 P. 1023 (1925).

Impairment of Contract Obligation.

Calling of bonds which have been outstanding and unpaid for more than three years did not impair bondholder's contract by depriving him of interest thirty days after call. *Sebern v.*

Cobb, 41 Idaho 386, 238 P. 1023 (1925).

Contract obligation of bonds which could not have been paid by proceeds of assessments under ch. 29 of this title was impaired by calling such bonds for refunding, although they had been outstanding for three years. *Sebern v. Cobb*, 41 Idaho 386, 238 P. 1023 (1925).

Where bonds have been outstanding for five years, contract obligation thereof was not impaired by issuance of refunding bonds, under this chapter. *Sebern v. Cobb*, 41 Idaho 386, 238 P. 1023 (1925).

42-3003. Resolution specifying terms and conditions. — Whenever the board of commissioners shall deem it expedient to issue refunding bonds under the provisions of this chapter, they shall by resolution duly adopted and entered upon the minutes of the district specify, the amount and date of the bonds to be refunded, the amount of the refunding bonds proposed to be issued, shall designate the denomination or denominations thereof, fix the date of issue, the rate of interest, which shall not exceed six per cent (6%) per annum. [1925, ch. 21, § 3, p. 29; I.C.A., § 41-2603.]

ANALYSIS

Interest rate.

Sufficiency of resolution.

Interest Rate.

In issuance of refunding bonds, commissioners had right to fix any interest not more than six per cent, and so long as it did not exceed this rate, failure to fix exact rate was irregularity that did not affect substantial rights of any party. *Sebern v. Cobb*, 41 Idaho 386, 238 P. 1023 (1925).

Sufficiency of Resolution.

Resolution which provided that bonds shall be issued "in denominations of one hundred, five hundred and one thousand dollars, in such proportion and amounts as may be most advantageous to said district and the sale of said bonds," and shall bear "interest at the lowest rate at which the same may be legally sold, and in no event to exceed interest at the rate of six per cent per annum," was sufficient. *Sebern v. Cobb*, 41 Idaho 386, 238 P. 1023 (1925).

42-3004. Confirmation proceedings — Petition. — The board of drainage commissioners shall file in the district court of the county in which the greater portion of their lands are situated, a petition, praying that the proceedings aforesaid may be examined, approved and confirmed, and that they may be authorized and directed to execute and negotiate the said refunding bonds. The petition shall state generally that the drainage district is duly organized; that an assessment roll has theretofore been duly prepared, approved and confirmed by the court; the aggregate amount of the assessments contained therein; the amount and date of the bonds outstanding which it is sought to refund; that the same are valid and binding obligations of the district, and that it will be of benefit to the district, or the property owners therein that said bonds be refunded, together with the proceedings had and taken by the commissioners toward the issuance of said refunding bonds, and said petition need not state any further facts. [1925, ch. 21, § 4, p. 29; I.C.A., § 41-2604.]

Optional Methods.

Where district resolved to issue and sell bonds for paying and redeeming outstanding bonds and to call and pay them, it was error for court to direct district to issue bonds to be

sold in such amounts, from year to year, as would redeem outstanding bonds falling due each year. *Sebern v. Cobb*, 41 Idaho 386, 238 P. 1023 (1925).

42-3005. Confirmation proceedings — Time and notice of hearing — Practice. — Upon the filing of said petition, the court or judge shall fix a time for the hearing thereof, and shall order the clerk of the court to give and publish a notice of the filing of said petition. The notice shall be given and published in a newspaper in the county in which the proceeding is filed, for three (3) successive weeks. The notice shall state the time and place fixed for the hearing of the petition, and that the proceeding is brought to procure an order, approving and authorizing the sale of refunding bonds of said district, and giving the amount of said bonds, and that any person interested in the subject matter of said petition may, on or before the day fixed for the hearing thereof, file objections thereto. None of the pleadings in said matter need be sworn to. Every material statement of the petition not controverted at such hearing, must be taken as true, and every person or party failing to file objections shall be deemed to have admitted all the allegations of the petition. [1925, ch. 21, § 5, p. 29; I.C.A., § 41-2605.]

42-3006. Confirmation proceedings — Hearing — Decree. — Upon the hearing of such petition, the court shall examine all of the proceedings set up in the petition, and all objections thereto, and may ratify, approve and confirm or dismiss the same. The court shall disregard every error, irregularity or omission which does not affect the substantial rights of any party, and if the court shall find that the assessments imposed by the assessment roll are final and conclusive, and adequate security for retiring and paying off said refunding bonds, and that it will be of benefit to the district or the property owners therein that said refunding bonds be issued, it shall issue its order or decree, approving and confirming such proceedings, reciting therein that the lien of the assessment roll theretofore prepared, approved and confirmed shall not be deemed to have been lost or waived but shall remain in full force and effect for the purpose of retiring and paying off said refunding bonds, in like manner as the original bond issue and shall direct the commissioners to execute and negotiate said refunding bonds as in this chapter provided. [1925, ch. 21, § 6, p. 29; I.C.A., § 41-2606.]

42-3007. Exchange of bonds — Application of proceeds of sale — Effect of decree. — All or any part of such refunding bonds may be exchanged, dollar for dollar, for the bonds to be refunded, or they may be sold, at not less than their par value, as directed by the board of commissioners and the proceeds thereof shall be applied only to the purposes for which said refunding bonds are issued. The authority vested in the board of commissioners by the judgment and decree as in this chapter provided shall be and remain effective until all of the bonded indebtedness so authorized to be refunded has been paid, redeemed or refunded. [1925, ch. 21, § 7, p. 29; I.C.A., § 41-2607.]

42-3008. Application of drainage district law. — The laws of the state of Idaho as they now exist, or as they may hereafter be amended or enacted in relation to drainage districts providing the form of bond to be issued, the issuance, registration and sale thereof, the levies to pay interest thereon and to create a sinking fund for the payment and redemption thereof, and for collection of such levies and for the calling and payment of said bonds shall govern and apply to the refunding bonds issued under the provisions of this chapter, when not in conflict herewith. [1925, ch. 21, § 8, p. 29; I.C.A., § 41-2608.]

Cross ref. Bonds of drainage districts,
§§ 42-2952 — 42-2959.

42-3009. Assessment roll under former bond issue — Continuance in effect. — The assessment roll or rolls of any drainage district which has been authorized and filed as provided by law, and upon which any original bond issue was made, shall continue in full force and effect, and the assessment or assessments contained therein shall be a lien upon all of the property of such drainage district as contained in such assessment roll or rolls and subject to levies for the payment of the principal and interest of said refunding bonds as the same fall due, in like manner, and to the same extent, as to the original bond issue or any issue refunded. [1925, ch. 21, § 9, p. 29; I.C.A., § 41-2609.]

Compiler's notes. Section 10 of S.L. 1925, ch. 21 declared an emergency. Approved February 10, 1925.

CHAPTER 31

FLOOD CONTROL DISTRICTS

SECTION.

- 42-3101. Short title.
- 42-3102. Policy of state.
- 42-3103. Definitions.
- 42-3104. Districts — Composition — Designated by number.
- 42-3105. Petition to establish district — Contents.
- 42-3106. Division of district — Maps and surveys.
- 42-3107. Publication of notice — Contents.
- 42-3108. Hearing on petition — Findings and order of director — Recording.
- 42-3109. Board members — Appointment — Bond of commissioners — Oath.
- 42-3110. Organization of board — Approval by court.
- 42-3111. Commissioners — Annual appointment — Officers' election — Duties.
- 42-3112. Vacancies on board — Appointment by director.
- 42-3113. Meetings of board — Regular — Special.

SECTION.

- 42-3114. Compensation of commissioners.
- 42-3115. Commissioners — Powers and duties.
- 42-3116. Sealed bids — When required — Publication of notice.
- 42-3117. Contracts submitted to voters — Notice — Election.
- 42-3118. Electors — Qualifications.
- 42-3119. Title to and sale of waters — Disposition of aggregate.
- 42-3120. Enlargement of district — Petition.
- 42-3121. Consolidation of districts.
- 42-3122. Petition for consolidation — Investigation — Notice of hearing.
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- 42-3125. Director may submit consolidation to election.
- 42-3126. Dissolution of district.
- 42-3127. Exclusion of a division.

SECTION.

42-3128. Exclusion of a division — Disbursement of assets and liabilities.

42-3101. Short title. — This act may be known and cited as the “Flood Control District Act.” [1971, ch. 300, § 1, p. 1219.]

Compiler’s notes. Former §§ 42-3101 — 42-3124 which comprised I.C.A., §§ 41-2701 — 41-2724 as added by 1937, ch. 215, § 1, p. 362; 1949, ch. 185, §§ 1-11 and § 13, p. 390; 1967, ch. 182, § 1, p. 608; 1969, ch. 72, § 1, p. 222; 1969, ch. 157, § 1, p. 490 were repealed by S.L. 1971, ch. 300, § 27, and the material

on the same subject substituted therefor.

The words “this act” refer to S.L. 1971, ch. 300 compiled herein as §§ 42-3101 — 42-3126.

Sec. to sec. ref. This chapter is referred to in § 39-8106.

42-3102. Policy of state. — It is hereby recognized by the legislature that the protection of life and property from floods is of great importance to this state. It is therefore declared to be the policy of the state to provide for the prevention of flood damage in a manner consistent with the conservation and wise development of our water resources and thereby to protect and promote the health, safety and general welfare of the people of this state. [1971, ch. 300, § 2, p. 1219.]

Compiler’s notes. Former § 43-3102 was repealed. See Compiler’s note, § 42-3101.

42-3103. Definitions. — Whenever used or referred to in this act, unless a different meaning clearly appears from the context, the following terms shall have the following meanings:

1. “Board” or “board of commissioners” means the board of commissioners of the flood control district.
2. “Commissioner” means a member of the board of commissioners of the flood control district.
3. “Department” means the department of water resources, state of Idaho.
4. “Director” means the director of the department of water resources, state of Idaho.
5. “District” means any flood control district organized by authority of this act or prior acts of the Idaho legislature.
6. “State” means the state of Idaho. [1971, ch. 300, § 3, p. 1219.]

Compiler’s notes. Former § 42-3103 was repealed. See Compiler’s note, § 42-3101.

For words “this act” see Compiler’s note, § 42-3101.

The names of the department of water administration and of the director of the de-

partment of water administration have been changed to the department of water resources and the director of the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, §§ 28 and 31 (§§ 42-1801a and 42-1804).

42-3104. Districts — Composition — Designated by number. — Flood control districts, composed of any portion of a county, or any county or counties requiring flood control, may be established pursuant to this act and when so established shall be governmental subdivisions of this state and public bodies, corporate and politic. Districts shall be assigned a number by

the department and shall have all of the powers and duties conferred by law upon such districts. [1971, ch. 300, § 4, p. 1219.]

Compiler's notes. Former § 42-3104 was repealed. See Compiler's note, § 42-3101. For words "this act" see Compiler's note, § 42-3101.

42-3105. Petition to establish district — Contents. — A petition, signed by one third ($\frac{1}{3}$) or more of the qualified voters residing within the territory of the proposed district may be filed with the director of the department of water resources asking that a district be organized in the territory described in the petition. Such petition shall set forth:

1. The object of the organization of the district.
2. The temporary boundaries of the proposed district.
3. That the establishment of said district, and the proposed method or system of flood control is a proper and advantageous method of accomplishing the relief sought or the benefits to be secured.
4. That the establishment of said district and the reservoirs, dams, levees, dikes, power plants, plans of irrigation and drainage improving, enlarging, widening, deepening, or straightening existing watercourses or rivers or the removal of natural obstructions therefrom or any other thing to be done will be conducive to the public health and welfare or will increase the public revenue. [1971, ch. 300, § 5, p. 1219.]

Compiler's notes. Former § 42-3105 was repealed. See Compiler's note, § 42-3101. § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

The name of the director of the department of water administration has been changed to the director of the department of water resources on the authority of S.L. 1974, ch. 286,

Sec. to sec. ref. This section is referred to in § 42-3127.

Cited in: Marty v. State, 117 Idaho 133, 786 P.2d 524 (1989).

42-3106. Division of district — Maps and surveys. — The director shall examine said petition and, if it is found to be in accordance with the requirements here set forth, shall, without delay, proceed and examine all matters named and referred to in said petition and make such surveys of the territory to be effected by the proposed district, as will enable him to fully determine whether the same is necessary, practicable or feasible and shall prepare a report of his findings. For the purpose of making his findings, the director may advise and consult with any local governmental subdivision, including the officers and agents of any irrigation district, drainage district, canal company, or any individual water user who is not a member of any such company, who or which may be interested in, or affected by, the proposed district.

The director shall prepare a map of the proposed district and shall divide the proposed district into not less than three (3), nor more than nine (9) divisions so as to provide adequate representation to all of the interests within said district. [1971, ch. 300, § 6, p. 1219.]

Compiler's notes. Former § 42-3106 was repealed. See Compiler's note, § 42-3101.

Cited in: Marty v. State, 117 Idaho 133, 786 P.2d 524 (1989).

Sec. to sec. ref. This section is referred to in § 42-3127.

42-3107. Publication of notice — Contents. — Within a reasonable time after the filing of the petition the director shall give and publish notice that the party whose name first appears on said petition, and others, have filed a petition for organization of a district, giving the general boundaries of said district, the general outline of work, plans or improvements contemplated, and shall further state the time and place where said petition will be considered by him, and any proponents and opponents desiring to be heard shall be heard at such time and place. Such notice shall be published three (3) weeks, at three (3) consecutive weekly issues, before the date upon which said hearing will be heard, in a newspaper of general circulation within each county in which any of the lands proposed to be included within the district are located. [1971, ch. 300, § 7, p. 1219.]

Compiler's notes. Former § 42-3107 was repealed. See Compiler's note, § 42-3101.

Sec. to sec. ref. This section is referred to in § 42-3127.

Cross ref. Notice by mail, § 60-109A.

42-3108. Hearing on petition — Findings and order of director — Recording. — The director shall, at the hearing herein provided, permit any person or corporation interested in the formation of the proposed district, or any of its objects or purposes, to appear and make objections to the organization of the district. The petition shall be prima facie evidence of proponents of the formulation of the district, although such petitioners may withdraw their names at said hearings, or as is otherwise provided by law. The director shall make his findings upon facts alleged in the petition and any objections presented at such hearing, and any other facts necessary for the determination of the practicability and feasibility of said district.

If the director shall recommend that said district be organized, he shall make and enter an order and record the same in the office of the county recorder of each county wherein the lands of the said district thereof are located. The order shall set forth facts as found by him upon the hearing of the petition. Upon entering and recording the order, in the manner provided, the district shall be considered as organized.

Whenever the director shall recommend against the organization of the district at the hearing, but shall recommend the formulation of a district materially different from that prayed for in the petition filed with him, there shall be no further proceedings thereon, unless the director be requested so to do by one third ($\frac{1}{3}$) of the qualified voters therein in the same manner as provided herein for the filing of the original petition, and upon the filing of such petition the director shall be required to comply with this act as if such petition had been filed with him in the first instance.

If the director shall recommend that said district not be organized at such hearing, nothing further shall be done unless a new petition shall be filed in the manner herein provided. [1971, ch. 300, § 8, p. 1219.]

Compiler's notes. Former § 42-3108 was repealed. See Compiler's note, § 42-3101.

Sec. to sec. ref. This section is referred to in § 42-3127.

For words "this act" see Compiler's note, § 42-3101.

Cited in: Marty v. State, 117 Idaho 133, 786 P.2d 524 (1989).

42-3109. Board members — Appointment — Bond of commissioners — Oath. — The order of the director organizing said district shall name the members of the board without regard to political affiliation. Each division of the district shall be represented by one (1) commissioner who shall be a qualified voter within the division which he represents, and a resident and qualified elector of the county in which he resides.

The members of the board of the district, appointed as aforesaid, shall be entitled to enter upon the duties of their office upon qualification as county officers are required to qualify, and upon each commissioner giving a bond to the state for the benefit of said district for the faithful performance of his duties as such commissioner in the sum of five thousand dollars (\$5,000) with one or more sureties, or a surety bond, the premium for which shall be a lawful expenditure of the district, either of which shall be approved by the judge of the district court wherein the commissioner resides; provided, the judge of the district court, upon application and proper showing by the board may enter an order reducing the amount of the bond to such sum as may appear to him to be reasonable and adequate under the showing made. The commissioners shall take the oath of office and file their bonds within fifteen (15) days after they are appointed and they shall hold office until their successors are duly appointed and qualified as in this act provided. The bonds of the commissioners shall be filed with the clerk of the district court of the county in which the office of the district is located and kept in trust by said clerk of the district court.

Immediately after their appointment and the filing and approval of their bonds the commissioners shall organize themselves into a board, as in this act provided, and shall by lot determine the terms of their office, which shall be one (1), two (2) and three (3) years, respectively. Annually thereafter the director shall appoint the commissioner, or commissioners, to succeed those whose terms of office are expiring. Such appointments shall be for three (3) years, provided that each division of the district shall be represented by one (1) commissioner who shall be a qualified voter within the division which he represents, and a resident and qualified elector of the county in which he resides. [1971, ch. 300, § 9, p. 1219.]

Compiler's notes. Former § 42-3109 was repealed. See Compiler's note, § 42-3101.

For words "this act" see Compiler's note, § 42-3101.

Sec. to sec. ref. This section is referred to in § 42-3111.

Cited in: Marty v. State, 117 Idaho 133, 786 P.2d 524 (1989).

42-3110. Organization of board — Approval by court. — The board, duly organized by order of the director shall within a reasonable time after their appointment, qualification and organization, file, in the district court of the county in which their office is located, a petition praying that all of the proceedings prior thereto may be examined and approved by the court.

The petition shall set forth in detail the proceedings taken prior to the entry of the order organizing the district, and the subsequent appointment and organization of the board. Upon the filing of the petition the court may require such notice to be given of the hearing on said petition as in his discretion he deems necessary and proper. At the hearing the court shall

require that evidentiary [evidentiary] proof be presented of all of such proceedings taken pursuant to the rules of evidence.

In the event that the court finds that all proceedings were in conformity with this act, and that all procedures were followed, and that said district was organized in conformity with this act, then the court shall make its findings of fact, conclusions of law and order confirming these proceedings.

The order of the court entered upon the hearing of any petition shall be conclusive as the regularity of the proceedings unless appealed from within thirty (30) days after the entry of such order, provided that upon such appeal no bond shall be required, except for costs of the appeal, and no stay shall be allowed pending the appeal. [1971, ch. 300, § 10, p. 1219.]

Compiler's notes. Former § 42-3110 was repealed. See Compiler's note, § 42-3101. The bracketed word "evidentiary" was inserted by the compiler. For words "this act" see Compiler's note, § 42-3101.

42-3111. Commissioners — Annual appointment — Officers' election — Duties. — Annually on the same day the district was organized the director shall appoint a commissioner or commissioners whose term expires. Each commissioner thereafter who may be appointed shall qualify by taking the oath and filing a bond which shall be approved in the same manner as provided in section 42-3109 of this act.

Upon the initial organization and annually thereafter on the same date, the board shall organize, by the election of one (1) of their number chairman, and one (1) of their number vice chairman. They shall elect, or appoint a secretary, who may, or may not, be a member of the board. They shall elect, or appoint a treasurer, who may, or may not, be a member of the board.

The chairman shall preside at all meetings, sign all claims, except his own, which shall be signed by the vice chairman, sign all warrants in payment of claims, after the submission of such claims and thus approved by the board, and such other duties as shall be required of him by law, or prescribed by the board.

The vice chairman, in the absence of the chairman, shall have the same powers and duties as the chairman.

The secretary of the board shall have the duties as are prescribed by the board. He shall attend all meetings of the board, shall keep a record of the proceedings, and shall enter in said record all matters required by law, or by the board, so to be entered; and said record shall be open to inspection by any person at all reasonable times. In the absence of the secretary, the board shall appoint some person, who, as acting secretary, shall keep the record of the proceedings of the board and certify the same to the secretary, and the board. Whenever in the discretion of the board, it is deemed advisable to do so, the secretary may be placed under surety (fidelity) bond, in the manner and in the amount which shall be prescribed by the board.

The treasurer appointed, or elected, by the board shall have such duties as the board may prescribe. He shall be placed under a surety (fidelity) bond issued by a surety company authorized to do business in the state, in such an amount as the board from time to time may determine. The treasurer shall keep a complete and accurate record of all of the financial affairs of the

district and shall deposit all moneys of the district in the designated depository ordered by the board, and shall comply with the public depository law as now appearing, or as it may be amended. [1971, ch. 300, § 11, p. 1219.]

Compiler's notes. Former § 42-3111 was repealed. See Compiler's note, § 42-3101. appeared in the law as enacted. For words "this act" see Compiler's note, § 42-3101.
The words enclosed in parentheses so ap-

42-3112. Vacancies on board — Appointment by director. — If vacancies occur in said board through death, resignation, or failure to qualify of one or more of the commissioners, such vacancy shall be filled by appointment by the director and said appointee shall be from the same division of the district as the commissioner whom he is replacing, and shall serve for the unexpired term, or until his successor is appointed and qualified. [1971, ch. 300, § 12, p. 1219.]

Compiler's notes. Former § 42-3112 was repealed. See Compiler's note, § 42-3101.

42-3113. Meetings of board — Regular — Special. — The board shall designate the official location of their office, which shall be within said district.

Regular meetings of the board shall be held monthly on a uniform day of a uniform week as shall be determined by the board except that by and with the prior approval of the director monthly meetings may be suspended and meetings may be held quarterly. Such regular meetings shall be held at a time and place to be fixed by the board. The board shall send a certified true copy of their order fixing the official location of their office, and the time and place of their regular meetings to the department of water resources and to any agency of the United States with whom the district is cooperating.

Special meetings and adjourned meetings of the board may be called by the chairman, vice chairman or secretary, or any quorum of the board, and may be held at any time. If the time and place of such special meeting shall not have been determined at a meeting of the board with all members being present, then notice of the time and place of such special, or adjourned meeting, shall be given each member of the board not less than three (3) days before such special meeting is to be convened; unless such notice is waived in writing, signed by all of the members of the board present and voting at such special or adjourned meeting, and the signed waiver made a part of the minutes of such meeting.

A quorum for the transaction of business of the board shall consist of a majority of the members of the board. Unless otherwise provided by law, all questions shall be determined by a majority of the vote cast. The chairman may vote in all cases, and, in the event he elects not to vote and in the case of a tie, then he must cast the deciding vote.

All meetings, regular, special and adjourned, of the board, are declared to be public meetings open to the public. Nothing herein contained shall be construed to prevent any board from holding executive sessions from which the public may be excluded; provided that no rules, regulations, or any other

official action, of any kind or character, shall be adopted at such executive sessions. [1971, ch. 300, § 13, p. 1219.]

Compiler's notes. Former § 42-3113 was repealed. See Compiler's note, § 42-3101.

The names of the department of water administration and of the director of the department of water administration have been

changed to the department of water resources and the director of the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, §§ 28 and 31 (§§ 42-1801a and 42-1804).

42-3114. Compensation of commissioners. — The commissioners of the district shall each receive for their services the sum of twenty dollars (\$20.00) per day, and fifteen cents (15¢) per mile for travel and their necessary expenses for each day they shall be away from their place of residence and engaged in the business of their office. The commissioners shall present an itemized account under oath on forms prescribed by the board. [1971, ch. 300, § 14, p. 1219; am. 1978, ch. 244, § 1, p. 535.]

Compiler's notes. Former § 42-3114 was repealed. See Compiler's note, § 42-3101.

42-3115. Commissioners — Powers and duties. — The board of commissioners of flood control districts shall have the following powers and duties:

1. To annually fix and determine, the amount of money required to be raised by taxation to supply funds for costs of construction, costs of operation and maintenance of the work and equipment of the district, and to levy and cause to be collected assessments on real property within the district in an amount not to exceed six hundredths of one percent (.06%) of the market value for assessment purposes on all taxable property within the district, provided however that a higher levy may be approved and ratified by the qualified voters at an election to be held, subject to the provisions of section 34-106, Idaho Code, for that purpose in the same manner as provided for the approval and ratification of contracts, in section 42-3117, Idaho Code, and said levy shall be certified by the board to the board of county commissioners of the county, or counties, in which said district is located, with directions that at the time and in the manner required by law for levying taxes for county purposes, such board, or boards, of county commissioners shall levy such tax upon the market value for assessment purposes of the real property within the boundaries of the district. Such certification of levies shall be prepared and forwarded by the board of the flood control district to the board, or boards, of county commissioners on or before September 1 of each year.

Such levies shall be levied and collected in the manner provided by law, and the moneys collected shall be turned over to the treasurer or treasurers, of the county, or counties, in which said district is located.

Said moneys shall be public funds and subject to the provisions of the public depository laws of the state.

2. To employ such personnel as may be necessary to carry out the purposes and objects of this act, with the full power to bind said district for the compensation of such personnel.

3. To sue and be sued in the name of the district; to have a seal, which seal shall be judicially noticed; to have perpetual succession unless terminated as hereinafter provided; to make and execute contracts and other instruments necessary or convenient to the exercise of its power and to promulgate, amend and repeal rules not consistent with the provisions of this chapter.

4. To manage and conduct the business and affairs of the district, both within and without the district.

5. To construct, operate and maintain structural works of improvement for the prevention of floodwater and sediment damages, and the conservation, development, utilization, and disposal of water, whether within or without the boundaries of the district, and to enter into contract for the purposes set forth above, provided however, that the board shall not enter into contracts that necessitate an expenditure in excess of fifteen thousand dollars (\$15,000), without first advertising for sealed competitive bids as herein provided. However, where it is determined by order of the board that there is an existing emergency, or where it is determined that the district is in a flood fight resulting from unanticipated conditions, the requirement for sealed competitive bids shall not apply.

6. To prescribe the duties of officers, agents and employees as may be required.

7. To establish the fiscal year of the district and to keep records of all business transactions of the district.

8. To prepare a statement of the financial condition of the district at the end of each fiscal year, in a form to be prescribed by the director or by the legislative services office, and publish in at least one (1) issue of some newspaper published, or in general circulation in, the county, or counties, in which such district is located and to file a certified copy of such financial report with the director and the legislative services office on or before February 2 of each year.

9. To have an audit of the financial affairs of the district as required in section 67-450B, Idaho Code. A certified copy of said audit shall be filed with the director on or before February 2 following the audit.

10. To obtain options upon and acquire by purchase, exchange, lease, gift, grant, bequest, devise, or otherwise, any property, real or personal, and improve any properties acquired; to receive income from such properties and to expend such income in carrying out the purposes and provisions of this chapter; to lease any of its property or interest therein in furtherance of the purposes and provisions of this chapter, provided that no contract or agreement for the acquisition, purchase or repair of personal property involving expenditure in excess of one thousand dollars (\$1,000), shall be entered into without first advertising for sealed competitive bids as herein provided.

11. To have the power of eminent domain for the use of the district in the construction, operation, maintenance and upkeep of its structures, waterways, dikes, dams, basins, or any other use necessary in the carrying out of the provisions of this chapter.

12. To convey rights-of-way and easements for highways, public roads, public utilities, and for other purposes, over district property, as shall be determined by the board to be in the best interests of the district.

13. To convey, by deed, bill of sale, or other appropriate instrument, all of the estate and interest of the district, in any real or personal property. Prior to such sale or conveyance, the board shall have the property appraised by three (3) disinterested residents of the district, which appraisal shall be entered in the minutes of the board. The property may be sold at public auction or at a private sale by sealed competitive bids, as the board shall determine, to the highest cash bidder, provided that in no case shall any property of a district be sold for less than its appraised value. All sales by sealed competitive bids shall be advertised as herein provided.

14. To use natural streams and to improve the same for use as a flood control structure. However, in the event that the use of the natural stream involves alteration of the stream channel, no such alteration shall be made by the district until such alteration is approved by the director.

15. To enter into contracts or agreements with the United States or any of its officers, agents, or subdivisions, or with the state or any of its officers, agents or political subdivisions, and to cooperate with such governments, persons or agencies in effectuating, promoting and accomplishing the purposes of this chapter, provided that the district has sufficient moneys on hand, or in their budget for the year in which said contract is entered into, to defray the expenditure of funds called for in such contract without the creation of any indebtedness.

Whenever any such contract shall, by its terms, require the expenditure of funds by the district in excess of the moneys on hand or the funds to be realized from their budget for the year in which said contract is entered into, then such contract may not be entered into by the district until ratified by two-thirds ($\frac{2}{3}$) of the qualified voters voting at an election to be held, subject to the provisions of section 34-106, Idaho Code, for that purpose, according to the provisions of this chapter.

16. To bear its allocated share of the cost of any project resulting from any contract or agreement entered into as provided herein.

17. To take over, administer and maintain pursuant to any agreement or contract entered into in accordance with the provisions of this act, any flood control project within or without the boundaries of the district undertaken in cooperation with the United States or any of its agencies, or with the state of Idaho or any of its agencies, or any combinations thereof.

18. To accept donations, gifts and contributions in money, services, or materials, or otherwise, from the United States or any of its agencies, or the state of Idaho or any of its agencies or any combinations thereof, and to expend such moneys, services, or materials in carrying on its operations.

19. To exercise all other powers necessary, convenient or incidental to carrying out the purposes and provisions of the chapter. [1971, ch. 300, § 15, p. 1219; am. 1979, ch. 175, § 1, p. 522; am. 1985, ch. 79, § 1, p. 152; am. 1993, ch. 258, § 1, p. 887; am. 1993, ch. 327, § 21, p. 1186; am. 1993, ch. 387, § 12, p. 1417; am. 1995, ch. 82, § 18, p. 218; am. 1995, ch. 118, § 60, p. 417; am. 1996, ch. 159, § 17, p. 502.]

Compiler's notes. Section 41 of S.L. 1993, ch. 327 read: "All employees employed by the Joint Senate Finance-House Appropriations Committee, the Legislative Auditor or Legislative Budget Office on June 30, 1993, shall be transferred to the Legislative Council and shall be deemed to be employees of the Legislative Council on July 1, 1993. All moneys which have been appropriated to and been encumbered by the Joint Senate Finance-House Appropriations Committee, the Legislative Budget Office and the Legislative Auditor on June 30, 1993, shall be transferred to the Legislative Council and shall be deemed to be encumbered by that body. All moneys appropriated to the Joint Senate Finance-House Appropriations Committee for the Legislative Auditor and the Legislative Budget Office are deemed appropriated to the Legislative Council for the same period and purpose."

Former § 42-3115 was repealed. See Compiler's note, § 42-3101.

For words "this act" see Compiler's note, § 42-3101.

Sections 20 and 22 of S.L. 1993, ch. 327 are compiled as §§ 39-414A and 42-4416, respectively.

Sections 11 and 13 of S.L. 1993, ch. 387 are compiled as §§ 42-619 and 42-3209, respectively.

Sections 17 and 19 of S.L. 1995, ch. 82 are compiled as §§ 39-2805 and 42-3708, respectively.

Sections 59 and 61 of S.L. 1995, ch. 118 are compiled as §§ 42-2801 and 42-3117, respectively.

Sections 16 and 18 of S.L. 1996, ch. 159 are compiled as §§ 38-1517 and 56-450, respectively.

Sec. to sec. ref. This section is referred to in § 42-3117.

42-3116. Sealed bids — When required — Publication of notice. —

1. A district shall advertise for sealed competitive bids if it is:
 - (a) to construct, operate, and maintain water control structures, whether within or without the boundaries of the district, and the project involves an expenditure in excess of fifteen thousand dollars (\$15,000), advertise for sealed competitive bids;
 - (b) to contract for the acquisition, purchase or repair of personal property or equipment involving an expenditure in excess of one thousand dollars (\$1,000);
 - (c) to convey the estate and interest of the district, in any real or personal property with a value in excess of one thousand dollars (\$1,000).
2. The district shall advertise for bids by notice first being given in a newspaper of general circulation within the district. The notice inviting bids shall set a date, time and place for the opening of sealed competitive bids. The first publication of notice shall be at least twenty-one (21) days before the date of the opening of the bids. Notice shall be published three (3) times, in three (3) separate issues of said newspaper, not less than one (1) week apart.

The board may let the contract to the responsible bidder offering the best price or may reject any bid, or reject all bids, and republish notice for bids in the same manner and for the same time as first bid. If, after republishing, no satisfactory bid is presented, the board may proceed under its own direction, subject to the approval of the director.

The notice shall set forth the project to be done and shall incorporate by reference plans and specifications for such project, or shall set forth the property to be purchased and shall incorporate by reference the specifications of such personal property, equipment or the repair thereof, or shall set forth the property being sold. [1971, ch. 300, § 16, p. 1219; am. 1979, ch. 175, § 2, p. 522; am. 1993, ch. 258, § 2, p. 887.]

Compiler's notes. Former § 42-3116 was repealed. See Compiler's note, § 42-3101.

42-3117. Contracts submitted to voters — Notice — Election. —

Whenever any contract with the United States or any agency thereof or, the state, is proposed to be entered into by any district which would create indebtedness in excess of the moneys on hand or the funds to be realized from their budget for the year in which said contract is entered into, the board shall first submit the question to the qualified voters of the district at an election to be held, subject to the provisions of section 34-106, Idaho Code, for that purpose.

Notice of such election must be given as provided in section 34-1406, Idaho Code. The notice must specify the date of the holding of the election, the qualification of the voters, the nature of the contract set forth in general terms, and by reference shall give notice as to where a copy of such contract, proposed to be entered into, may be viewed by the qualified voters, one (1) of which places shall be with each of the commissioners of the district and such other places as the board may determine by their order. Said notice shall further set forth the amount of the contract, the amount of the funds, if any, which will be received from the United States, and/or the state, the amount that the district will be obligating itself to pay, the duration of construction and obligation of such contract, the estimate of the mill levy required for operation, maintenance and administrative expenses of the district, whether such obligation may be met, within the limitations imposed by the levy authorized by this chapter, or whether, in addition to voting upon the contract it will be necessary to vote upon an increase in the authorized levy.

The notice shall further state the hours between which the polls will be open, the definite place or places of holding the election, which shall be fixed by the board by its order, which order will require at least one (1) polling place in every division of the district, and the question to be voted upon.

The ballot shall contain the question to be voted upon and shall contain the words "Contract-Yes" and "Contract-No," or other words equivalent.

In the event such contract requires the district to call for a levy beyond the limitations imposed in section 42-3115, Idaho Code, then the ballot shall contain the question to be voted upon and shall contain the words "Contract and Levy-Yes" and "Contract and Levy-No" or other words equivalent.

In this election, the polling places shall be presided over by a board of election which shall be appointed by the board which shall consist of two (2) judges and a clerk, who shall be qualified voters of the division and the district. Before entering upon their duties each member of the board of election shall take an oath, which shall be administered by any qualified district voter before they shall perform their duties as such member of the board of election.

In such election the ballots used by the voters shall be kept in a sealed container until the polls are closed at the time specified in the notice of election and then shall be counted in open view.

It is intended that no informalities in the conduct of such election shall invalidate the same if the election shall have been otherwise fairly held.

The returns of such election shall be canvassed by the board which shall constitute the board of canvassers. All ballot boxes shall be returned to the

board immediately upon the close of the polls and the counting of the ballots, and the ballots shall be canvassed not more than ten (10) days thereafter.

If upon the canvass of the votes it appears that the contract was approved by two-thirds ($\frac{2}{3}$) of the qualified voters voting at the election, then the contract will be considered to be approved. [1971, ch. 300, § 17, p. 1219; am. 1995, ch. 118, § 61, p. 417.]

Compiler's notes. Former § 42-3117 was repealed. See Compiler's note, § 42-3101.

Sec. to sec. ref. This section is referred to in § 42-3115.

Sections 60 and 62 of S.L. 1995, ch. 118 are compiled as §§ 42-3115 and 42-3125, respectively.

42-3118. Electors — Qualifications. — No person shall be entitled to vote at an election for the purpose of raising the authorized maximum levy or the ratification of contracts by a flood control district, or for any other purpose in connection with said district, unless at the time of the election he is:

1. An elector within the meaning of article 6, section 2, of the Constitution of the state of Idaho; and
2. A resident within the district for a period of thirty (30) or more days next preceding the election. [1971, ch. 300, § 18, p. 1219; am. 1982, ch. 254, § 10, p. 646.]

Compiler's notes. Former § 42-3118 was repealed. See Compiler's note, § 42-3101.

repealed and § 11 of S.L. 1982, ch. 254 is compiled as § 43-111.

Section 9 of S.L. 1982, ch. 254 has been

42-3119. Title to and sale of waters — Disposition of aggregate. —

(1) The commissioners of any flood control district may in the manner provided by law obtain title to any unappropriated waters which said district has developed, conserved, or stored and said commissioners may sell, dispose, or use said waters within or without the said district in any manner which the commissioners shall decide is of the greatest advantage to the district. The powers herein granted to the commissioners shall not be denied them by reason of contrary provisions of any other statute, except that the district may not obtain title to any waters previously appropriated.

(2) If in the operation of the works of the flood control district or in the removal of natural obstructions from the beds of navigable lakes, rivers, and streams between the ordinary high water marks, the district acquires rock, sand or gravel aggregates, the district may dispose of such aggregate not needed for district purposes through commercial sales or by donation to public agencies. District purposes as used in this section shall include construction or reconstruction of dikes, levees, and related access facilities. If sold through commercial sales or used for nonflood control related improvements on private land, the fees required by chapter 7, title 47, Idaho Code, shall apply and shall be paid to the state board of land commissioners. If the aggregate is donated to any public agency for use by that public agency, no fees shall be imposed or collected.

(3) As used in this section, public agency means a state agency, county, municipality, or highway district. [1971, ch. 300, § 19, p. 1219; am. 1986, ch. 142, § 1, p. 399.]

Compiler's notes. Former § 42-3119 was repealed. See Compiler's note, § 42-3101.

42-3120. Enlargement of district — Petition. — An existing district may be enlarged in the same manner as a district may be originally organized pursuant to the provisions of this act, except that a petition for the enlargement of an existing district shall be signed by at least one third ($\frac{1}{3}$) of the qualified voters in the area of the proposed extension to this existing district, as shall be determined by the voters who voted in the last general election next preceding the filing of the petition for enlargement; and shall bear the indorsement of the board of the existing district certifying that the proposed enlargement is desirable. [1971, ch. 300, § 20, p. 1219.]

Compiler's notes. Former § 42-3120 was repealed. See Compiler's note, § 42-3101.

For words "this act" see Compiler's note, § 42-3101.

Sec. to sec. ref. This section is referred to in § 42-3127.

42-3121. Consolidation of districts. — If the boards of commissioners of any two (2) or more flood control districts which are contiguous deem it for the best interests of their respective district that the same be consolidated into a single district, such boards may petition the director of the department of water resources, state of Idaho, for an order consolidating the said districts. [1971, ch. 300, § 21, p. 1219.]

Compiler's notes. Former § 42-3121 was repealed. See Compiler's note, § 42-3101.

The name of the director of the department of water administration has been changed to

the director of the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

42-3122. Petition for consolidation — Investigation — Notice of hearing. — Upon receiving a petition for the consolidation of two (2) or more flood control districts, the director shall investigate the condition of such districts, and all questions affecting such proposed consolidation, and within a reasonable time shall give and publish a notice of the proposed consolidation, which notice shall state a time and place where said petition will be considered by him, and any proponents of objections desiring to be heard shall be heard at such time and place. Such notice shall be published two (2) weeks in three (3) consecutive weekly issues before the date upon which the same is to be heard, in a newspaper of general circulation within each county in which any of the lands within the said proposed consolidation district are located. [1971, ch. 300, § 22, p. 1219.]

Compiler's notes. Former § 42-3122 was repealed. See Compiler's note, § 42-3101.

42-3123. Director's findings on petition and hearing. — The director shall, at the hearing herein provided, permit any person or corporation interested in the proposed consolidation or in any of its objects or purposes, to appear and make objection to the consolidation of said district.

The director shall make his findings upon facts alleged in the petition and any objections presented at such hearing and any facts based on his own investigation and any other facts necessary for the determination of the practicability and feasibility and desirability of said consolidation. [1971, ch. 300, § 23, p. 1219.]

Compiler's notes. Former § 42-3123 was repealed. See Compiler's note, § 42-3101.

42-3124. Decision by director — Court confirmation of consolidation required. — The director shall recommend for or against the consolidation, basing his decision on his findings of facts and stating his reasons. If the director shall recommend that the districts be not consolidated, nothing further shall be done, unless a new petition shall be filed in the manner herein provided. If the director shall recommend that the districts be consolidated, he may make and enter an order consolidating the districts and record said order in the office of the county recorder of each county wherein the lands in said consolidated district are located. The order shall also divide the consolidated district into not less than three (3) nor more than nine (9) divisions, and shall name the commissioners appointed by him for the consolidated district. The consolidated district shall be known and described by the name and number of the largest district of those consolidated. In the case of the consolidation of two (2) or more districts which are contiguous and already existing and concerning each of which the confirmation of proceedings has already been obtained, procedure the same in all respects as herein specified for the creation of an original flood control district shall be followed by the board of the consolidated district for the purpose of procuring a like order, or orders, of the district court touching such consolidation. [1971, ch. 300, § 24, p. 1219.]

Compiler's notes. Former § 42-3124 was repealed. See Compiler's note, § 42-3101.

42-3125. Director may submit consolidation to election. — The director may upon receiving a petition for consolidation of two (2) or more flood control districts, order an election to be held, subject to the provisions of section 34-106, Idaho Code, in each district. If two-thirds ($\frac{2}{3}$) of the qualified voters in each district, voting at the election, shall vote in favor of consolidation, the director shall make and enter an order consolidating the districts as in the preceding section. If fewer than two-thirds ($\frac{2}{3}$) of the qualified voters in any district voting at the election shall vote in favor of the consolidation, nothing further shall be done, unless a new petition shall be filed in the manner herein provided. [1971, ch. 300, § 25, p. 1219; am. 1995, ch. 118, § 62, p. 417.]

Compiler's notes. Sections 61 and 63 of S.L. 1995, ch. 118 are compiled as §§ 42-3117 and 42-3202, respectively.

42-3126. Dissolution of district. — A district may be dissolved by the district court for the county in which the office of a district was last located, on complaint or petition of parties holding and owning:

1. Fifty per cent (50%) or more of the issued, outstanding, unpaid bonds of such district; or
2. Fifty per cent (50%) or more of all land located within the boundaries of such district; or
3. Claims, warrants, liens or other legal obligations of such district in an amount equal to not less than thirty per cent (30%) of the issued, outstanding and unpaid bonds of such district; or
4. Upon the complaint of the director of the department of water resources.

It must be made to appear to the satisfaction of the court, by such complaint or petition, that any one (1) or more of the following conditions exist in or as to said district:

1. That the district has been abandoned, or for two (2) or more years last past has ceased to function, and there is little or no possibility that it will ever function in the future.
2. That no useful purpose exists for the further continuance of the organization of the district.
3. That there are not sufficient qualified voters of such district to hold a legal election. [1971, ch. 300, § 26, p. 1219.]

Compiler's notes. The name of the director of the department of water administration has been changed to the director of the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

Section 28 of S.L. 1971, ch. 300 read: "This act shall not impair or affect any act done, offense committed, or right accrued or acquired, or liability, penalty, forfeiture, or punishment incurred prior to the time this act takes effect, but the same may be enjoyed, asserted, enforced, prosecuted, or inflicted as fully as to the same extent as if this act had not been passed. All districts heretofore incorporated under the laws of the state, repealed by this act, will continue to operate and will succeed to all of the rights, privileges and duties of the district under this act."

Section 29 of S.L. 1971, ch. 300 read: "If any section, subsection, subdivision, paragraph, sentence, part or provision of this act shall be found to be invalid or ineffective by the court, it shall be conclusively presumed that this act would have been passed by the legislature without such invalid section, subsection, subdivision, paragraph, sentence, part or provision, and this act, as a whole, shall not be declared invalid by reason of the fact that one or more sections, subsections, subdivision, paragraphs, sentences, parts or provisions may be so found invalid."

Section 27 of S.L. 1971, ch. 300 repealed former §§ 42-3101 — 42-3124.

Section 30 of S.L. 1971, ch. 300 provided that this act shall be in full force and effect on and after July 1, 1971.

42-3127. Exclusion of a division. — The qualified electors residing in a division of a flood control district may petition the director of the department of water resources requesting to be excluded from a district. Said petition must be signed by one-third (⅓) or more of the qualified electors residing within the territory of the division and the petition must:

- (1) Show that the division either plans to join another existing district or form a new district.

(2) Describe the impacts on the remainder of the district after the division is excluded.

(3) Describe the benefits to the division that will result from its exclusion from the original district.

(4) Be in proper form as required by section 42-3105, Idaho Code, to proceed with the formation of a new district or be in proper form as required by section 42-3120, Idaho Code, to proceed with the addition of the division to an already existing district.

(5) Present an equitable division of assets and liabilities between the division and the remaining district.

Upon receipt, the director shall examine the petition, and if in proper form and if it appears that an equitable distribution of assets and liabilities can be made, the director shall proceed with the publication of notice, as described in section 42-3107, Idaho Code. The director shall, at the hearing, permit any person or corporation interested in the exclusion of the division to appear and present testimony and evidence in support of or against exclusion of the division. The director shall base his findings upon allegations in the petition, testimony and evidence presented at the hearing and any other facts necessary for the determination of the practicability and feasibility of exclusion of the division.

If the director shall recommend that a division should be excluded, he shall make and enter his findings in the form of a petition to the district court for the county in which the largest portion of the division is located. The district court may then order the exclusion of a division.

If the director shall determine that a division should not be excluded, nothing further shall be done, unless a new petition is filed in a similar manner as described above.

At such time as the division is excluded by the district court, the new district or enlargement of an existing district shall be ordered by the director in accordance with section 42-3108, Idaho Code.

The director may redivide the district from which the division was excluded in order to meet the requirements of section 42-3106, Idaho Code. [I.C., § 42-3127, as added by 1984, ch. 240, § 1, p. 585.]

42-3128. Exclusion of a division — Disbursement of assets and liabilities. — The distribution of assets and liabilities made necessary by the exclusion of a division from a flood control district pursuant to section 42-3127, Idaho Code, shall be established by decree of the district court. In order to establish the distribution of assets and liabilities between the remaining district and the excluded division, the court may consider the director's findings and recommendations, county tax records and district records. [I.C., § 42-3128, as added by 1984, ch. 240, § 2, p. 585.]

CHAPTER 32

WATER AND SEWER DISTRICTS

SECTION.

- 42-3201. Declaration of purpose.
- 42-3202. Definition of terms.
- 42-3202A. Recreational water and/or sewer district — Definition.
- 42-3202B. Water and/or sewer districts meeting the criteria of recreational water and/or sewer districts — Creation.
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SECTION.

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- 42-3231. Quorum of board at hearing.
- 42-3232. Validation of acts taken pursuant to this chapter.
- 42-3233. Merger authorized.
- 42-3234. Majority vote required.
- 42-3235. Voting procedure.
- 42-3236. Ballot.
- 42-3237. Court order declaring merger.
- 42-3238. Private community sewer system — Properties exempt from other taxation.

42-3201. Declaration of purpose. — It is hereby declared that the organization of water and sewer districts, having the purposes and powers provided in this act, will serve a public use and will promote the health, safety, prosperity, security and general welfare of the inhabitants of said districts. [1947, ch. 152, § 1, p. 364.]

Compiler's notes. The words "this act" refer to S.L. 1947, ch. 152, which is compiled herein as most of the sections within §§ 42-3201 — 42-3227.

Sec. to sec. ref. This chapter is referred to in §§ 31-877, 39-3635, 42-3202B, 42-3218A, 42-3218C, 42-3218D, 42-3232 and 50-1702.

Cited in: Dalton v. South Fork of Coeur

D'Alene River Sewer Dist., 101 Idaho 833, 623 P.2d 141 (1980); Kootenai County Property Ass'n v. Kootenai County, 115 Idaho 676, 769 P.2d 553 (1989).

Attack on Organization.

The district court's order declaring appellant district organized was not subject to

collateral attack but the invalidity of this organization could only be raised by the state in an action in quo warranto which would have to be brought or be commenced by the

attorney general within 30 days after said decree declaring such district organized. *Clemens v. Pinehurst Water Dist.*, 81 Idaho 213, 339 P.2d 665 (1959).

42-3202. Definition of terms. — A water district is one to supply water for domestic, commercial, and/or industrial purposes by any available means, and for that purpose any such district shall have power to extend its water lines to the source of water supply.

A sewer district is one to provide for sewage disposal and for that purpose any such district shall have power to extend its sewer lines to an appropriate outlet.

A district may be created for a combination of water and sewer purposes, or either of said purposes. A district may be entirely within or entirely without, or partly within and partly without one (1) or more municipalities or counties, and the district may consist of noncontiguous tracts or parcels of property.

The word "board" as used in this chapter shall mean the board of directors of a district.

A "qualified elector" of a district, within the meaning of and entitled to vote under this chapter, unless otherwise specifically provided herein, is a person qualified to vote at general elections in this state, and who has been a bona fide resident of the district for at least thirty (30) days prior to any election in the district.

Wherever the term "publication" is used in this chapter and no manner specified therefor, it shall mean publication twice, the first time not less than twelve (12) days prior to the election and the second time not less than five (5) days prior to the election, as provided in section 34-1406, Idaho Code. [1947, ch. 152, § 2, p. 364; am. 1955, ch. 63, § 1, p. 122; am. 1957, ch. 29, § 1, p. 40; am. 1974, ch. 101, § 1, p. 1202; am. 1975, ch. 189, § 1, p. 529; am. 1995, ch. 118, § 63, p. 417.]

Compiler's notes. Section 2 of S.L. 1955, ch. 63 is compiled as § 42-3207.

Section 2 of S.L. 1957, ch. 29 is compiled as § 42-3207.

Sections 62 and 64 of S.L. 1995, ch. 118 are compiled as §§ 42-3125 and 42-3202B, respectively.

Section 2 of S.L. 1974, ch. 101 declared an emergency. Approved March 27, 1974.

Cross ref. Qualifications of voters, §§ 34-401 — 34-407.

Disposal.

This section empowers sewer districts to "provide for sewage disposal," and disposal necessarily includes treatment. *City of Boise v. Bench Sewer Dist.*, 116 Idaho 25, 773 P.2d 642 (1989).

42-3202A. Recreational water and/or sewer district — Definition. — A recreational water and/or sewer district is one in which less than a majority of the landowners or state lessees or federal permittees in the district sought to be created reside within the district and at least fifty per cent (50%) of the land area of said district is in a natural state, or used for agricultural purposes.

The actual or potential development anticipated for said district shall be predominantly recreational in character. The district or areas near the district shall meet one or more of the following criteria: have unique scenic

value; man-made or natural recreational facilities such as waterways, marinas, ski slopes, wilderness areas; provide open space; and be removed from large, densely populated urban areas. Recreational water and/or sewer districts shall provide services and/or facilities to landowners or state lessees or federal permittees. The proposed district shall be in the best interests of the state of Idaho in that the benefits derived by property owners shall effectuate the preservation and development of recreational opportunities within the state. [I.C., § 42-3202A, as added by 1975, ch. 189, § 2, p. 529; am. 1979, ch. 272, § 1, p. 706; am. 1980, ch. 191, § 1, p. 421; am. 1982, ch. 364, § 1, p. 914.]

Compiler's notes. Section 3 of S.L. 1975, ch. 189, declared an emergency. Approved March 28, 1975. **Sec. to sec. ref.** This section is referred to in § 42-3202C.

42-3202B. Water and/or sewer districts meeting the criteria of recreational water and/or sewer districts — Creation. — Each petition filed with the clerk of the district court pursuant to the provisions of this chapter shall be verified and the petitioner shall certify or prove to the satisfaction of the court that the district sought to be created is a recreational water and/or sewer district under the terms of section 42-3202A, Idaho Code. The court decree pursuant to the provision of section 42-3207, Idaho Code, determining the nature of such district pursuant to the petitioner's prayer shall be conclusive for this and all other purposes. If the water and/or sewer district sought to be created is a recreational water and/or sewer district as defined in section 42-3202A, Idaho Code, such recreational water or sewer district shall be created in the manner provided in chapter 32, title 42, Idaho Code, except that the term, "qualified elector" shall mean any natural person who is qualified to vote in an Idaho general election, and who is an actual resident of the district, or who is an actual resident of Idaho, owning land within the boundaries of the district or area to be included within the district, or is a lease holder of a state recreational lease, or is a permit holder of a federal recreational use permit and pays personal property tax on improvements on the lease or permit area, irrespective of his or her place of residence in Idaho. The holder or holders of a bona fide contract to purchase any land within the proposed district whose names appear upon the next preceding county assessment roll for the payment of taxes on the land shall be deemed an owner of land for the purposes of this section. [I.C., § 42-3202B, as added by 1979, ch. 272, § 2, p. 706; am. 1980, ch. 191, § 2, p. 421; am. 1982, ch. 364, § 2, p. 914; am. 1995, ch. 118, § 64, p. 417.]

Compiler's notes. Section 3 of S.L. 1979, ch. 272 is compiled as § 42-3232. Section 3 of S.L. 1982, ch. 364 declared an emergency. Approved April 2, 1982.

Sections 63 and 65 of S.L. 1995, ch. 118 are compiled as §§ 42-3202 and 42-3207, respectively. **Sec. to sec. ref.** This section is referred to in § 42-3211.

42-3202C. Changing status of district. — The board of directors of a water and/or sewer district may, at any time after the formation of such

district, determine that the district qualifies as a recreational water and/or sewer district as defined under section 42-3202A, Idaho Code, and that it is in the best interest of the district to petition the court to change the district's status to a recreational water and/or sewer district. Said petition must be filed in the office of the clerk of the court vested with jurisdiction, in a county in which the major part of the real property in the existing district is situated. The petition must be signed by the chairman of the district's board of directors and shall set forth the following:

(1) The name of the existing district, date on which said district was formed and a general description of the district's boundaries.

(2) That the petition was initiated after a majority vote of the board of directors that it is in the best interest of the district to change its status to a recreational water and/or sewer district.

(3) The criteria the district meets under section 42-3202A, Idaho Code, thereby qualifying it as a recreational water and/or sewer district.

(4) A prayer for changing the status of the existing district to that of a recreational water and/or sewer district.

Upon filing of the petition, the court shall by order fix a time and place for hearing as provided in section 42-3206, Idaho Code. Upon the hearing of said petition any interested persons or corporations may appear before said court and make objections to the proposed status change. Further, if it then shall appear that the petition for a change in status has been signed and presented as hereinabove provided and the allegations of the petition are true, the court shall by order duly entered of record, grant the prayed for change of status of the existing district. [I.C., § 42-3202C, as added by 1988, ch. 302, § 1, p. 958.]

42-3203. Jurisdiction to establish districts. — The district court sitting in and for any county in this state, or any judge thereof in vacation, is hereby vested with jurisdiction, power and authority to establish districts which may be entirely within or partly within and partly without the judicial district in which said court is located. [1947, ch. 152, § 3, p. 364.]

42-3204. Petition — Contents — Amendments. — The organization of a district shall be initiated by a petition filed in the office of the clerk of the court vested with jurisdiction, in a county in which the major part of the real property in the proposed district is situated. The petition shall be signed by not less than ten per cent (10%) of the taxpayers of the district, who pay a general tax on real property owned by him or her within the district; provided, however, that no single tract or parcel of property containing five (5) acres or more may be included in any district organized under this act without the consent of the owner or owners thereof.

The petition shall set forth:

(1) The name of the proposed district consisting of a chosen name preceding the words, "water district" or "sewer district," or "water and sewer district."

(2) A general description of the improvements to be constructed or installed within and for the district.

(3) The estimated cost of the proposed improvements.

(4) A general description of the boundaries of the district or the territory to be included therein, with such certainty as to enable a property owner to determine whether or not his property is within the district.

(5) A prayer for the organization of the district.

No petition with the requisite signatures shall be declared null and void on account of alleged defects, but the court may at any time permit the petition to be amended to conform to the facts by correcting any errors in the description of the territory, or in any other particular. Similar petitions or duplicate copies of the same petition for the organization of the same district may be filed and shall together be regarded as one petition. All such petitions filed prior to the hearing on the first petition filed, shall be considered by the court the same as though filed with the first petition placed on file. [1947, ch. 152, § 4, p. 364.]

Compiler's notes. For words "this act", see Compiler's note, § 42-3201.

42-3205. Bond of petitioners. — At the time of filing the petition or at any time subsequent thereto, and prior to the time of hearing on said petition a bond shall be filed, with security approved by the court, sufficient to pay all expenses connected with the proceedings in case the organization of the district be not effected. If at any time during the proceeding the court shall be satisfied that the bond first executed is insufficient in amount, it may require the execution of an additional bond within a time to be fixed, not less than ten (10) days distant, and upon failure of the petitioner to execute the same, the petition shall be dismissed. [1947, ch. 152, § 5, p. 364.]

42-3206. Notice of hearing on petition — Jurisdiction. — Immediately after the filing of such petition, the court wherein such petition is filed or a judge thereof in vacation, shall by order fix a place and time, not less than twenty (20) days nor more than forty (40) days after the petition is filed, for hearing thereon and thereupon the clerk of said court shall cause notice by publication to be made of the pendency of the petition and of the time and place of hearing thereon; the clerk of said court shall also forthwith cause a copy of said notice to be mailed by U. S. registered mail to the board of county commissioners of each of the several counties and to the governing body of each municipality having territory within the proposed district.

The district court in and for the county in which the petition for the organization of a district has been filed, shall thereafter for all purposes of this act, except as hereinafter otherwise provided, maintain and have original and exclusive jurisdiction, coextensive with the boundaries of the district, and of the real property proposed to be included in said district or affected by said district without regard to the usual limits of its jurisdiction.

No judge of such court wherein such petition is filed shall be disqualified to perform any duty imposed by this act by reason of ownership of property within any proposed district. [1947, ch. 152, § 6, p. 364.]

Compiler's notes. For words "this act", see Compiler's note, § 42-3201.

Sec. to sec. ref. This section is referred to in § 42-3202C.

Cross ref. Notice by mail, § 60-109A.

42-3207. Hearings on petitions — Election for organization and directors. — On the day fixed for such hearing or at any adjournment thereof the court shall ascertain from the tax rolls of the county or counties in which the district is located or into which it extends, the total number of taxpayers within the proposed district, who pay a general tax on real property owned by him or her within the district.

If the court finds that no petition has been signed and presented in conformity with this chapter, or that the material facts are not as set forth in the petition filed, it shall dismiss said proceedings and adjudge the costs against the signers of the petition in such proportion as it shall deem just and equitable. No appeal or writ of error shall lie from an order dismissing said proceedings; but nothing herein shall be construed to prevent the filing of a subsequent petition or petitions for similar improvements or for a similar district, and the right so to renew such proceedings is hereby expressly granted and authorized.

Any time after the filing of the petition for the organization of a district and before the day fixed for the hearing thereon, the owner or owners of any real property within the proposed district may file a petition with the court stating reasons why said property should not be included therein, why his land or any part thereof will not be benefited by the proposed district, or should not be embraced in said district and made liable to taxation therefor, and praying that said property be excluded therefrom. Such petition shall be duly verified and shall describe the property sought to be excluded. The court shall conduct a hearing on said petition and shall hear all objections to the inclusion in the district of any lands described in said petition. In case any owner of real estate included in said proposed district shall satisfy the court that his real estate, or any part thereof, has been wrongfully included therein or will not be benefited thereby then the court shall exclude such real estate as will not be benefited.

Upon said hearing, if it shall appear that a petition for the organization of a district has been signed and presented as hereinabove provided, in conformity with this chapter, and the allegations of the petition are true, the court shall, by order duly entered of record, direct that the question of the organization of the district shall be submitted to the qualified electors of the district at an election to be held, subject to the provisions of section 34-106, Idaho Code, for that purpose, and such order shall appoint three (3) qualified electors of the district as judges of said election. The clerk of the court having jurisdiction shall give published notice of the time and place of an election to be held in the district in accordance with the provisions of section 34-1406, Idaho Code.

Such election shall be held and conducted in the same manner as general elections in this state, including chapter 14, title 34, Idaho Code, except that the court shall establish as many election precincts within such proposed district as are deemed necessary, and shall define the boundaries thereof, which precincts and boundaries may thereafter be changed by the board of

directors of such district if so organized. Such court, and thereafter the board of directors of such district, if so organized, shall appoint three (3) judges of election, one (1) of whom shall act as clerk for such election precinct.

At any time after the filing of the petition herein referred to and before the day fixed for hearing, nominees for the board of directors of the district may be nominated by the filing of a petition designating the name or names of the nominee or nominees, signed by at least five (5) qualified electors of the district. If upon the hearing as herein provided the court shall order an election for the creation of the district, the court shall also ascertain the names of persons nominated by the board of directors, and shall order that the names of persons whom the court finds to have been properly nominated shall be listed upon a ballot submitted to the electors at such election. In the event the court makes its order providing for such election, it shall prescribe the form of the question and ballot relating to the creation of the district, and also the form of the ballot relating to the election of the directors; provided that all matters may be contained upon one ballot to be submitted to the voters.

At such election the voters shall vote for or against the organization of the district, and for five (5) qualified electors, who shall constitute the board of directors of the district, if organized, one (1) director to act until the first biennial election, two (2) until the second, and two (2) until the third biennial election.

The judges of election shall certify the returns of the election to the district court having jurisdiction. If a majority of the votes cast at said election are in favor of the organization, the district court shall declare the district organized and give it a corporate name by which, in all proceedings, it shall thereafter be known, and designated the first board of directors elected, and thereupon the district shall be a governmental subdivision of the state of Idaho and a body corporate with all the powers of a public or quasi-municipal corporation.

If an order be entered establishing the district, such order shall be deemed final and no appeal or writ of error shall lie therefrom, and the entry of such order shall finally and conclusively establish the regular organization of the said district against all persons except the state of Idaho, in an action in the nature of a writ of quo warranto, commenced by the attorney general within thirty (30) days after said decree declaring such district organized as herein provided, and not otherwise. The organization of said district shall not be directly or collaterally questioned in any suit, action or proceeding except as herein expressly authorized. [1947, ch. 152, § 7, p. 364; am. 1955, ch. 63, § 2, p. 122; am. 1957, ch. 29, § 2, p. 40; 1967, ch. 186, § 1, p. 613; am. 1995, ch. 118, § 65, p. 417.]

Compiler's notes. Section 1 of S.L. 1955, ch. 63, is compiled herein as § 42-3202.

Section 3 of S.L. 1955, ch. 63 is compiled herein as § 42-3221.

Section 1 of S.L. 1957, ch. 29 is compiled herein as § 42-3202.

Section 3 of S.L. 1957, ch. 29 is compiled herein as § 42-3211.

Sections 64 and 66 of S.L. 1995, ch. 118 are compiled as §§ 42-3202B and 42-3211, respectively.

Sec. to sec. ref. This section is referred to

in §§ 42-3202B and 42-3224.

Constitutionality.

The provision of this section prior to 1957 amendment requiring residents and qualified electors to be taxpayers before voting at an organizational election was an unconstitutional requirement inasmuch as no qualifications are ever to be required for any person to vote or hold office except in school elections or in irrigation district elections. *Clemens v. Pinehurst Water Dist.*, 81 Idaho 213, 339 P.2d 665 (1959).

The unconstitutional portion of this section, prior to 1957 amendment, relative to taxpayer qualification of electors at an organizational election of a water and sewer district did not invalidate the entire water and sewer district act, tit. 42, ch. 32, but such objectionable provision of the statute was separable from said act. *Clemens v. Pinehurst Water Dist.*, 81 Idaho 213, 339 P.2d 665 (1959).

42-3208. Qualification of members of board. — Whenever a district has been declared duly organized, the members of the board shall qualify by filing with the clerk of court their oaths of office, and corporate surety bonds at the expense of the district in an amount not to exceed \$1,000 each, the form thereof to be fixed and approved by the court, conditioned for the faithful performance of their duties as directors. [1947, ch. 152, § 8, p. 364.]

42-3209. Organization of board — Accounts of treasurer — Compensation of members — Annual audit — Removal of directors. — After taking oath and filing bonds, the board shall choose one (1) of its members as chairman of the board and president of the district, and shall elect a secretary and a treasurer of the board and of the district, who may or may not be members of the board. The secretary and the treasurer may be one person. Such board shall adopt a seal and the secretary shall keep, in a well-bound book, a record of all its proceedings, minutes of all meetings, certificates, contracts, bonds given by employees and all corporate acts which shall be open to inspection of all owners of real property in the district, as well as to all other interested parties.

The treasurer shall keep strict and accurate accounts of all money received by and disbursed for and on behalf of the district, in permanent records. He shall file with the clerk of the court, at the expense of the district, a corporate fidelity bond in an amount not less than five thousand dollars (\$5,000), conditioned on the faithful performance of the duties of his office.

Each member of the board shall receive as compensation for his service a sum not in excess of one hundred dollars (\$100) per meeting, payable monthly. No member of the board shall receive any compensation as an employee of the district or otherwise, other than that herein provided, and no member of the board shall be interested in any contract or transaction with the district except in his official representative capacity.

It shall be the duty of the board of directors to cause an audit to be made of all financial affairs of the district during each year ending November 30th as required in section 67-450B, Idaho Code.

The court having jurisdiction of the district shall have the power to remove directors for cause shown, on petition, notice and hearing. [1947, ch. 152, § 9, p. 364; am. 1965, ch. 191, § 1, p. 399; am. 1977, ch. 7, § 1, p. 14; am. 1993, ch. 44, § 1, p. 116; am. 1993, ch. 387, § 13, p. 1417; am. 2003, ch. 36, § 1, p. 156.]

Compiler's notes. This section was amended by two 1993 acts — ch. 44, § 1, and ch. 387, § 13, both effective July 1, 1993 — which do not appear to conflict and have been compiled together.

The amendment by ch. 44, § 1, in the third paragraph substituted “fifty dollars (\$50.00)” for “twenty-five dollars (\$25.00)” preceding “per meeting,”.

The amendment by ch. 387, § 13, near the end of the second paragraph added “five thousand dollars” following “in an amount not less

than”; added parentheses around “\$5,000”; in the next to last paragraph at the end substituted “as required in section 67-450B, Idaho Code” for “, which audit shall be made during the last month of each calendar year.”; and deleted the former last two sentences.

Sections 12 and 14 of S.L. 1993, ch. 387 are compiled as §§ 42-3115 and 42-4416, respectively.

Section 2 of S.L. 1965, ch. 191 declared an emergency. Approved March 23, 1965.

42-3210. Meetings — Vacancies. — The board shall meet regularly once each month at a time and in a place to be designated by the board. Special meetings may be held as often as the needs of the district require, on notice to each member of the board. Three (3) members of the board shall constitute a quorum at any meeting. Any vacancy on the board shall be filled by the remaining members or member of the board, the appointee to act until the next biennial election when the vacancy shall be filled by election. If the board shall fail, neglect or refuse to fill any vacancy within thirty (30) days after the same occurs, the court having jurisdiction shall fill such vacancy. [1947, ch. 152, § 10, p. 364.]

42-3211. Elections — Terms of office. — (1) Except as provided in subsection (2), of this section, on the first Tuesday in February, in the second calendar year after the organization of any district, and on the first Tuesday in February every second year thereafter an election shall be held, which shall be known as the biennial election of the district.

(2) In districts created under section 42-3202B, Idaho Code, biennial elections shall be held on the first Tuesday in August.

(3) At the first biennial election in any district hereafter organized, and each sixth year thereafter, there shall be elected by the qualified electors of the district, one (1) member of the board to serve for a term of six (6) years; at the second biennial election and each sixth year thereafter, there shall be elected two (2) members of the board to serve for terms of six (6) years, and at the third biennial election, and each sixth year thereafter, there shall be elected two (2) members of the board to serve for terms of six (6) years.

Not later than 5:00 p.m. on the sixth Friday preceding the election, nominations may be filed with the secretary of the board and if a nominee does not withdraw his name before the first publication of the notice of election, his name shall be placed on the ballot. The board shall provide for holding such election and shall appoint judges to conduct it. The secretary of the district shall give notice of election by publication, and shall arrange such other details in connection therewith as the board may direct. The returns of the election shall be certified to and shall be canvassed and declared by the board. The candidate or candidates, according to the number of directors to be elected, receiving the most votes, shall be elected. Any new member of the board shall qualify in the same manner as members of the first board qualify.

In any election for director, if after the deadline for filing a declaration of intent as a write-in candidate, it appears that the number of qualified

candidates who have been nominated is equal to the number of directors to be elected, it shall not be necessary for the candidates to stand for election, and the board of directors shall declare such candidates elected as directors, and the secretary of the district shall immediately make and deliver to such persons certificates of election signed by him and bearing the seal of the district. [1947, ch. 152, § 11, p. 364; am. 1957, ch. 29, § 3, p. 40; am. 1980, ch. 257, § 1, p. 670; am. 1995, ch. 118, § 66, p. 417.]

Compiler's notes. Section 2 of S.L. 1980, ch. 257 read: "Elections in districts created under section 42-3202B, Idaho Code, shall be held on the second Tuesday in July of the same year as scheduled before the effective date [July 1, 1980] of this act."

Section 2 of S.L. 1957, ch. 29 is compiled herein as § 42-3207.

Section 4 of S.L. 1957, ch. 29 is compiled herein as § 42-3218.

Sections 65 and 67 of S.L. 1995, ch. 118 are compiled as §§ 42-3207 and 42-3218, respectively.

42-3211a. Expiration of term. — Any person serving as a board member for a recreational water district, recreational sewer district or a recreational water and sewer district, whose term of office would, after the effective date [July 1, 1980] of this act, expire in January shall continue to serve until the following July election, and all subsequently elected board members shall serve terms of office beginning and ending in July. [1980, ch. 257, § 3, p. 670.]

Compiler's notes. The bracketed effective date was inserted by the compiler.

42-3211b. When election not required. [Repealed.]

Compiler's notes. This section, which comprised I.C., § 42-3211b, as added by 1986, ch. 83, § 1, p. 242, was repealed by S.L. 1995, ch. 118, § 112, effective July 1, 1995.

42-3212. General powers of board. — For and on behalf of the district the board shall have the following powers:

- (a) To have perpetual existence;
- (b) To have and use a corporate seal;
- (c) To sue and be sued, and be a party to suits, actions and proceedings;
- (d) Except as otherwise provided in this chapter, to enter into contracts and agreements, cooperative and otherwise, affecting the affairs of the district, including contracts with the United States of America and any of its agencies or instrumentalities, and contracts with corporations, public or private, municipalities, or governmental subdivisions, and to cooperate with any one (1) or more of them in building, erecting or constructing works, canals, pipelines, sewage treatment plants, and other facilities within or without the district. Except in cases in which a district will receive aid from a governmental agency, a notice shall be published for bids on all construction contracts involving an expense of fifteen thousand dollars (\$15,000) or more for labor, materials and equipment, which sum shall exclude design costs, bid advertising and related bidding expenses. The district may reject any and all bids, and if it shall appear that the district can perform the work or secure material for less than the lowest bid, it may proceed so to do;

(e) To borrow money and incur indebtedness and evidence the same by certificate, notes or debentures, and to issue bonds, in accordance with the provisions of this chapter;

(f) To acquire, dispose of and encumber real and personal property, water, water rights, water and sewage systems and plants, and any interest therein, including leases and easements within or without said district;

(g) To refund any bonded indebtedness of the district without an election; provided, however, that the obligations of the district shall not be increased by any refund of bonded indebtedness. Otherwise, the terms and conditions of refunding bonds shall be substantially the same as those of an original issue of bonds;

(h) To have the management, control and supervision of all the business and affairs of the district, and the construction, installation, operation and maintenance of district improvements therein or therefor;

(i) To hire and retain agents, employees, engineers and attorneys;

(j) To have and exercise the power of eminent domain in the manner provided by law for the condemnation of private property for public use to take any property necessary to the exercise of the powers herein granted, both within and without the district;

(k) To construct and maintain works and establish and maintain facilities across or along any public street or highway, and in, upon, or over any vacant public lands, which public lands are now, or may become, the property of the state of Idaho, and to construct works and establish and maintain facilities across any stream of water or watercourse, and to maintain access to facilities and works by the removal of snow from roads and lands; provided, however, that the district shall promptly restore any such street or highway to its former state of usefulness as nearly as may be, and shall not use the same in such manner as to completely or unnecessarily impair the usefulness thereof;

(l) To fix and from time to time to increase or decrease water and sewer rates, tolls or charges for services or facilities furnished by the district, and to pledge such revenue for the payment of any indebtedness of the district. The board shall fix rates, tolls and charges and the time or times for the payment thereof. All such rates, tolls and charges not paid within thirty (30) days after the date fixed for the payment thereof shall become delinquent; the board shall certify all such delinquent rates, tolls and charges to the tax collector of the county by the district, not later than the first day of August and shall be, by said tax collector, placed upon the tax roll and collected in the same manner and subject to the same penalties as other district taxes; provided, however, that special assessments certified to the tax collector which are placed on property qualifying for a hardship exemption may be returned to the taxing district from which they originated if the special assessments are not paid within three (3) years. The date of priority of such lien shall be the date upon which such charge becomes delinquent. The board shall shut off or discontinue service for delinquencies in the payment of such rates, tolls or charges, or in the payment of taxes levied pursuant to this chapter, and prescribe and enforce rules and regulations for the connection with and the disconnection from properties of the facilities of the

district. For health and sanitary purposes the board shall have the power to compel the owners of inhabited property within a sewer district to connect their property with the sewer system of such district, and upon a failure so to connect within sixty (60) days after written notice by the board so to do the board may cause such connection to be made and a lien to be filed against the property for the expense incurred in making such connection, provided, however, that no owner shall be compelled to connect his property with such system unless a service line is brought, by the district, to a point within two hundred (200) feet of his dwelling place;

(m) To adopt and amend bylaws not in conflict with the constitution and laws of the state for carrying on the business, objects and affairs of the board and of the district;

(n) To have and exercise all rights and powers necessary or incidental to or implied from the specific powers granted herein. Such specific powers shall not be considered as a limitation upon any power necessary or appropriate to carry out the purposes and intent of this chapter. [1947, ch. 152, § 12, p. 364; am. 1961, ch. 135, § 1, p. 195; am. 1980, ch. 13, § 1, p. 26; am. 1991, ch. 41, § 1, p. 80; am. 2003, ch. 272, § 1, p. 726.]

Compiler's notes. For sections in which "this act" is compiled see Compiler's note, § 42-3201.

Cross ref. Splitting or separating purchases or work projects to evade competitive bidding, § 59-1026.

Cited in: Southside Water & Sewer Dist. v. Murphy, 97 Idaho 881, 555 P.2d 1148 (1976); Payette Lakes Water & Sewer Dist. v. Hays, 103 Idaho 717, 653 P.2d 438 (1982).

ANALYSIS

Classification.
Fees.

Classification.

Where evidence showed that sewer district treated mobile home park owner in unreasonable and discriminatory manner by placing him in "unsewered" classification resulting in higher rate charges, district court was correct in reclassifying owner into preferred rate category and refunding previously collected excessive sewer charges. *Dalton v. South Fork of*

Coeur D'Alene River Sewer Dist., 101 Idaho 833, 623 P.2d 141 (1980).

Fees.

This section is a legislative determination that sewer district boards shall assess the fees associated with services rendered to residents in their respective jurisdictions. This grant of authority to sewer district boards implicitly withdraws the same power from any geographically coextensive municipality such as a city or county, and there cannot exist two municipalities exercising the same or essentially similar powers within the same territory at the same time. *City of Boise v. Bench Sewer Dist.*, 116 Idaho 25, 773 P.2d 642 (1989).

A city ordinance charging a connection fee to residents of a sewer district for hookups to the city sewer system was in excess of the city's municipal jurisdiction and was in conflict with the statutory scheme governing sewer districts. *City of Boise v. Bench Sewer Dist.*, 116 Idaho 25, 773 P.2d 642 (1989).

42-3213. Taxes. — In addition to the other means providing revenue for such districts as herein provided, the board shall have power and authority to levy and collect ad valorem taxes on and against all taxable property within the district. [1947, ch. 152, § 13, p. 364.]

42-3214. Levy and collection of taxes. — To levy and collect taxes as herein provided, the board shall, in each year, determine the amount of money necessary to be raised by taxation, taking into consideration other sources of revenue of the district, and shall fix a rate of levy which, when levied upon every dollar of assessed valuation of taxable property within the district, and with other revenues will raise the amount required by the

district annually, to supply funds for paying expenses of organization and the costs of construction, operating and maintaining the works and equipment of the district, and promptly to pay in full, when due, all interest on the principal of bonds and other obligations of the district, and in the event of accruing defaults or deficiencies, an additional levy may be made as provided in section 42-3215. The board shall, on or before the first day of September of each year, certify to the board of county commissioners of each county within the district, or having a portion of its territory within the district, the rate so fixed with directions that at the time and in the manner required by law for levying taxes for county purposes, such board of county commissioners shall levy such tax upon the assessed valuation of all taxable property within the district, in addition to such other taxes as may be levied by such board of county commissioners at the rate so fixed and determined. [1947, ch. 152, § 14, p. 364.]

42-3215. Levies to cover defaults and deficiencies. — The board in certifying annual levies as herein provided, shall take into account the maturing indebtedness for the ensuing year as provided in its contracts, maturing bonds and interest on bonds, and deficiencies and defaults of prior years, and shall make ample provision for the payment thereof. In case the moneys produced from such levies, together with other revenues of the district are not sufficient punctually to pay the annual instalments on its contracts or bonds, and interest thereon, and to pay defaults and deficiencies, then the board shall make such additional levies of taxes as may be necessary for such purposes, and notwithstanding any limitations, such taxes shall be made and continue to be levied until the indebtedness of the district shall be fully paid. [1947, ch. 152, § 15, p. 364; am. 1980, ch. 136, § 3, p. 297; am. 1996, ch. 322, § 37, p. 1029.]

Compiler's notes. Sections 2 and 4 of S.L. 1980, ch. 136 are compiled as §§ 6-928 and 42-3217, respectively.

Sections 36 and 38 of S.L. 1996, ch. 322 are compiled as §§ 42-619 and 42-3217, respectively.

42-3216. Officers to levy and collect taxes. — It shall be the duty of the body having authority to levy taxes within each county, to levy the taxes provided in this act and it shall be the duty of all officials charged with the duty of collecting taxes to collect such taxes at the time and in the form and manner and with like interest and penalties as other taxes are collected and when collected to pay the same to the district ordering its levy and collection, and the payment of such collections shall be made monthly to the treasurer of the district and paid into the depository thereof to the credit of the district. [1947, ch. 152, § 16, p. 364.]

Compiler's notes. For sections in which "this act" is compiled see Compiler's notes, § 42-3201.

42-3217. Sinking fund. — Whenever any indebtedness has been incurred by a district, it shall be lawful for the board to levy taxes and collect revenue for the purpose of creating a sinking fund in such amount sufficient

to meet the payments of principal and interest on such indebtedness as the same matures, and to constitute a sinking fund for the payment of the principal amount of the indebtedness within thirty (30) years from the time of contracting the indebtedness evidenced thereby and in accordance with the provisions made for the payment of the principal and interest of such indebtedness and also to constitute a sinking fund for payment of the principal thereof, and theretofore provided by resolution pursuant to section 42-3222, Idaho Code, and as required by the constitution and laws of the state of Idaho. [1947, ch. 152, § 17, p. 364; am. 1980, ch. 136, § 4, p. 297; am. 1985, ch. 38, § 1, p. 80; am. 1996, ch. 322, § 38, p. 1029.]

Compiler's notes. Sections 3 and 5 of S.L. 1980, ch. 136 are compiled as §§ 42-3215 and 42-3708, respectively. Section 37 of S.L. 1996, ch. 322 is compiled as § 42-3215.

42-3218. Inclusion of property petitioned — Hearing — Order — Annexation of property petitioned — Hearing — Order — Annexation of property by election — Election procedure. — The boundaries of any district organized under the provisions of this chapter may be changed in the manner herein prescribed, but the change of boundaries of the district shall not impair or affect its organization or its rights in or to property, or any of its rights or privileges whatsoever; nor shall it affect or impair or discharge any contract, obligation, lien or charge for or upon which it might be liable or chargeable had any such change of boundaries not been made.

(a) The owners of real property may file with the board a petition, in writing, praying that such real property be included in the district. The petition shall describe the property owned by the petitioners, and such petition shall be deemed to give assent of the petitioners to the inclusion in said district of the property described in the petition, and shall be accompanied by a reasonable filing fee in an amount to be determined by the board. Such petition must be acknowledged in the same manner that conveyances of land are required to be acknowledged. The secretary of the board shall cause notice of filing of such petition to be given and published in the county in which the property is situated, which notice shall state the filing of such petition, names of petitioners, descriptions of lands mentioned and the prayer of such petitioners; giving notice to all persons interested to appear at the office of the board at the time named in said notice and show cause in writing, if any they have, why the petition should not be granted. The board shall at the time and place mentioned or at such time or times to which the hearing may be adjourned, proceed to hear the petition and all objections thereto, presented, in writing, by any person showing cause why said petition should not be granted. The failure of any person to show cause in writing shall be deemed as an assent on his part to the inclusion of such lands in the district as prayed in the petition. If the petition is granted, the board shall make an order to that effect and file the same with the clerk of the district court together with a copy of the petition and proof of publication certified by the secretary of the board. The clerk of the district court shall

present the same to the court and upon order of the court the property shall be included in the district.

(b) The territory adjoining or in close proximity to and in the same county with any district created under the provisions of this chapter may be annexed to the district by either of the following procedures: (1) A petition for annexation of real property described in such petition, which has been signed by the owners of not less than sixty per cent (60%) of the area in land within the territory to be annexed, and which contains the separate property descriptions of such petitioners, and which is acknowledged in the same manner that conveyances of land are required to be acknowledged, accompanied by a reasonable filing fee in an amount to be determined by the board, may be filed with the board. Upon filing with the board of such a petition, the secretary of the board shall cause notice of filing of such petition to be given and published in the county in which the property is situated, which notice shall state the filing of such petition, names of petitioners, descriptions of lands mentioned and the prayer of such petitioners; giving notice to all persons interested, including the staff and employees of said district and anyone designated by said district, to appear at the office of the board at the time named in said notice and show cause in writing, if any they have, why the petition should not be granted. The board shall at the time and place mentioned or at such time or times to which the hearing may be adjourned, proceed to hear the petition and all objections thereto, presented, in writing, by any person showing cause why said petition shall not be granted. The failure of any person to show cause in writing shall be deemed as an assent to the annexation of such lands into the district as prayed in the petition. The board shall have full discretion to determine if the petition shall be granted. If the petition is granted, the board shall make an order to that effect and file the same with the clerk of the district court together with a copy of the petition and proof of publication certified by the secretary of the board. The clerk of the district court shall present the same to the court and upon order of the court the property shall be included in the district. (2) Upon filing with the board of a petition signed by registered voters owning real property residing in the territory to be annexed, who constitute at least twenty per cent (20%) of the taxpayers in such territory, praying for an election to determine if annexation shall be made of property designated in such petition, together with payment of a reasonable filing fee in an amount to be determined by the board, the board shall cause notice of filing of such petition to be given and published in the county in which the property is situated, which notice shall state the filing of such petition, names of petitioners, descriptions of lands to be annexed and the prayer of such petition; giving notice to all persons interested, including the staff and employees of said district and anyone designated by said district to appear at the office of the board at the time named in said notice and show cause in writing, if any they have, why the petition shall not be granted. The board shall at the time and place mentioned or at such time or times to which the hearing may be adjourned, proceed to hear the petition and all objections thereto, presented, in writing, by any person showing cause why said petition shall not be granted. The board shall have full discretion to

determine if the petition shall be granted, and if such petition is granted, the board shall direct that an election be held, subject to the provisions of section 34-106, Idaho Code. The election shall be conducted in the same manner as general elections in this state, except that the board shall establish as many voting places within such territory proposed to be annexed as are by the board deemed necessary and shall define the boundaries of such voting places. The board shall appoint three (3) judges of election for each voting place, one (1) of whom shall be designated by the board to be the clerk of such election precinct. Each elector shall be registered as required by the general election laws and shall have resided within the area to be annexed for thirty (30) days.

The secretary of the board of directors shall publish notice of the time and place of such election, in accordance with the provisions of section 34-1406, Idaho Code. The notice shall particularly describe the property to be annexed, the name of the district to which the territory is proposed to be annexed, and the terms and conditions prescribed by the board under which the property may be annexed. The notice shall designate the places in the territory where the election will be held, and shall require the voters to cast ballots which shall contain the words:

For annexation to.... District.

Against annexation to.... District.

The judges of the election shall make their return thereof to the board of directors of the district, which shall canvass the returns and render a statement of the results of the election on the records of the board. If the majority of the votes cast favor annexation, the board shall enter an order annexing the property described in the notice of election and upon the filing of a copy thereof with the clerk of the district court, and upon order of the court, the territory shall thereupon become annexed to the district and shall thenceforth be a part of the district.

(c) In all proceedings for inclusion or annexation hereunder, the board shall have the power to prescribe terms and conditions under which said property may be included in the district, including the condition that such property may only be annexed or included within the district if the property is also established as a water or sewer subdistrict of the district, pursuant to sections 42-3218A through 42-3218D, Idaho Code, and may be required to pay the district its pro rata share of construction costs theretofore incurred by the district pursuant to any bond issue theretofore made or otherwise; provided, however, that such terms and conditions shall be announced by the board at or before the hearing to be held pursuant to subparagraphs (a) and (b) above. Within ten (10) days of the announcement of the terms and conditions under which the property may be included the majority of the petitioners filing petitions under the provisions of subparagraphs (a) or (b) may withdraw their petitions, and no further proceedings shall thereafter be had by the board upon such petitions.

(d) All public streets, roads, highways or alleys upon or within which is situated any part of the operative system or equipment of the district and all public streets, roads, highways and alleys which abut against or touch property annexed or to be annexed to the district, to the extent they abut

against or touch such property and are not included in a different district, shall be deemed to be included in the district as a part of the annexation and shall be included in the legal description and map which the district must file in the offices of the county assessor, county recorder and the state tax commission as required by section 63-215, Idaho Code; provided, however, that upon application by the district to the state tax commission, if the commission finds after consultation with the county assessor and the county recorder that exemption from the requirements of this subparagraph (d) will not unduly burden state and local tax administration, the commission by order may exempt the district from the requirements of this subparagraph (d), but the district shall be required to comply with section 63-215, Idaho Code. [1947, ch. 152, § 18, p. 364; am. 1957, ch. 29, § 4, p. 40; am. 1969, ch. 274, § 1, p. 816; am. 1973, ch. 110, § 1, p. 196; am. 1975, ch. 28, § 1, p. 43; am. 1988, ch. 215, § 2, p. 405; am. 1995, ch. 118, § 67, p. 417; am. 1996, ch. 322, § 39, p. 1029.]

Compiler's notes. Sections 3 and 5 of S.L. 1957, ch. 29 are compiled herein as §§ 42-3211, 42-3222, respectively.

Sections 66 and 68 of S.L. 1995, ch. 118 are compiled as §§ 42-3211 and 42-3222, respectively.

Section 40 of S.L. 1996, ch. 322 is compiled as § 42-3708.

Section 2 of S.L. 1969, ch. 274 declared an emergency. Approved March 27, 1969.

Section 2 of S.L. 1975, ch. 28 provided that the act should take effect on and after July 1, 1975.

42-3218A. Subdistricts — Authority to establish — Election. —

The board of directors of any water or sewer district organized under the provisions of chapter 32, title 42, Idaho Code, may at any time, on their own motion, call an election to submit to the qualified electors of a proposed water or sewer subdistrict the question of the creation of a water or sewer subdistrict. The election shall be called, held, and conducted pursuant to the provisions of chapter 32, title 42, Idaho Code. The proceedings calling the election shall set forth the boundaries of the proposed water or sewer subdistrict and shall provide for the submission of the question of the creation of the water or sewer subdistrict to the qualified electors residing within the proposed boundaries of the water or sewer subdistrict. No proposition for the creation of a water or sewer subdistrict shall be determined to have carried unless the proposition shall receive a majority of the votes cast. Whenever the creation of more than one (1) water or sewer subdistrict is submitted at the same election, separate ballots and separate propositions shall be used in voting on the question of creating each water or sewer subdistrict. [I.C., § 42-3218A, as added by 1988, ch. 215, § 1, p. 405; am. 1996, ch. 73, § 1, p. 237.]

Compiler's notes. The words "this act" refer to S.L. 1988, ch. 215, §§ 1, 2 which is compiled as §§ 42-3218 — 42-3218D.

Section 2 of S.L. 1996, ch. 73 is compiled as § 42-4103.

Sec. to sec. ref. Sections 42-3218A — 42-3218D are referred to in § 42-3218C.

42-3218B. Establishment. — Whenever a proposition for the creation of a water or sewer subdistrict shall have been approved in the manner set forth in section 42-3218A, Idaho Code, the board of directors of the water or sewer district shall enter in the minutes of the board an order providing for the establishment and creation of the water or sewer subdistrict setting forth therein the legal description of the boundaries thereof, and shall designate therein a name for such water or sewer subdistrict. Within ten (10) days after the entry of the order creating a water or sewer subdistrict, the board of directors shall certify the fact of the creation of the water or sewer subdistrict to the board of county commissioners of each county in which any part of the water or sewer subdistrict is located, by the filing of a certified copy of the order of the board of directors creating and establishing the water or sewer subdistrict. [I.C., § 42-3218B, as added by 1988, ch. 215, § 1, p. 405.]

42-3218C. Nature and powers. — Each water or sewer subdistrict created and established as provided in sections 42-3218A through 42-3218D, Idaho Code, shall be a political subdivision of the state of Idaho. The board of directors entering the order creating and establishing a water or sewer subdistrict shall be the governing body of all water or sewer subdistricts created by the board, and shall possess those powers as provided in chapter 32, title 42, Idaho Code, on behalf of the water or sewer subdistrict, including the power to order, conduct and hold all elections in water or sewer subdistricts for the purpose of incurring debt and issuing bonds pursuant to chapter 32, title 42, Idaho Code. [I.C., § 42-3218C, as added by 1988, ch. 215, § 1, p. 405.]

42-3218D. Indebtedness — Bond issues. — Water or sewer subdistricts may incur debt and issue bonds for the purpose of acquiring, purchasing, or improving a water or sewer site or sites, and acquiring or constructing new water or sewer facilities. The governing body of a water or sewer subdistrict may submit to the qualified electors of the water or sewer subdistrict the question of whether the governing body of the water or sewer subdistrict shall be empowered to issue negotiable bonds of the water or sewer subdistrict in an amount and for a period of time to be named in the notice of election. Notice of the bond election shall be given, the election shall be conducted and the returns thereof canvassed and the qualifications of electors voting or offering to vote shall be as provided in chapter 32, title 42, Idaho Code. [I.C., § 42-3218D, as added by 1988, ch. 215, § 1, p. 405.]

42-3219. Exclusion of property petitioned — Hearing — Order. — The owner or owners in fee of any real property constituting a portion of the district may file with the board a petition praying that such lands be excluded and taken from said district. Petitions shall describe the property which the petitioners desire to have excluded. Such petition must be acknowledged in the same manner and form as required in case of a conveyance of land and be accompanied by a deposit of money sufficient to pay all costs of the exclusion proceedings. The secretary of the board shall

cause a notice of filing of such petition to be published in the county in which said property or the major portion thereof, is located. The notice shall state the filing of such petition, the names of petitioners, description of the property mentioned in said petition, and the prayer of said petitioners; and it shall notify all persons interested to appear at the office of said board at the time named in said notice, showing cause in writing, if any they have, why said petition should not be granted. The board at the time and place mentioned in the notice, or at the time or times at which the hearing of said petition may be adjourned, shall proceed to hear the petition and all objections thereto, presented in writing by any person showing cause as aforesaid, why the prayer of the petition should not be granted. The filing of such petition shall be deemed and taken as an assent by each and all such petitioners to the exclusion from the district of the property mentioned in the petition, or any part thereof. The board, if it deems it not for the best interests of the district that the property mentioned in the petition, or portion thereof, shall be excluded from the district, shall order that said petition be denied, but if it deems it for the best interest of the district that the property mentioned in the petition, or some portion thereof, be excluded from the district, then the board may order the property mentioned in the petition or some portion thereof, excluded from the district. Upon allowance of such petition, the board shall file a certified copy of the order of the board making such change with the clerk of the court and upon order of the court said property shall be excluded from the district. [1947, ch. 152, § 19, p. 364.]

42-3219A. Exclusion and removal of lands following rejection twice by electorate of certain proposals for creation of indebtedness. — Upon rejection by the district electorate of substantially the same proposal in two (2) separate elections for the creation of indebtedness for the purpose of acquisition, construction, installation or completion of any works or other improvements or facilities or the making of any contract to carry out the purposes of the district, and after denial by the board of a petition for exclusion of property filed and heard, as provided under section 42-3219, the owners in fee, or their representatives, of real property located in the district may petition the district court of the judicial district in which the majority of the property subject of said petition is located for exclusion and removal of their lands from such water and sewer district. Such petition shall be signed by not less than fifty-one per cent (51%) of the qualified electors of the area to be excluded from the district, shall include a legal description of the real property, the subject of said petition, shall be acknowledged in the same manner and form as required in case of a conveyance of land and shall be accompanied by a deposit of money sufficient to pay all costs of the exclusion and removal proceedings. The petitioners shall cause notice of filing of such petition to be filed with the district, and to be published in a newspaper of general circulation in the county in which said property, or the major portion thereof, is located, once a week for three (3) consecutive weeks. Such notice shall state the date of filing of such petition and the names of the petitioners, shall include a legal description of the property mentioned in said petition,

shall set forth the prayer of said petitioners, and shall notify all persons interested to appear at the designated [designated] court at the time stated in said notice, showing cause in writing, if any they have, why said petition should not be granted. At any time before the expiration of the time of publication, any person may file his objections to said petition. At the time and place designated in the notice, or at the time or times at which the hearing of said petition may be adjourned, the court shall proceed [proceed] to hear the petition and all objections thereto presented in writing by any person showing cause as aforesaid.

The court shall grant such petition upon finding that said proposals for the creation of indebtedness were twice rejected by the electors of the whole district, and upon the finding that said real property so designated by the petition for exclusion and removal forms a contiguous area and either has no need for water and sewage disposal services or reasonably constitutes a separate area for purposes of water and sewage disposal services.

The granting of such petition by the court and the exclusion of such property from the district shall not relieve such property from paying any bond indebtedness of the district existing at the time of said exclusion order against any such property so excluded, nor shall the granting of said petition and exclusion of such property relieve such property of any levy for the support of said district for the year in which it is removed. [I.C., § 42-3219A, as added by 1967, ch. 242, § 1, p. 705.]

Compiler's notes. The bracketed words "designated" and "proceed", near the end of the first paragraph, were inserted by the compiler.

Section 2 of S.L. 1967, ch. 242 declared an emergency. Approved March 29, 1967.

42-3219B. Exclusion and removal of lands following rejection twice by electorate of certain proposals for creation of indebtedness — Alternative procedure. — The board of directors of the district may, upon rejection by the district electorate of substantially the same proposal in two (2) separate elections (whether held prior to or after enactment of this section) for the creation of indebtedness for the purpose of acquisition, construction, installation or completion of any works or other improvement or facilities or the making of any contract to carry out the purposes of the district, petition the district court of the judicial district in which the majority of the property subject of the petition is located for exclusion and removal of lands from such water and sewer district. Such petition shall include a general description of the boundaries of the area to be excluded from the district with such certainty as to enable a property owner to determine whether or not his property is within the area to be excluded and shall be verified. The board of directors of the district, as petitioners, shall cause notice of filing of such petition to be published in a newspaper of general circulation in the county in which said property, or the major portion thereof is located, once a week for three (3) consecutive weeks. Such notice shall state the date of filing of such petition, shall include a description of the boundaries of the area to be excluded from the district with such certainty as to enable a property owner to determine whether or not his

property is within the area to be excluded, and shall notify all persons interested to appear at the designated court at the time stated in said notice, showing cause in writing, if any they have, why said petition should not be granted. At any time before the expiration of the time of publication, any person may file his objection to said petition. At the time and place designated in the notice, or at the time or times at which the hearing of said petition may be adjourned, the court shall proceed to hear the petition and all objections thereto presented in writing by any person showing cause as aforesaid.

The court shall grant such petition upon finding that said proposals for the creation of indebtedness were twice rejected by the electors of the whole district, and upon the finding that said area so designated by the petition for exclusion and removal forms a contiguous area and either has no need for water or sewage disposal services or reasonably constitutes a separate area for purposes of water and sewage disposal services; or is of such location and character that water or sewage disposal services cannot be furnished to it by such water and sewer district at reasonable cost and that the withdrawal of such area will be conducive to the general welfare of the balance of the district.

The granting of such petition by the court and such exclusion of said property from the district shall not relieve such property from paying any bond indebtedness of the district existing at the time of said exclusion order against any such property so excluded, nor shall the granting of such petition and exclusion of such property relieve such property of any levy for the support of said district for the year in which it is removed.

The procedure for the exclusion and removal of lands from a water and sewer district as provided in this section shall be an alternative to the procedures provided in sections 42-3219 and 42-3219A, Idaho Code. [I.C., § 42-3219B, as added by 1971, ch. 60, § 1, p. 35.]

Compiler's notes. Section 2 of S.L. 1971, ch. 60 declared an emergency. Approved March 4, 1971.

42-3220. Liability of property included or excluded. — All real property included within, or excluded from, a district shall thereafter be subject to the levy of taxes for the payment of any indebtedness of the district outstanding at the time of inclusion or exclusion. [1947, ch. 152, § 20, p. 364.]

42-3221. Issuance of negotiable coupon bonds — Form and terms.
— To carry out the purposes of this act, and to pay the necessary and ordinary expenses of the district, the board is hereby authorized to issue negotiable coupon bonds of the district. Bonds shall bear interest, payable semi-annually, and shall be due and payable serially, either annually or semi-annually, commencing not later than three (3) years and extending not more than thirty (30) years from date. The form and terms of said bonds, including provisions for their payment and redemption, shall be determined by the board. If the board so determines, such bonds may be redeemable

prior to maturity upon payment of a premium, not exceeding three per centum (3%) of the principal thereof. Said bonds shall be executed in the name of and on behalf of the district and signed by the chairman of the board with the seal of the district affixed thereto and attested by the secretary of the board. Said bonds shall be in such denominations as the board shall determine and the bonds and coupons thereto attached shall be payable to bearer. Interest coupons shall bear the original or facsimile signature of the chairman of the board. [1947, ch. 152, § 21, p. 364; am. 1955, ch. 63, § 3, p. 122; 1965, ch. 140, § 1, p. 274; am. 1970, ch. 133, § 7, p. 309.]

Compiler's notes. For sections in which "this act" is compiled see Compiler's notes, § 42-3201.

Section 2 of S.L. 1955, ch. 63 is compiled herein as § 42-3207.

Sections 6 and 8 of S.L. 1970, ch. 133 are

compiled herein as §§ 42-2954, 42-3708, respectively.

Section 4 of S.L. 1955, ch. 63 declared an emergency. Approved February 25, 1955.

Section 2 of S.L. 1965, ch. 140 declared an emergency. Approved March 13, 1965.

42-3222. Indebtedness of district — Submission of proposition to electorate. — Whenever any board shall, by resolution, determine that the interest of said district and the public interest or necessity demand the acquisition, construction, installation or completion of any works or other improvements or facilities, or the making of any contract with the United States or other persons or corporations, public or private, municipalities, or governmental subdivisions, to carry out the objects or purposes of said district, requiring the creation of an indebtedness that will exceed the income and revenue provided for the year, said board shall order the submission of the proposition of issuing such obligations or bonds, or creating other indebtedness to the qualified electors of the district at an election held, subject to the provisions of section 34-106, Idaho Code, for that purpose. The declaration of public interest or necessity herein required and the provision for the holding of such election may be included within one and the same resolution, which resolution, in addition to such declaration of public interest or necessity, shall recite the objects and purposes for which the indebtedness is proposed to be incurred, the estimated cost of the works or improvements, as the case may be, the amount of principal of the indebtedness to be incurred therefor, and the maximum rate of interest to be paid on such indebtedness. Such resolution shall also fix the date upon which such election shall be held and the manner of holding the same and the method of voting for or against the incurring of the proposed indebtedness. Such resolution shall also fix the compensation to be paid the officers of the election and shall designate the polling place or places and shall appoint, for each polling place from the electors of the district, the officers of such election consisting of three (3) judges, one (1) of whom shall act as clerk. [1947, ch. 152, § 22, p. 364; am. 1957, ch. 29, § 5, p. 40; am. 1971, ch. 25, § 6, p. 61; am. 1992, ch. 151, § 1, p. 457; am. 1995, ch. 118, § 68, p. 417.]

Compiler's notes. Section 4 of S.L. 1957, ch. 29, is compiled herein as § 42-3218.

Section 67 of S.L. 1995, ch. 118 is compiled as § 42-3218.

Section 6 of S.L. 1957, ch. 29 declared an

emergency. Approved February 11, 1957.

Section 9 of S.L. 1971, ch. 6, declared an emergency. Approved February 16, 1971.

Cross ref. Time limit on subsequent elections, § 63-2216.

Sec. to sec. ref. This section is referred to in § 42-3217.

42-3223. Notice of election. — The board shall prescribe the form of the notice of election, and direct the publication of the same in accordance with the provisions of sections 34-1405 and 34-1406, Idaho Code. [1947, ch. 152, § 23, p. 364; am. 1995, ch. 118, § 69, p. 417.]

Cross ref. Notice by mail, § 60-109A.

42-3224. Conduct of election — Canvass of returns. — The election board or boards shall conduct the election in the manner prescribed by law for the holding of general elections, including chapter 14, title 34, Idaho Code, and shall make their returns to the secretary of the district, provided that precincts shall be as provided in section 42-3207, Idaho Code. At any regular or special meeting of the board held within ten (10) days following the date of such election, the returns thereof shall be canvassed and the results thereof declared. [1947, ch. 152, § 24, p. 364; am. 1967, ch. 186, § 2, p. 613; am. 1995, ch. 118, § 70, p. 417.]

Compiler's notes. Section 71 of S.L. 1995, ch. 118 is compiled as § 42-3234.

Section 3 of S.L. 1967, ch. 186 declared an emergency. Approved March 22, 1967.

42-3225. Effect of election — Subsequent elections. — In the event that it shall appear from said returns that two-thirds ($\frac{2}{3}$) of said qualified electors who are taxpayers of the district who shall have voted on any proposition submitted hereunder at such election voted in favor of such proposition, the district shall thereupon be authorized to incur such indebtedness or obligations, enter into such contract or issue and sell such bonds of the district, as the case may be, all for the purpose or purposes and object or objects provided for in the proposition submitted hereunder and in the resolution therefor, and in the amount so provided and at a rate of interest not exceeding the rate of interest recited in such resolution. Submission of the proposition of incurring such obligation or bonded or other indebtedness at such an election shall not prevent or prohibit submission of the same or other propositions at subsequent election or elections called for such purpose. [1947, ch. 152, § 25, p. 364.]

42-3226. Correction of faulty notices. — In any and every case where a notice is provided for in this act, if the court finds for any reason that due notice was not given, the court shall not thereby lose jurisdiction, and the proceeding in question shall not thereby be void or be abated, but the court shall in that case order due notice to be given, and shall continue the hearing until such time as notice shall be properly given, and thereupon shall proceed as though notice has [had] been properly given in the first instance. [1947, ch. 152, § 26, p. 364.]

Compiler's notes. The bracketed word "had" was inserted by the compiler.
For sections in which "this act" is compiled

see Compiler's notes, § 42-3201.

Cross ref. Notice by mail, § 60-109A.

42-3227. Separability. — If it should be judicially determined that any part of this act is invalid or unenforceable, such determination shall not affect the remaining parts, it being the intention to make this act and all its parts severable. [1947, ch. 152, § 27, p. 364.]

Compiler's notes. For sections in which "this act" is compiled see Compiler's notes, § 42-3201.

In General.

The fact that § 42-3207 prior to the 1957 amendment required taxpayer qualification of organizational electors and was uncon-

tutional was held in view of this section not to void the entire water and sewer district act inasmuch as it was clearly apparent the legislature intended that the act be severable. *Clemens v. Pinehurst Water Dist.*, 81 Idaho 213, 339 P.2d 665 (1959).

42-3228. Budget and hearing. — A board shall adopt a budget and shall cause a public hearing to be held upon such budget, prior to certifying a tax levy to the board of county commissioners of each county within the district, or having a portion of its territory within the district. [I.C., § 42-3228, as added by 1973, ch. 84, § 1, p. 134.]

42-3229. Notice of hearing. — Notice of the budget hearing meeting shall be posted at least ten (10) full days prior to the date of said meeting in at least one (1) conspicuous place in each water and sewer district to be determined by the board; a copy of such notice shall also be published in a daily or weekly newspaper published within such water and sewer district, in one (1) issue thereof, during such ten (10) day period. The place, hour and day of such hearing shall be specified in said notice, as well as the place where such budget may be examined prior to such hearing. A full and complete copy of such proposed budget shall be published with and as a part of the publication of such notice of hearing. [I.C., § 42-3229, as added by 1973, ch. 84, § 2, p. 134.]

42-3230. Public inspection of budget — Time and place. — Such budget shall be available for public inspection from and after the date of the posting of notices of hearing as in this act provided, at such place and during such business hours as the board may direct. [I.C., § 42-3230, as added by 1973, ch. 84, § 3, p. 134.]

Compiler's notes. The words "this act" refer to S.L. 1973, ch. 84 compiled herein as §§ 42-3228 — 42-3231.

42-3231. Quorum of board at hearing. — A quorum of the board shall attend such hearing and explain the proposed budget and hear any and all objections thereto. [I.C., § 42-3231, as added by 1973, ch. 84, § 4, p. 134.]

42-3232. Validation of acts taken pursuant to this chapter. — (1) All acts and proceedings heretofore taken pursuant to chapter 32, title 42, Idaho Code, for the organization of the district, the elections incidental thereto, the authorization, issuance, and sale of bonds of any such district, are hereby confirmed, validated and declared legally effective, including all acts and proceedings of any person, public officer, board or agency heretofore

done or taken upon the question of the authorization, issuance, sale or exchange of such bonds authorized to be issued under such statutes, notwithstanding any lack of power, authority or otherwise, and notwithstanding any defects and irregularities in the creation of such public body, including all election procedures incidental thereto, and in such public securities, acts and proceedings, and in such authorization, execution, sale, issuance and payment.

(2) The provisions of this section shall not operate to confirm, validate or legalize any action or proceedings [proceeding], the legality of which is being contested or inquired into [in] any legal proceeding now pending and undetermined and shall not operate to confirm, validate or legalize any action or proceedings [proceeding] which has heretofore been determined in any legal proceeding to be illegal, void or ineffective.

(3) Any action or proceeding contesting the validity of any action or proceeding referred to in subsection (1) of this section shall be brought within thirty (30) days from the effective date of this act.

(4) This act shall operate to supply such legislative authority as may be necessary to validate any public securities heretofore issued and any such acts and proceedings heretofore taken which the legislature could have supplied or provided for in the law under which such public securities were issued and such acts or proceedings were taken. [I.C., § 42-3232, as added by 1979, ch. 272, § 3, p. 706.]

Compiler's notes. The bracketed words "proceeding" and "in" in subsection (2) were inserted by the compiler.

The words "this act" refer to S.L. 1979, ch. 272 compiled herein as §§ 42-3202A, 42-3202B.

Section 2 of S.L. 1979, ch. 272 is compiled as § 42-3202B.

Section 4 of S.L. 1979, ch. 272 declared an emergency. Approved March 30, 1979.

42-3233. Merger authorized. — Two (2) or more water and/or sewer districts may vote to merge upon such terms as the districts may agree. In order to bring the matter to a vote, each board of directors, by majority vote, must independently vote to call an election for a vote to merge. [I.C., § 42-3233, as added by 1982, ch. 88, § 1, p. 163.]

Cross ref. Annexation by district, § 42-3218.

42-3234. Majority vote required. — If all boards of directors of districts proposing to merge call for the election, each district shall independently hold an election, subject to the provisions of section 34-106, Idaho Code, and if more than a majority of those voting in each election favor the merger, the merger shall occur. [I.C., § 42-3234, as added by 1982, ch. 88, § 1, p. 163; am. 1995, ch. 118, § 71, p. 417.]

Compiler's notes. Sections 70 and 72 of S.L. 1995, ch. 118 are compiled as §§ 42-3224 and 42-3705, respectively.

42-3235. Voting procedure. — Qualifications for and methods of voting, conduct of the election and canvass of the returns shall be the same as provided for the election of a director. [I.C., § 42-3235, as added by 1982, ch. 88, § 1, p. 163.]

Cross ref. Election of directors, § 42-3211.

42-3236. Ballot. — Each ballot shall have attached to it a summary of the terms of the merger, and the ballot issue shall read:

Shall _____ and _____ sewer and/or water districts
merge into one sewer and/or water district to be known as
_____ on the summary of terms outlined.

YES ☐ NO ☐

(PLACE AN "X" IN THE BOX REFLECTING YOUR CHOICE.)

[I.C., § 42-3236, as added by 1982, ch. 88, § 1, p. 163.]

Compiler's notes. The words enclosed in parentheses so appeared in the law as enacted.

42-3237. Court order declaring merger. — In the event all districts voting on the issue pass the same, each board shall certify the results of the election to the district court in which most of the territory of the merged district will be. Upon satisfying itself that the election proceedings were proper in each district, the court shall enter an order creating the merged district under the terms presented to the voters. The court shall also select five (5) directors for the newly merged district from among the directors of the constituent districts recommended for such positions and shall set their terms of office. [I.C., § 42-3237, as added by 1982, ch. 88, § 1, p. 163.]

42-3238. Private community sewer system — Properties exempt from other taxation. — Notwithstanding any other provision of law, no water district, sewer district or water and sewer district shall levy or collect any tax, any fee or any other charge of any kind related in any way to the collection or treatment of sewage by such district against any property located in such district which property is served by a private community sewer system. Said properties shall be exempt from any such tax, fee or charge. A "private community sewer system" means a system which collects and processes sewage for ten (10) or more residences, commercial or industrial facilities. The exemption provided in this section shall not apply to residences, commercial or industrial facilities served by an individual septic system. Nothing contained herein shall prohibit a charge for the delivery or furnishing of water by such district. [I.C., § 42-3238, as added by 1991, ch. 263, § 1, p. 652.]

CHAPTER 33

COMMISSIONS TO NEGOTIATE COMPACTS WITH OTHER STATES

SECTION.

42-3301. Appointment of members of commission to serve on joint commission relating to waters of Bear River.

42-3302. Legal, engineering and other assistants.

42-3303. Authority and duties of commissioners.

42-3304. Director of the department of water resources and attorney general to render assistance.

42-3305. Request for reciprocal legislation and proper congressional resolution.

42-3306. Tenure of office — Remuneration and expenses — Reduction of number.

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42-3308. Appointment of commissioner — Term — Remuneration — Duties.

42-3309. Request for reciprocal legislation and appointment of Nevada commissioner.

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secure apportionment upon failure to compact.

42-3313. Commission to serve on joint commission relating to waters of Snake River.

42-3314. Legal, engineering and other assistance.

42-3315. Authority and duties of commission.

42-3316. Director of department of water resources and attorney general to render assistance.

42-3317. Request for reciprocal legislation and proper congressional resolution.

42-3318. Tenure of office — Remuneration and expenses — Reduction of number.

42-3319. Commission to serve on joint commission relating to waters of Columbia River.

42-3320. Legal, engineering and other assistance.

42-3321. Authority and duties of commission.

42-3322. Director of department of water resources and attorney general to render assistance.

42-3323. Request for reciprocal legislation and congressional enabling legislation.

42-3324. Tenure of office — Remuneration and expenses.

42-3301. Appointment of members of commission to serve on joint commission relating to waters of Bear River. — The governor of the state of Idaho is hereby authorized to appoint a commission consisting of three (3) members, of which the director of the department of water resources may be one, to represent the state of Idaho on a joint commission to be composed of commissioners representing the states of Wyoming, Utah, and Idaho, and a commissioner that may be appointed to represent the United States of America, to be constituted by said states for the purpose of negotiating and entering into a compact or compacts, agreement or agreements, between the said states, with consent of congress, respecting the lawful diversion, distribution, and the further utilization and disposition of the waters of Bear River, and all streams tributary thereto, with due regard to the priority rule controlling the use of water, and fixing and determining a method of regulation, administration and control of the waters of said river; provided, however, that any compact or agreement so entered into on behalf of said states shall not be binding or obligatory upon either of said states or citizens thereof until and unless the same shall have been ratified and approved by the legislatures of [the said] three (3) states and by the congress of the United States. [1943, ch. 90, § 1, p. 180.]

Compiler's notes. The bracketed words "the said" were inserted by the compiler.

The name of the director of the department of water administration (formerly the state reclamation engineer, successor to the commissioner of reclamation) has been changed to the director of the department of water

resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

Collateral References. Cooperation or compacts between states as to water rights. 134 A.L.R. 1412.

42-3302. Legal, engineering and other assistants. — As soon as the commissioners of the state of Idaho shall have been appointed and shall have entered upon the performance of their duties, as herein provided, they shall be furnished such legal, engineering and other assistants as the governor and attorney general and director of the department of water resources of the state of Idaho may deem advisable and necessary. [1943, ch. 90, § 2, p. 180.]

Compiler's notes. The name of the director of the department of water administration (formerly the state reclamation engineer, successor to the commissioner of reclamation)

has been changed to the director of the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

42-3303. Authority and duties of commissioners. — Said commissioners for the state of Idaho shall have authority to make full investigations of Bear River and its tributaries and the drainage area thereof, as may be necessary in order to determine the facts as to physical conditions obtaining upon said river, and of the present and future needs of the state of Idaho and its citizens, to the proper use and benefits of the waters of said stream and to perform such other duties as may be necessary to sufficiently determine such facts and to secure the necessary information in order that they may properly perform their duties as commissioners of the state of Idaho upon said joint commission. [1943, ch. 90, § 3, p. 180.]

42-3304. Director of the department of water resources and attorney general to render assistance. — It shall be the duty of the director of the department of water resources of the state of Idaho, and the attorney general of said state, to aid and assist the commissioners to be appointed for the state of Idaho whenever necessary in order to facilitate their work in carrying out the intent and purposes of this act. [1943, ch. 90, § 4, p. 180.]

Compiler's notes. The words "this act" refer to S.L. 1943, ch. 90, which is compiled herein as §§ 42-3301 — 42-3306.

The name of the director of the department of water administration (formerly the state reclamation engineer, successor to the com-

missioner of reclamation) has been changed to the director of the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

42-3305. Request for reciprocal legislation and proper congressional resolution. — The governor of Idaho shall advise the governors of the states of Utah and Wyoming and the President of the United States of this enactment and request that reciprocal legislation be enacted by said states and that a proper resolution be adopted by the congress of the United

States giving permission to the states of Idaho, Utah and Wyoming to enter into a compact or agreement respecting the control and use of the waters of Bear River and its tributaries. [1943, ch. 90, § 5, p. 180.]

42-3306. Tenure of office — Remuneration and expenses — Reduction of number. — The tenure of office of said commissioners shall be at the pleasure of the governor, and their remuneration and expenses shall be fixed by him; provided, however, that if the states of Utah and Wyoming shall appoint but one (1) commissioner to perform such services for said respective states, then and in that event, the governor of the state of Idaho may, in his discretion, reduce the number of commissioners of the state of Idaho from three (3) to one (1), who shall exercise all the rights and duties imposed by this act. [1943, ch. 90, § 6, p. 180.]

Compiler's notes. For sections in which "this act" is compiled see note, § 42-3304.

Section 7 of S.L. 1943, ch. 90 declared an emergency. Approved Feb. 27, 1943.

42-3307. Compact with United States and Nevada authorized relative to water rights of Salmon Falls Creek. — Authority shall be and is hereby granted unto the governor of the state of Idaho to cause a compact to be entered into by the state of Idaho, with the state of Nevada and the United States, concerning the acquiring of water rights and the distribution of water within the respective states of Idaho and Nevada from Salmon Falls Creek, the North Fork of which heads in Idaho and flows through Nevada, and the South Fork of which heads in Nevada and joins with the North Fork in Nevada, and which thence flows into Idaho where it empties into the reservoir, situated in Townships Fourteen (14) and Fifteen (15) South, Ranges Fourteen (14) and Fifteen (15) E. B. M., Twin Falls County, State of Idaho, of the Salmon River Canal Company, Ltd., a corporation organized and existing under and by virtue of the laws of the state of Idaho. [1943, ch. 44, § 1, p. 89.]

42-3308. Appointment of commissioner — Term — Remuneration — Duties. — For the purpose of carrying this act into effect, a commissioner for the state of Idaho shall be appointed by the governor, whose term of office shall be at the pleasure of the governor, and whose remuneration shall be fixed by the governor, and whose duties shall embrace, gathering and compiling data, attending meetings of the commission of which said commissioner shall be a member, carrying on negotiations for an agreement or compact between the state of Idaho, the state of Nevada, and the United States concerning the acquiring of water rights and the distribution of water within the states of Idaho and Nevada, and to generally perform such duties as shall be required by the governor of the state of Idaho in carrying out the purpose and intent of this act. [1943, ch. 44, § 2, p. 89.]

Compiler's notes. The words "this act" refer to S.L. 1943, ch. 44, which is compiled herein as §§ 42-3307 — 42-3312.

42-3309. Request for reciprocal legislation and appointment of Nevada commissioner. — The governor (a) Shall advise the executive branch of the state of Nevada and the President of the United States of the enactment of this legislation, and request that reciprocal legislation be enacted by the state of Nevada, and that proper resolution be adopted by the congress of the United States giving permission to the states of Idaho and Nevada to enter into a compact or agreement respecting the acquiring of water rights and the distribution of water in the states of Idaho and Nevada, and concerning the disposition, distribution and apportionment of the waters of Salmon Falls Creek, and its tributaries hereinabove more particularly described, between the states of Idaho and Nevada.

(b) And shall request the executive branch of the government of the state of Nevada to cause a commissioner to be appointed to carry such reciprocal legislation as may be enacted by the state of Nevada into effect. And shall request the President of the United States to cause a commissioner to be appointed, pursuant to proper resolution of congress, to whom shall be delegated such authority as shall be needed, to the end that permission shall be granted by the United States to the states of Idaho and Nevada to enter into such compact or agreement. [1943, ch. 44, § 3, p. 89.]

42-3310. Composition of commission — Purpose. — The commissioner appointed by the governor of the state of Idaho, pursuant to this act, and a commissioner who shall be appointed pursuant to legislation enacted by the state of Nevada, and a commissioner who shall be appointed by the President of the United States pursuant to resolution of the congress, shall constitute a commission for the purpose of formulating a compact or agreement concerning the acquiring of water rights and the distribution of water on said Salmon Falls Creek within the states of Idaho and Nevada. [1943, ch. 44, § 4, p. 89.]

Compiler's notes. For sections in which "this act" is compiled see note, § 42-3308.

42-3311. Effective date of compact. — Any compact or agreement negotiated under the terms of this act and reciprocal legislation of the state of Nevada and joint resolution of the congress of the United States shall become effective upon its approval and ratification by the legislature of the state of Idaho. [1943, ch. 44, § 5, p. 89.]

Compiler's notes. For sections in which "this act" is compiled see note, § 42-3308.

42-3312. Institution of legal proceedings to secure apportionment upon failure to compact. — Should it be determined by the governor of the state of Idaho that a compact or agreement cannot be negotiated or carried into effect concerning the acquiring of water rights and the distribution of water within the states of Idaho and Nevada of the said Salmon Falls Creek, pursuant to the terms of this act, then and in that contingency the governor of the state of Idaho shall be, and he is hereby,

authorized to direct the attorney general of the state of Idaho to institute appropriate legal proceedings on behalf of the state of Idaho against the state of Nevada in the Supreme Court of the United States, or other court or courts, to obtain an equitable apportionment and distribution between the states of Idaho and Nevada of the waters of the said Salmon Falls Creek, which said direction shall be carried into effect by the attorney general of the state of Idaho; to the end that priority rights on the stream shall be established. [1943, ch. 44, § 6, p. 89.]

Compiler's notes. For sections in which "this act" is compiled see note, § 42-3308.

42-3313. Commission to serve on joint commission relating to waters of Snake River. — The governor of the state of Idaho is hereby authorized to appoint a commission of ten (10) members, of which the director of the department of water resources shall be one (1), to represent the state of Idaho on a joint commission to be composed of commissioners representing the states of Wyoming and Idaho and a commissioner that may be appointed by the President of the United States, to be constituted by said states for the purpose of negotiating and entering into a compact or compacts, agreement or agreements, between the states, with the consent of congress, respecting the lawful diversion, distribution, and further utilization and disposition of the waters of the Snake River and all streams tributary thereto, with due regard to vested rights, mutual benefits and equitable apportionment, and fixing and determining a method of regulation, administration and control of the waters of said river; provided, however, that any compact or agreement so entered into on behalf of said states shall not be binding or obligatory upon either of said states or citizens thereof until and unless the same shall have been ratified and approved by the legislatures of both states and by the congress of the United States. [1949, ch. 11, § 1, p. 11.]

Compiler's notes. On June 3, 1948, Congress granted its consent to the states of Idaho and Wyoming to negotiate and enter into a compact for the division of the waters of the Snake River and its tributaries. 62 Stat., ch. 383, p. 294.

The name of the director of the department of water administration (formerly the state

reclamation engineer) has been changed to the director of the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

Cross ref. Ratification of Snake River compact, see § 42-3401.

Sec. to sec. ref. Sections 42-3313 — 42-3318 are referred to in § 42-3401.

42-3314. Legal, engineering and other assistance. — As soon as the commissioners of the state of Idaho shall have been appointed and shall have entered upon the performance of their duties, as herein provided, they shall be furnished such legal, engineering and other assistance as the governor and attorney general and director of the department of water resources and the board of examiners of the state of Idaho may deem advisable and necessary. [1949, ch. 11, § 2, p. 11.]

Compiler's notes. The name of the director of the department of water administration

(formerly the state reclamation engineer) has been changed to the director of the depart-

ment of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

42-3315. Authority and duties of commission. — The said commissioners for the state of Idaho shall have authority to make full investigations of Snake River and its tributaries and the drainage area thereof, as may be necessary in order to determine the facts as to physical conditions obtaining upon said river, and of the present and future needs of the state of Idaho and its citizens, to the proper use and benefits of the waters of said stream and to perform such other duties as may be necessary to sufficiently determine such facts and to secure the necessary information in order that they may properly perform their duties as commissioners of the state of Idaho upon said joint commission. [1949, ch. 11, § 3, p. 11.]

42-3316. Director of department of water resources and attorney general to render assistance. — It shall be the duty of the director of the department of water resources of the state of Idaho, and the attorney general of said state, to aid and assist the commissioners to be appointed for the state of Idaho whenever necessary in order to facilitate their work in carrying out the intent and purposes of this act. [1949, ch. 11, § 4, p. 11.]

Compiler's notes. The words "this act" refer to S.L. 1949, ch. 11, which is compiled herein as §§ 42-3313 — 42-3318.

The name of the director of the department of water administration (formerly the state

reclamation engineer) has been changed to the director of the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

42-3317. Request for reciprocal legislation and proper congressional resolution. — The governor of Idaho shall advise the governor of the state of Wyoming and the president of the United States of this enactment and request that reciprocal legislation be enacted by said state and that a proper resolution be adopted by the congress of the United States giving permission to the states of Idaho and Wyoming to enter into a compact or agreement respecting the control of the waters of Snake River and its tributaries. [1949, ch. 11, § 5, p. 11.]

Compiler's notes. The words "this enactment" refer to S.L. 1949, ch. 11, which is compiled herein as §§ 42-3313 — 42-3318.

42-3318. Tenure of office — Remuneration and expenses — Reduction of number. — The tenure of office of said commissioners shall be at the pleasure of the governor, and their remuneration and expenses shall be fixed by him; provided, however, that if the state of Wyoming shall appoint but one (1) commissioner to perform such services for said state, then and in that event, the governor of the state of Idaho may, in his discretion, reduce the number of commissioners of the state of Idaho from ten (10) to one (1), who shall exercise all the rights and duties imposed in this act. [1949, ch. 11, § 6, p. 11.]

Compiler's notes. Section 7 of S.L. 1949, ch. 11 declared an emergency. Approved January 28, 1949.

42-3319. Commission to serve on joint commission relating to waters of Columbia River. — The governor of the state of Idaho is hereby authorized to appoint a commission of five (5) members, of which the director of the department of water resources shall be one (1), to represent the state of Idaho on a joint commission to be composed of commissioners representing the states of Washington, Oregon, Wyoming, Montana, Utah, Nevada and Idaho, and a commissioner that may be appointed by the president of the United States, to be constituted by said states for the purpose of negotiating and entering into a compact or compacts, agreement or agreements, among the states, or so many of them, not less than five (5), as shall agree thereto, with the consent of congress, respecting the lawful diversion, distribution, and further utilization and disposition of the waters of the Columbia River and all streams tributary thereto, including the Snake River, with due regard to vested rights, mutual benefits and equitable apportionment, and fixing and determining a method of regulation, administration and control of said river, and its tributaries; provided, however, that any compact or agreement so entered into on behalf of said states shall not be binding or obligatory upon any of said states or citizens thereof until and unless the same shall have been ratified and approved by the legislatures of at least five (5) of the states, including the states of Washington, Oregon, Montana and Idaho and by the congress of the United States. [1951, ch. 61, § 1, p. 89.]

Compiler's notes. The name of the director of the department of water administration (formerly the state reclamation engineer) has been changed to the director of the depart-

ment of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

42-3320. Legal, engineering and other assistance. — As soon as the commissioners of the state of Idaho shall have been appointed and shall have entered upon the performance of their duties, as herein provided, they shall be furnished such legal, engineering and other assistance as the governor and attorney general and director of the department of water resources and the board of examiners of the state of Idaho might deem advisable and necessary. [1951, ch. 61, § 2, p. 89.]

Compiler's notes. The name of the director of the department of water administration (formerly the state reclamation engineer) has been changed to the director of the depart-

ment of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

42-3321. Authority and duties of commission. — The said commissioners for the state of Idaho shall have full authority to make full investigations of the Columbia River and its tributaries, including the Snake River, and the drainage thereof, as may be necessary in order to determine the facts as to physical conditions obtaining upon said river, and its tributaries, and of the present and future needs of the state of Idaho and

its citizens, to the proper use and benefits of the waters of said river, and its tributaries, and to perform such other duties as may be necessary to sufficiently determine such facts and to secure the necessary information in order that they may properly perform their duties as commissioners of the state of Idaho upon said joint commission. [1951, ch. 61, § 3, p. 89.]

42-3322. Director of department of water resources and attorney general to render assistance. — It shall be the duty of the director of the department of water resources of the state of Idaho, and the attorney general of said state, or whoever they may appoint, to aid and assist the commissioners to be appointed for the state of Idaho, whenever necessary in order to facilitate their work in carrying out the intent and purposes of this act. [1951, ch. 61, § 4, p. 89.]

Compiler's notes. The words "this act" refer to S.L. 1951, ch. 61, which is compiled herein as §§ 42-3319 — 42-3324.

The name of the director of the department of water administration (formerly the state

reclamation engineer) has been changed to the director of the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

42-3323. Request for reciprocal legislation and congressional enabling legislation. — The governor of Idaho shall advise the governors of the states of Washington, Oregon, Montana, Utah, Wyoming and Nevada, and the president of the United States of this enactment and request that reciprocal legislation be enacted by said states and that a proper resolution or statute be adopted by the congress of the United States granting permission to the states of Washington, Oregon, Montana, Utah, Wyoming, Nevada and Idaho to enter into a compact or agreement respecting the control of the waters of the Columbia River and its tributaries. [1951, ch. 61, § 5, p. 89.]

Compiler's notes. The words "this enactment" refer to S.L. 1951, ch. 61, which is compiled herein as §§ 42-3319 — 42-3324.

42-3324. Tenure of office — Remuneration and expenses. — The tenure of office of said commissioners shall be at the pleasure of the governor, and their remuneration and expenses shall be fixed by him. [1951, ch. 61, § 6, p. 89.]

CHAPTER 34

RATIFICATION OF INTERSTATE COMPACTS

SECTION.

42-3401. Snake River Compact ratified.

42-3402. Bear River Compact ratified.

42-3403. [Repealed.]

42-3404. Anadromous fish — Compact with

Washington and Oregon —
Regulatory powers of fish and
game representatives of
states.

42-3401. Snake River Compact ratified. — Ratification and approval is hereby given to the Snake River Compact as signed at the city of

Cheyenne in the state of Wyoming on the 10th day of October, 1949, by the commissioners of the state of Idaho, acting pursuant to authority granted by §§ 42-3313 — 42-3318, and the commissioners representing the state of Wyoming and approved by the representative of the United States, which compact is in full as follows:

SNAKE RIVER COMPACT

The states of Idaho and Wyoming, parties signatory to this compact, have resolved to conclude a compact as authorized by the Act of June 3, 1948 (62 Stat. 294), and after negotiations participated in by the following named state commissioners:

FOR IDAHO

Mark R. Kulp, Boise
N. V. Sharp, Filer
Charles H. Welteroth, Jerome
Roy Marquess, Paul
Ival V. Goslin, Aberdeen
R. Willis Walker, Rexburg
Alex O. Coleman, St. Anthony
Leonard E. Graham, Rigby
Charles E. Anderson, Idaho Falls
A. K. Van Orden, Blackfoot

FOR WYOMING

L. C. Bishop, Cheyenne
E. B. Hitchcock, Rock Springs
J. G. Imeson, Jackson
David P. Miller, Rock Springs
Carl Robinson, Afton
Ciril D. Cranney, Afton
Clifford P. Hansen, Jackson
Clifford S. Wilson, Driggs, Idaho
Lloyd Van Deburg, Jackson

and by R. J. Newell, representative of the United States of America, have agreed upon the following articles, to wit:

ARTICLE I

A. The major purposes of this compact are to provide for the most efficient use of the waters of the Snake River for multiple purposes; to provide for equitable division of such waters; to remove causes of present and future controversies; to promote interstate comity; to recognize that the most efficient utilization of such waters is required for the development of the drainage area of the Snake River and its tributaries in Wyoming and Idaho; and to promote joint action by the states and the United States in the development and use of such waters and the control of floods.

B. Either state using, claiming or in any manner asserting any right to the use of the waters of the Snake River under the authority of either state shall be subject to the terms of this compact.

ARTICLE II

As used in this compact:

A. The term "Snake River" as distinguished from terms such as "Snake River and its tributaries" shall mean the Snake River from its headwaters to the Wyoming-Idaho boundary and all tributaries flowing into it within the boundaries of Wyoming, and the Salt River and all its tributaries.

B. The terms "Idaho" and "Wyoming" shall mean, respectively, the state of Idaho and the state of Wyoming, and, except as otherwise expressly provided, either of those terms or the term "state" or "states" used in relation to any right or obligation created or recognized by this compact shall include any person or entity of any nature whatsoever, including the United States.

C. The term "domestic use" shall mean the use of water by an individual, or by a family unit or household for drinking, cooking, laundering, sanitation and other personal comforts and necessities; and for the irrigation of a family garden or orchard not exceeding one half acre in area.

D. The term "stock water use" shall mean the use of water for livestock and poultry.

E. The term "established Wyoming rights" shall mean Snake River water rights that have been validly established of record in Wyoming prior to July 1, 1949, for use in Wyoming.

ARTICLE III

A. The waters of the Snake River, exclusive of established Wyoming rights and other uses coming within the provisions of C of this article III, are hereby allocated to each state for storage or direct diversion as follows:

To Idaho _____ 96 per cent

To Wyoming _____ 4 per cent

subject to the following stipulations and conditions as to the four per cent allocated to Wyoming:

1. One half may be used in Wyoming by direct diversion or by storage and subsequent diversion without provision being made for replacement storage space.
2. The other one half may be diverted for direct use or stored for later diversion and use on the condition that there shall have been provided for reimbursement of Idaho users replacement storage space to the extent of one third of the maximum annual diversion in acre-feet but not in excess, however, of one third of half the total hereby allocated to Wyoming. Until this total replacement storage space has been made available, provision for meeting its proportionate part of this total shall be a prerequisite to the right to use water in Wyoming for any irrigation project authorized after June 30, 1949, for construction by any Federal agency.

B. The amount of water subject to allocation as provided in A of this article III shall be determined on an annual water-year basis measured from October 1 of any year through September 30 of the succeeding year. The quantity of water to which the percentage factors in A of this article III shall be applied through a given date in any water year shall be, in acre-feet, equal to the algebraic sum of:

1. The quantity of water, in acre-feet, that has passed the Wyoming state line in the Snake River to the given date, determined on the basis of gaging stations to be established at such points as are agreed on under the provisions of B of article VI.
 2. The change during that water year to the given date in quantity of water, in acre-feet, in any existing or future reservoirs in Wyoming which water is for use in Idaho.
 3. The quantity of water, in acre-feet, stored in that water year and in storage on the given date for later diversion and use in Wyoming, under rights having a priority later than June 30, 1949.
 4. One-third of the quantity of water, in acre-feet, excluding any storage water held over from prior years, diverted, under rights having a priority later than June 30, 1949, in that water year to the given date:
 - (a) from the Snake River for use that year on lands in Wyoming, and
 - (b) from tributaries of the Salt River for use that year on lands in Idaho.
- C. There are hereby excluded from the allocation made by this compact:
1. existing and future domestic and stock-water uses of water; provided, that the capacity of any reservoir for stock-water shall not exceed 20 acre-feet;
 2. established Wyoming rights; and
 3. all water rights for use in Idaho on any tributary of the Salt River heading in Idaho which were validly established under the laws of Idaho prior to July 1, 1949;
- and all such uses and rights are hereby recognized.

ARTICLE IV

No water of the Snake River shall be diverted in Wyoming for use outside the drainage area of the Snake River except with the approval of Idaho; and no water of any tributary of the Salt River heading in Idaho shall be diverted in Idaho for use outside the drainage area of said tributary except with the approval of Wyoming.

ARTICLE V

Subject to the provisions of this compact, waters of the Snake River may be impounded and used for the generation of electrical power, but such impounding and use shall be subservient to the use of such waters for domestic, stock and irrigation purposes, and shall not interfere with or prevent their use for such preferred purposes. Water impounded or diverted in Wyoming exclusively for the generation of electrical power shall not be charged to the allocation set forth in article III of this compact.

ARTICLE VI

A. It shall be the duty of the two states to administer this compact through the official in each state who is now or may hereafter be charged with the administration of the public water supplies, and to collect and

correlate through such officials the data necessary for the proper administration of the provisions of this compact. Such officials may, by unanimous action, adopt rules and regulations consistent with the provisions of this compact.

B. The states shall in conjunction with other responsible agencies cause to be established, maintained and operated such suitable water gaging stations as they find necessary to administer this compact. The United States Geological Survey, or whatever Federal agency may succeed to the functions and duties of that agency, so far as this compact is concerned, shall collaborate with officials of the states charged with the administration of this compact in the execution of the duty of such officials in the collection, correlation and publication of information necessary for its proper administration.

C. In the case of failure of the administrative officials of the two states to agree on any matter necessary to the administration of this compact, the director of the United States Geological Survey, or whatever official succeeds to his duties, shall be asked to appoint a Federal representative to participate as to the matters in disagreement, and points of disagreement shall be decided by majority vote.

ARTICLE VII

A. Either state shall have the right to file applications for and receive permits to construct or participate in the construction and use of any dam, storage reservoir or diversion works in the other state for the purpose of conserving and regulating its allocated water and to perfect rights thereto. Either state exercising this right shall comply with the laws of the other state except as to any general requirement for legislative approval that may be applicable to the granting of rights by one state for the diversion or storage of water for use outside of that state.

B. Each claim or right hereafter initiated for storage or diversion of water in one state for use in the other state shall be filed in the office of the proper official of the state in which the water is to be stored or diverted, and a duplicate copy of the application, including a map showing the character and location of the proposed facilities and the lands to be irrigated, shall be filed in the office of the proper official of the state in which the water is to be used. If a portion or all the lands proposed to be reclaimed are located in a state other than the one in which the water is to be stored or diverted, then, before approval, said application shall be checked against the records of the office of the state in which the water is to be used, and a notation shall be placed thereon by the officer in charge of such records as to whether or not he approves the application. All indorsements shall be placed on both the original and duplicate copies of all such applications and maps filed to the end that the records in both states may be complete and identical.

ARTICLE VIII

A. Neither state shall deny the right of the United States, and subject to the conditions hereinafter contained, neither state shall deny the right of

the other state to acquire rights to the use of water, or to construct or participate in the construction and use of diversion works and storage reservoirs with appurtenant works, canals and conduits in one state for the purpose of diverting, conveying, storing or regulating water in one state for use in the other state, when such use is within the allocation to such state made by this compact.

B. Either state shall have the right to acquire such property rights as are necessary to the use of water in conformity with this compact in the other state by donation, purchase or through the exercise of the power of eminent domain. Either state, upon the written request of the governor of the other state, for the benefit of whose water users property is to be acquired in the state to which such written request is made, shall proceed expeditiously to acquire the desired property either by purchase at a price satisfactory to the requesting state, or, if such purchase cannot be made, then through the exercise of its power of eminent domain and shall convey such property to the requesting state or such entity as may be designated by the requesting state; provided, that all costs of acquisition and expenses of every kind and nature whatsoever incurred in obtaining the requested property shall be paid by the requesting state at the time and in the manner prescribed by the state requested to acquire the property.

C. Should any facility be constructed in either state by and for the benefit of the other state, as above provided, the construction, repair, replacement, maintenance and operation of such facility shall be subject to the laws of the state in which the facility is located, except that, in the case of a reservoir constructed in either state for the benefit of the other state, the proper officials of the state in which the facility is located shall permit the storage and release of any water to which the other state is entitled under this compact.

D. Either state having property rights in the other state acquired as provided in B of this article VIII shall pay to the political subdivision of the state in which such property rights are located, each and every year during which such rights are held, a sum of money equivalent to the average annual amount of taxes assessed against those rights during the ten years preceding the acquisition of such rights in reimbursement for the loss of taxes to said political subdivision of the state, except that this provision shall not be applicable to interests in property rights the legal title to which is in the United States. Payments so made to a political subdivision shall be in lieu of any and all taxes by that subdivision on the property rights for which the payments are made.

ARTICLE IX

The provisions of this compact shall not apply to or interfere with the right or power of either state to regulate within its boundaries the appropriation, use and control of waters allocated to such state by this compact.

ARTICLE X

The failure of either state to use the waters, or any part thereof, the use of which is allocated to it under the terms of this compact, shall not constitute a relinquishment of the right to such use to the other state, nor shall it constitute a forfeiture or abandonment of the right to such use.

ARTICLE XI

In case any reservoir is constructed in one state where the water is to be used principally in the other state, sufficient water not to exceed five cubic feet per second shall be released at all times, if necessary for stockwater use and conservation of fish and wildlife.

ARTICLE XII

The provisions of this compact shall remain in full force and effect unless amended or terminated by action of the legislatures of both states and consented to and approved by the Congress of the United States in the same manner as this compact is required to be ratified and approved to become effective; provided, that in the event of such amendment or termination all rights theretofore established hereunder or recognized hereby shall continue to be recognized as valid by both states notwithstanding such amendment or termination.

ARTICLE XIII

Nothing in this compact shall be construed to limit or prevent either state from instituting or maintaining any action or proceeding, legal or equitable, for the protection of any right under this compact or the enforcement of any of its provisions.

ARTICLE XIV

A. Nothing in this compact shall be deemed:

1. To affect adversely any rights to the use of the waters of the Snake River, including its tributaries entering downstream from the Wyoming-Idaho state line, owned by or for Indians, Indian tribes and their reservations. The water required to satisfy these rights shall be charged against the allocation made to the state in which the Indians and their lands are located.
2. To impair or affect any rights or powers of the United States, its agencies or instrumentalities, in and to the use of the waters of the Snake River nor its capacity to acquire rights in and to the use of said waters.
3. To apply to any waters within the Yellowstone National Park or Grand Teton National Park.
4. To subject any property of the United States, its agencies or instrumentalities to taxation by either state or subdivisions thereof, nor to create an obligation on the part of the United States, its agents or

instrumentalities, by reason of the acquisition, construction or operation of any property or works of whatsoever kind, to make any payments to any state or political subdivisions thereof, state agency, municipality or entity whatsoever in reimbursement for the loss of taxes.

5. To subject any works of the United States used in connection with the control or use of waters which are the subject of this compact to the laws of any state to an extent other than the extent to which these laws would apply without regard to this compact.

B. Notwithstanding the provisions of A of this article, any beneficial uses hereafter made by the United States, or those acting by or under its authority, within either state, of the waters allocated by this compact shall be within the allocations hereinabove made for use in that state and shall be taken into account in determining the extent of use within that state.

ARTICLE XV

This compact shall become operative when approved by legislative enactment by each of the states, and when consented to by the Congress of the United States.

ARTICLE XVI

Wyoming hereby relinquishes the right to the allocation of stored water in Grassy Lake Reservoir, as set forth in Wyoming's reservoir permit No. 4631 Res. and evidenced by certificate No. R-1, page 318, and all claims predicated thereon.

In witness whereof the commissioners have signed this compact in quadruplicate, one of which shall be filed in the archives of the department of state of the United States of America and shall be deemed the authoritative original, and of which a duly certified copy shall be forwarded to the governor of each of the states.

Done at the city of Cheyenne, in the state of Wyoming, this 10th day of October, in the Year of Our Lord, One Thousand Nine Hundred and Forty-nine.

COMMISSIONERS FOR IDAHO		COMMISSIONERS FOR WYOMING	
/s/ Mark R. Kulp	Mark R. Kulp	/s/ L. C. Bishop	L. C. Bishop
/s/ N. V. Sharp	N. V. Sharp	/s/ E. B. Hitchcock	E. B. Hitchcock
/s/ Charles H. Welteroth	Charles H. Welteroth	/s/ J. G. Imeson	J. G. Imeson
/s/ Roy Marquess	Roy Marquess	/s/ David P. Miller	David P. Miller
/s/ Ival V. Goslin	Ival V. Goslin	/s/ Carl Robinson	Carl Robinson
/s/ R. Willis Walker	R. Willis Walker	/s/ Ciril D. Cranney	Ciril D. Cranney

/s/ Alex O. Coleman	/s/ Clifford P. Hansen
Alex O. Coleman	Clifford P. Hansen
/s/ Leonard E. Graham	/s/ Clifford S. Wilson
Leonard E. Graham	Clifford S. Wilson
/s/ Chas. E. Anderson	/s/ Lloyd Van Deburg
Charles E. Anderson	Lloyd Van Deburg
/s/ A. K. Van Orden	
A. K. Van Orden	

I have participated in the negotiation of this compact and intend to report favorably thereon to the Congress of the United States.

/s/ R. J. Newell
 R. J. Newell
 Representative of
 The United States of America

[1950 (E. S.), ch. 2, § 1, p. 4.]

Compiler's notes. Section 2 of S.L. 1950 (E. S.), ch. 2, read: "The compact set forth in section 1 of this act shall not become operative unless and until it has been ratified and approved by appropriate legislative enactment by the state of Wyoming and has been consented to by the Congress of the United States. The governor of Idaho shall give notice of the ratification and approval of this compact by the Idaho legislature to the governor

of Wyoming and to the President of the United States."

Wyoming ratified the Snake River Compact by an act approved February 20, 1950 (Sess. Laws Wyoming, Spec. Sess. 1950, ch. 2). Congress consented to the compact by an act approved March 21, 1950, ch. 73, § 1, 64 Stat. 29.

Section 3 of said act declared an emergency. Approved February 11, 1950.

42-3402. Bear River Compact ratified. — Ratification and approval is hereby given to the Bear River Compact as signed at the city of Salt Lake City, in the state of Utah on the twenty-second day of December, 1978, by Clifford J. Skinner, J. Daniel Roberts and Don W. Gilbert, commissioners of the state of Idaho, acting pursuant to authority granted by article XIV of the ratified Bear River Compact appearing at section 42-3402, Idaho Code, and the commissioners representing the state of Utah, the state of Wyoming and approved by Wallace N. Jibson, Representative of the United States, which compact is in full as follows:

AMENDED BEAR RIVER COMPACT

The state of Idaho, the state of Utah, and the state of Wyoming, acting through their respective commissioners after negotiations participated in by a representative of the United States of America appointed by the President, have agreed to an amended Bear River Compact as follows:

ARTICLE I

A. The major purposes of this compact are to remove the causes of present and future controversy over the distribution and use of the waters of the Bear River; to provide for efficient use of water for multiple purposes; to permit additional development of the water resources of Bear River; to promote interstate comity; and to accomplish an equitable apportionment of the waters of the Bear River among the compacting states.

B. The physical and all other conditions peculiar to the Bear River constitute the basis for this compact. No general principle or precedent with respect to any other interstate stream is intended to be established.

ARTICLE II

As used in this compact the term

1. "Bear River" means the Bear River and its tributaries from its source in the Uinta Mountains to its mouth in Great Salt Lake;

2. "Bear Lake" means Bear Lake and Mud Lake.[:]

3. "Upper Division" means the portion of Bear River from its source in the Uinta Mountains to and including Pixley Dam, a diversion dam in the Southeast Quarter of Section 25, Township 23 North, Range 120 West, Sixth Principal Meridian, Wyoming;

4. "Central Division" means the portion of the Bear River from Pixley Dam to and including Stewart Dam, a diversion dam in Section 34, Township 13 South, Range 44 East, Boise Base and Meridian, Idaho;

5. "Lower Division" means the portion of the Bear River between Stewart Dam and Great Salt Lake, including Bear Lake and its tributary drainage;

6. "Upper Utah Section Diversions" means the sum of all diversions in second-feet from the Bear River and the tributaries of the Bear River joining the Bear River upstream from the point where the Bear River crosses the Utah-Wyoming State line above Evanston, Wyoming; excluding the diversions by the Hilliard East Fork Canal, Lannon Canal, Lone Mountain Ditch, and Hilliard West Side Canal;

7. "Upper Wyoming Section Diversions" means the sum of all diversions in second-feet from the Bear River main stem from the point where the Bear River crosses the Utah-Wyoming State line above Evanston, Wyoming, to the point where the Bear River crosses the Wyoming-Utah State line east of Woodruff, Utah, and including the diversions by the Hilliard East Fork Canal, Lannon Canal, Lone Mountain Ditch, and Hilliard West Side Canal;

8. "Lower Utah Section Diversions" means the sum of all diversions in second-feet from the Bear River main stem from the point where the Bear River crosses the Wyoming-Utah State line east of Woodruff, Utah, to the point where the Bear River crosses the Utah-Wyoming State line northeast of Randolph, Utah;

9. "Lower Wyoming Section Diversions" means the sum of all diversions in second-feet from the Bear River main stem from the point where the Bear River crosses the Utah-Wyoming State line northeast of Randolph to and including the diversion at Pixley Dam;

10. "Commission" means the Bear River Commission, organized pursuant to Article III of this compact;

11. "Water user" means a person, corporation, or other entity having a right to divert water from the Bear River for beneficial use;

12. "Second-foot" means a flow of one cubic foot of water per second of time passing a given point;

13. "Acre-foot" means the quantity of water required to cover one acre to a depth of one foot, equivalent to 43,560 cubic feet;

14. "Biennium" means the 2-year period commencing on October 1 of the first odd numbered year after the effective date of this compact and each 2-year period thereafter;

15. "Water year" means the period beginning October 1 and ending September 30 of the following year;

16. "Direct flow" means all water flowing in a natural watercourse except water released from storage or imported from a source other than the Bear River watershed;

17. "Border Gaging Station" means the stream flow gaging station in Idaho on the Bear River above Thomas Fork near the Wyoming-Idaho boundary line in the Northeast Quarter of the Northeast Quarter of Section 15, Township 14 South, Range 46 East, Boise Base and Meridian, Idaho;

18. "Smiths Fork" means a Bear River tributary which rises in Lincoln County, Wyoming and flows in a general southwesterly direction to its confluence with Bear River near Cokeville, Wyoming;

19. "Grade Creek" means a Smiths Fork tributary which rises in Lincoln County, Wyoming and flows in a westerly direction and in its natural channel is tributary to Smiths Fork in Section 17, Township 25 North, Range 118 West, Sixth Principal Meridian, Wyoming;

20. "Pine Creek" means a Smiths Fork tributary which rises in Lincoln County, Wyoming, emerging from its mountain canyon in Section 34, Township 25 North, Range 118 West, Sixth Principal Meridian, Wyoming, and in its natural channel is tributary to Smiths Fork in Section 36, Township 25 North, Range 119 West, Sixth Principal Meridian, Wyoming;

21. "Bruner Creek" and "Pine Creek Springs" means Smiths Fork tributaries which rise in Lincoln County, Wyoming, in Sections 31 and 32, Township 25 North, Range 118 West, Sixth Principal Meridian, and in their natural channels are tributary to Smiths Fork in Section 36, Township 25 North, Range 119 West, Sixth Principal Meridian, Wyoming;

22. "Spring Creek" means a Smiths Fork tributary which rises in Lincoln County, Wyoming, in Sections 1 and 2, Township 24 North, Range 119 West, Sixth Principal Meridian, Wyoming, and flows in a general westerly direction to its confluence with Smiths Fork in Section 4, Township 24 North, Range 119 West, Sixth Principal Meridian, Wyoming;

23. "Sublette Creek" means the Bear River tributary which rises in Lincoln County, Wyoming and flows in a general westerly direction to its confluence with Bear River in Section 20, Township 24 North, Range 119 West, Sixth Principal Meridian, Wyoming;

24. "Hobble Creek" means the Smiths Fork tributary which rises in Lincoln County, Wyoming and flows in a general southwestly direction to its confluence with Smiths Fork in Section 35, Township 28 North, Range 118 West, Sixth Principal Meridian, Wyoming;

25. "Hilliard East Fork Canal" means that irrigation canal which diverts water from the right bank of the East Fork of Bear River in Summit County, Utah, at a point West 1,310 feet and North 330 feet from the Southeast corner of Section 16, Township 2 North, Range 10 East, Salt Lake Base and Meridian, Utah, and runs in a northerly direction crossing the Utah-Wyoming State line into the Southwest Quarter of Section 21, Township 12 North, Range 119 West, Sixth Principal Meridian, Wyoming;

26. "Lannon Canal" means that irrigation canal which diverts water from the right bank of the Bear River in Summit County, Utah, East 1,480 feet from the West Quarter corner of Section 19, Township 3 North, Range 10 East, Salt Lake Base and Meridian, Utah, and runs in a northerly direction crossing the Utah-Wyoming State line into the South Half of Section 20, Township 12 North, Range 119 West, Sixth Principal Meridian, Wyoming;

27. "Lone Mountain Ditch" means that irrigation canal which diverts water from the right bank of the Bear River in Summit County, Utah, North 1,535 feet and East 1,120 feet from the West Quarter corner of Section 19, Township 3 North, Range 10 East, Salt Lake Base and Meridian, Utah, and runs in a northerly direction crossing the Utah-Wyoming State line into the South Half of Section 20, Township 12 North, Range 119 West, Sixth Principal Meridian, Wyoming;

28. "Hilliard West Side Canal" means that irrigation canal which diverts water from the right bank of the Bear River in Summit County, Utah, at a point North 2,190 feet and East 1,450 feet from the South Quarter corner of Section 13, Township 3 North, Range 9 East, Salt Lake Base and Meridian, Utah, and runs in a northerly direction crossing the Utah-Wyoming State line into the South Half of Section 20, Township 12 North, Range 119 West, Sixth Principal Meridian, Wyoming;

29. "Francis Lee Canal" means that irrigation canal which diverts water from the left bank of the Bear River in Uinta County, Wyoming, in the Northeast Quarter of Section 30, Township 18 North, Range 120 West, Sixth Principal Meridian, Wyoming, and runs in a westerly direction across the Wyoming-Utah State line into Section 16, Township 9 North, Range 8 East, Salt Lake Base and Meridian, Utah;

30. "Chapman Canal" means that irrigation canal which diverts water from the left bank of the Bear River in Uinta County, Wyoming, in the Northeast Quarter of Section 36, Township 16 North, Range 121 West, Sixth Principal Meridian, Wyoming, and runs in a northerly direction crossing over the low divide into the Saleratus drainage basin near the Southeast corner of Section 36, Township 17 North, Range 121 West, Sixth Principal Meridian, Wyoming and then in a general westerly direction crossing the Wyoming-Utah State line;

31. "Neponset Reservoir" means that reservoir located principally in Sections 34 and 35, Township 8 North, Range 7 East, Salt Lake Base and Meridian, Utah, having a capacity of 6,900 acre-feet.

ARTICLE III

A. There is hereby created an interstate administrative agency to be known as the "Bear River Commission" which is hereby constituted a legal entity and in such name shall exercise the powers hereinafter specified. The commission shall be composed of nine commissioners, three commissioners representing each signatory state, and if appointed by the President, one additional commissioner representing the United States of America who shall serve as chairman, without vote. Each commissioner, except the chairman, shall have one vote. The state commissioners shall be selected in

accordance with state law. Six commissioners who shall include two commissioners from each state shall constitute a quorum. The vote of at least two thirds of the commissioners when a quorum is present shall be necessary for the action of the commission.

B. The compensation and expenses of each commissioner and each adviser shall be paid by the government which he represents. All expenses incurred by the commission in the administration of this compact, except those paid by the United States of America, shall be paid by the signatory states on an equal basis.

C. The commission shall have power to:

1. Adopt by-laws, rules, and regulations not inconsistent with this compact;
2. Acquire, hold, convey or otherwise dispose of property;
3. Employ such persons and contract for such services as may be necessary to carry out its duties under this compact;
4. Sue and be sued as a legal entity in any court of record of a signatory state, and in any court of the United States having jurisdiction of such action;
5. Cooperate with state and federal agencies in matters relating to water pollution of interstate significance;
6. Perform all functions required of it by this compact and do all things necessary, proper or convenient in the performance of its duties hereunder, independently or in cooperation with others, including state and federal agencies.

D. The commission shall:

1. Enforce this compact and its orders made hereunder by suit or other appropriate action;
2. Compile a report covering the work of the commission and expenditures during the current biennium, and an estimate of expenditures for the following biennium and transmit it to the President of the United States and to the governors of the signatory states on or before July 1 following each biennium.

ARTICLE IV

Rights to direct flow water shall be administered in each signatory state under state law, with the following limitations:

A. When there is a water emergency, as hereinafter defined for each division, water shall be distributed therein as provided below.

1. Upper Division

a. When the divertible flow as defined below for the Upper Division is less than 1,250 second-feet, a water emergency shall be deemed to exist therein and such divertible flow is allocated for diversion in the river sections of the Division as follows:

Upper Utah Section Diversions — 0.6 per cent,

Upper Wyoming Section Diversions — 49.3 per cent,

Lower Utah Section Diversions — 40.5 per cent,

Lower Wyoming Section Diversions — 9.6 per cent.

Such divertible flow shall be the total of the following five items:

- (1) Upper Utah Section Diversions in second-feet,
- (2) Upper Wyoming Section Diversions in second-feet,
- (3) Lower Utah Section Diversions in second-feet,
- (4) Lower Wyoming Section Diversions in second-feet,
- (5) The flow in second-feet passing Pixley Dam.

b. The Hilliard East Fork Canal, Lannon Canal, Lone Mountain Ditch, and Hilliard West Side Canal, which divert water in Utah to irrigate lands in Wyoming, shall be supplied from the divertible flow allocated to the Upper Wyoming Section Diversions.

c. The Chapman, Bear River, and Francis Lee Canals, which divert water from the main stem of Bear River in Wyoming to irrigate lands in both Wyoming and Utah, shall be supplied from the divertible flow allocated to the Upper Wyoming Section Diversions.

d. The Beckwith Quinn West Side Canal, which diverts water from the main stem of Bear River in Utah to irrigate lands in both Utah and Wyoming, shall be supplied from the divertible flow allocated to the Lower Utah Section Diversions.

e. If for any reason the aggregate of all diversions in a river section of the Upper Division does not equal the allocation of water thereto, the unused portion of such allocations shall be available for use in the other river sections in the Upper Division in the following order:

- (1) In the other river section of the same state in which the unused allocation occurs; and (2) In the river sections of the other state. No permanent right of use shall be established by the distribution of water pursuant to this paragraph e.

f. Water allocated to the several sections shall be distributed in each section in accordance with state law.

2. Central Division

a. When either the divertible flow as hereinafter defined for the Central Division is less than 870 second-feet, or the flow of the Bear River at Border Gaging Station is less than 350 second-feet, whichever shall first occur, a water emergency shall be deemed to exist in the Central Division and the total of all diversions in Wyoming from Grade Creek, Pine Creek, Bruner Creek and Pine Creek Springs, Spring Creek, Sublette Creek, Smiths Fork, and all the tributaries of Smiths Fork above the mouth of Hobbie Creek including Hobbie Creek, and from the main stem of the Bear River between Pixley Dam and the point where the river crosses the Wyoming-Idaho state line near border shall be limited for the benefit of the state of Idaho, to not exceeding forty-three (43) per cent of the divertible flow. The remaining fifty-seven (57) per cent of the divertible flow shall be available for use in Idaho in the Central Division, but if any portion of such allocation is not used therein it shall be available for use in Idaho in the Lower Division.

The divertible flow for the Central Division shall be the total of the following three items:

- (1) Diversions in second-feet in Wyoming consisting of the sum of all diversions from Grade Creek, Pine Creek, Bruner Creek and Pine

Creek Springs, Spring Creek, Sublette Creek, and Smiths Fork and all the tributaries of Smiths Fork above the mouth of Hobble Creek including Hobble Creek, and the main stem of the Bear River between Pixley Dam and the point where the river crosses the Wyoming-Idaho state line near Border, Wyoming.

(2) Diversions in second-feet in Idaho from the Bear River main stem from the point where the river crosses the Wyoming-Idaho state line near Border to Stewart Dam including West Fork Canal which diverts at Stewart Dam.

(3) Flow in second-feet of the Rainbow Inlet Canal and of the Bear River passing downstream from Stewart Dam.

b. The Cook Canal, which diverts water from the main stem of the Bear River in Wyoming to irrigate lands in both Wyoming and Idaho, shall be considered a Wyoming diversion and shall be supplied from the divertible flow allocated to Wyoming.

c. Water allocated to each state shall be distributed in accordance with state law.

3. Lower Division

When the flow of water across the Idaho-Utah boundary line is insufficient to satisfy water rights in Utah, covering water applied to beneficial use prior to January 1, 1976, any water user in Utah may file a petition with the commission alleging that by reason of diversions in Idaho he is being deprived of water to which he is justly entitled, and that by reason thereof, a water emergency exists, and requesting distribution of water under the direction of the commission. If the commission finds a water emergency exists, it shall put into effect water delivery schedules based on priority of rights and prepared by the commission without regard to the boundary line for all or any part of the division, and during such emergency, water shall be delivered in accordance with such schedules by the state official charged with the administration of public waters.

B. The commission shall have authority upon its own motion (1) to declare a water emergency in any or all river divisions based upon its determination that there are diversions which violate this compact and which encroach upon water rights in a lower state, (2) to make appropriate orders to prevent such encroachments, and (3) to enforce such orders by action before state administrative officials or by court proceedings.

C. When the flow of water in an interstate tributary across a state boundary line is insufficient to satisfy water rights on such tributary in a lower state, any water user may file a petition with the commission alleging that by reason of diversions in an upstream state he is being deprived of water to which he is justly entitled and that by reason thereof a water emergency exists, and requesting distribution of water under the direction of the commission. If the commission finds that a water emergency exists and that interstate control of water of such tributary is necessary, it shall put into effect water delivery schedules based on priority of rights and prepared without regard to the state boundary line. The state officials in charge of water distribution on interstate tributaries may appoint and fix the compensation and expenses of a joint water commissioner for each

tributary. The proportion of the compensation and expenses to be paid by each state shall be determined by the ratio between the number of acres therein which are irrigated by diversions from such tributary, and the total number of acres irrigated from such tributary.

D. In preparing interstate water delivery schedules the commission, upon notice and after public hearings, shall make findings of fact as to the nature, priority and extent of water rights, rates of flow, duty of water, irrigated acreages, types of crops, time of use, and related matters; provided that such schedules shall recognize and incorporate therein priority of water rights as adjudicated in each of the signatory states. Such findings of fact shall, in any court or before any tribunal, constitute prima facie evidence of the facts found.

E. Water emergencies provided for herein shall terminate on September 30 of each year unless terminated sooner or extended by the commission.

ARTICLE V

A. Water rights in the Lower Division acquired under the laws of Idaho and Utah covering water applied to beneficial use prior to January 1, 1976, are hereby recognized and shall be administered in accordance with state law based on priority of rights as provided in article IV, paragraph A3. Rights to water first applied to beneficial use on or after January 1, 1976, shall be satisfied from the respective allocations made to Idaho and Utah in this paragraph and the water allocated to each state shall be administered in accordance with state law. Subject to the foregoing provisions, the remaining water in the Lower Division, including ground water tributary to the Bear River, is hereby apportioned for use in Idaho and Utah as follows:

- (1) Idaho shall have the first right to the use of such remaining water resulting in an annual depletion of not more than 125,000 acre-feet.
- (2) Utah shall have the second right to the use of such remaining water resulting in an annual depletion of not more than 275,000 acre-feet.
- (3) Idaho and Utah shall each have an additional right to deplete annually on an equal basis, 75,000 acre-feet of the remaining water after the rights provided by subparagraphs (1) and (2) above have been satisfied.
- (4) Any remaining water in the Lower Division after the allocations provided for in subparagraphs (1), (2), and (3) above have been satisfied shall be divided; thirty (30) percent to Idaho and seventy (70) percent to Utah.

B. Water allocated under the above subparagraphs shall be charged against the state in which it is used regardless of the location of the point of diversion.

C. Water depletions permitted under provisions of subparagraphs (1), (2), (3), and (4) above, shall be calculated and administered by a commission-approved procedure.

ARTICLE VI

A. Existing storage rights in reservoirs constructed above Stewart Dam prior to February 4, 1955 are as follows:

Idaho	324 acre-feet
Utah	11,850 acre-feet
Wyoming	2,150 acre-feet

Additional rights are hereby granted to store in any water year above Stewart Dam, 35,500 acre-feet of Bear River water and no more under this paragraph for use in Utah and Wyoming; and to store in any water year in Idaho or Wyoming on Thomas Fork 1,000 acre-feet of water for use in Idaho. Such additional storage rights shall be subordinate to, and shall not be exercised when the effect thereof will be to impair or interfere with (1) existing direct flow rights for consumptive use in any river division and (2) existing storage rights above Stewart Dam, but shall not be subordinate to any right to store water in Bear Lake or elsewhere below Stewart Dam. One half of the 35,500 acre-feet of additional storage right above Stewart Dam so granted to Utah and Wyoming is hereby allocated to Utah, and the remaining one half thereof is allocated to Wyoming.

B. In addition to the rights defined in paragraph A of this article, further storage entitlements above Stewart Dam are hereby granted. Wyoming and Utah are granted an additional right to store in any year 70,000 acre-feet of Bear River water for use in Utah and Wyoming to be divided equally; and Idaho is granted an additional right to store 4,500 acre-feet of Bear River water in Wyoming or Idaho for use in Idaho. Water rights granted under this paragraph and water appropriated, including ground water tributary to Bear River, which is applied to beneficial use on or after January 1, 1976, shall not result in an annual increase in depletion of the flow of the Bear River and its tributaries above Stewart Dam of more than 28,000 acre-feet in excess of the depletion as of January 1, 1976. Thirteen thousand (13,000) acre-feet of the additional depletion above Stewart Dam is allocated to each of Utah and Wyoming, and two thousand (2,000) acre-feet is allocated to Idaho.

The additional storage rights provided for in this paragraph shall be subordinate to, and shall not be exercised when the effect thereof will be to impair or interfere with (1) existing direct flow rights for consumptive use in any river division and (2) existing storage rights above Stewart Dam, but shall not be subordinate to any right to store water in Bear Lake or elsewhere below Stewart Dam; provided, however, there shall be no diversion of water to storage above Stewart Dam under this paragraph B when the water surface elevation of Bear Lake is below 5,911.00 feet, Utah Power & Light Company datum (the equivalent of elevation 5,913.75 feet based on the sea level datum of 1929 through the Pacific Northwest Supplementary Adjustment of 1947). Water depletions permitted under this paragraph B shall be calculated and administered by a commission-approved procedure.

C. In addition to the rights defined in article VI, paragraphs A and B, Idaho, Utah and Wyoming are granted the right to store and use water above Stewart Dam that otherwise would be bypassed or released from Bear Lake at times when all other direct flow and storage rights are satisfied. The availability of such water and the operation of reservoir space to store water above Bear Lake under this paragraph shall be determined by a commission-approved procedure. The storage provided for in this paragraph shall

be subordinate to all other storage and direct flow rights in the Bear River. Storage rights under this paragraph shall be exercised with equal priority on the following basis: six (6) percent thereof to Idaho; forty-seven (47) percent thereof to Utah; and forty-seven (47) percent thereof to Wyoming.

D. The waters of Bear Lake below elevation 5,912.91 feet, Utah Power & Light Company Bear Lake datum (the equivalent of elevation 5,915.66 feet based on the sea level datum of 1929 through the Pacific Northwest Supplementary Adjustment of 1947) shall constitute a reserve for irrigation. The water of such reserve shall not be released solely for the generation of power, except in emergency, but after release for irrigation it may be used in generating power if not inconsistent with its use for irrigation. Any water in Bear Lake in excess of that constituting the irrigation reserve may be used solely for the generation of power or for other beneficial uses. As new reservoir capacity above the Stewart Dam is constructed to provide additional storage pursuant to paragraph A of this article, the commission shall make a finding in writing as to the quantity of additional storage and shall thereupon make an order increasing the irrigation reserve in accordance with the following table:

Additional storage acre-feet	Lake Surface elevation Utah Power Oight Company Bear Lake datum	
	5,000	5,913.24
	10,000	5,913.56
	15,000	5,913.87
	20,000	5,914.15
	25,000	5,914.41
	30,000	5,914.61
	35,500	5,914.69
*	36,500	5,914.70

E. Subject to existing rights, each state shall have the use of water, including ground water, for ordinary domestic, and stock watering purposes, as determined by state law and shall have the right to impound water for such purposes in reservoirs having storage capacities not in excess, in any case, of 20 acre-feet, without deduction from the allocation made by paragraphs A, B, and C of this article.

F. The storage rights in Bear Lake are hereby recognized and confirmed subject only to the restrictions hereinbefore recited.

ARTICLE VII

It is the policy of the signatory states to encourage additional projects for the development of the water resources of the Bear River to obtain the maximum beneficial use of water with a minimum of waste, and in furtherance of such policy, authority is granted within the limitations provided by this compact, to investigate, plan, construct, and operate such projects without regard to state boundaries, provided that water rights for each such project shall, except as provided in article VI, paragraphs A and B thereof, be subject to rights theretofore initiated and in good standing.

ARTICLE VIII

A. No state shall deny the right of the United States of America, and subject to the conditions hereinafter contained, no state shall deny the right of another signatory state, any person or entity of another signatory state, to acquire rights to the use of water or to construct or to participate in the construction and use of diversion works and storage reservoirs with appurtenant works, canals, and conduits in one state for use of water in another state, either directly or by exchange. Water rights acquired for out-of-state use shall be appropriated in the state where the point of diversion is located in the manner provided by law for appropriation of water for use within such state.

B. Any signatory state, any person or any entity of any signatory state, shall have the right to acquire in any other signatory state such property rights as are necessary to the use of water in conformity with this compact by donation, purchase, or, as hereinafter provided through the exercise of the power of eminent domain in accordance with the law of the state in which such property is located. Any signatory state, upon the written request of the governor of any other signatory state for the benefit of whose water users property is to be acquired in the state to which such written request is made, shall proceed expeditiously to acquire the desired property either by purchase at a price acceptable to the requesting governor, or if such purchase cannot be made, then through the exercise of its power of eminent domain and shall convey such property to the requesting state or to the person, or entity designated by its governor provided, that all costs of acquisition and expenses of every kind and nature whatsoever incurred in obtaining such property shall be paid by the requesting state or the person or entity designated by its governor.

C. Should any facility be constructed in a signatory state by and for the benefit of another signatory state or persons or entities therein, as above provided, the construction, repair, replacement, maintenance and operation of such facility shall be subject to the laws of the state in which the facility is located.

D. In the event lands or other taxable facilities are acquired by a signatory state in another signatory state for the use and benefit of the former, the users of the water made available by such facilities, as a condition precedent to the use thereof, shall pay to the political subdivisions of the state in which such facilities are located, each and every year during which such rights are enjoyed for such purposes, a sum of money equivalent to the average of the amount of taxes annually levied and assessed against the land and improvements thereon during the ten years preceding the acquisition of such land. Said payments shall be in full reimbursement for the loss of taxes in such political subdivision of the state.

E. Rights to the use of water acquired under this article shall in all respects be subject to this compact.

ARTICLE IX

Stored water, or water from another watershed may be turned into the channel of the Bear River in one state and a like quantity, with allowance for

loss by evaporation, transpiration, and seepage, may be taken out of the Bear River in another state either above or below the point where the water is turned into the channel, but in making such exchange the replacement water shall not be inferior in quality for the purpose used or diminished in quantity. Exchanges shall not be permitted if the effect thereof is to impair vested rights or to cause damage for which no compensation is paid. Water from another watershed or source which enters the Bear River by actions within a state may be claimed exclusively by that state and use thereof by that state shall not be subject to the depletion limitations of articles IV, V and VI. Proof of any claimed increase in flow shall be the burden of the state making such claim, and it shall be approved only by the unanimous vote of the commission.

ARTICLE X

A. The following rights to the use of Bear River water carried in interstate canals are recognized and confirmed.

Name of Canal	Date of priority	Primary right second-feet	<u>Lands irrigated</u>	
			Acres	State
Hilliard East Fork	1914	28.00	2,644	Wyoming
Chapman	8-13-86	16.46	1,155	Wyoming
	8-13-86	98.46	6,892	Utah
	4-12-12	.57	40	Wyoming
	5-3-12	4.07	285	Utah
	5-21-12	10.17	712	Utah
	2-6-13	.79	55	Wyoming
	8-28-05	134.00		
Francis Lee	1879	2.20	154	Wyoming
	1879	7.41	519	Utah

Under the right as herein confirmed not to exceed 134 second-feet may be carried across the Wyoming-Utah state line in the Chapman Canal at any time for filling the Neponset Reservoir, for irrigation of land in Utah and for other purposes. The storage right in Neponset Reservoir is for 6,900 acre-feet which is a component part of the irrigation right for the Utah lands listed above.

All other rights to the use of water carried in interstate canals and ditches, as adjudicated in the state in which the point of diversion is located, are recognized and confirmed.

B. All interstate rights shall be administered by the state in which the point of diversion is located and during times of water emergency, such rights shall be filled from the allocations specified in article IV hereof for the section in which the point of diversion is located, with the exception that the diversion of water into the Hilliard East Fork Canal, Lannon Canal, Lone Mountain Ditch, and Hilliard West Side Canal shall be under the administration of Wyoming. During times of water emergency these canals and the Lone Mountain Ditch shall be supplied from the allocation specified in article IV for the Upper Wyoming Section Diversions.

ARTICLE XI

Applications for appropriation, for change of point of diversion, place and nature of use, and for exchange of Bear River water shall be considered and acted upon in accordance with the law of the state in which the point of diversion is located, but no such application shall be approved if the effect thereof will be to deprive any water user in another state of water to which he is entitled, nor shall any such application be approved if the effect thereof will be an increase in the depletion of the flow of the Bear River and its tributaries beyond the limits authorized in each state in articles IV, V and VI of this compact. The official of each state in charge of water administration shall, at intervals and in the format established by the commission, report on the status of use of the respective allocations.

ARTICLE XII

Nothing in this compact shall be construed to prevent the United States, a signatory state or political subdivision thereof, person, corporation, or association, from instituting or maintaining any action or proceeding, legal or equitable, for the protection of any right under state or federal law or under this compact.

ARTICLE XIII

Nothing contained in this compact shall be deemed

1. to affect the obligations of the United States of America to the Indian tribes;
2. to impair, extend or otherwise affect any right or power of the United States, its agencies or instrumentalities involved herein; nor the capacity of the United States to hold or acquire additional rights to the use of the water of the Bear River;
3. to subject any property or rights of the United States to the laws of the states which were not subject thereto prior to the date of this compact;
4. to submit any property of the United States to taxation by the states or any subdivision thereof, nor to obligate the United States to pay any state or subdivision thereof for loss of taxes.

ARTICLE XIV

At intervals not exceeding twenty years, the commission shall review the provisions hereof, and after notice and public hearing, may propose amendments to any such provision, provided, however, that the provisions contained herein shall remain in full force and effect until such proposed amendments have been ratified by the legislatures of the signatory states and consented to by congress.

ARTICLE XV

This compact may be terminated at any time by the unanimous agreement of the signatory states. In the event of such termination all rights established under it shall continue unimpaired.

ARTICLE XVI

Should a court of competent jurisdiction hold any part of this compact to be contrary to the constitution of any signatory state or to the Constitution of the United States, all other severable provisions of this compact shall continue in full force and effect.

ARTICLE XVII

This compact shall be in effect when it shall have been ratified by the legislature of each signatory state and consented to by the congress of the United States of America. Notice of ratification by the legislatures of the signatory states shall be given by the governor of each signatory state to the governor of each of the other signatory states and to the President of the United States of America, and the President is hereby requested to give notice to the governor of each of the signatory states of approval by the congress of the United States of America.

IN WITNESS WHEREOF, The commissioners and their advisors have executed this compact in five originals, one of which shall be deposited with the General Services Administration of the United States of America, one of which shall be forwarded to the governor of each of the signatory states, and one of which shall be made a part of the permanent records of the Bear River Commission.

Done at Salt Lake City, Utah, this 22nd day of December 1978.

For the State of Idaho:

/s/Don W. Gilbert

/s/Clifford J. Skinner

/s/J. Daniel Roberts

For the state of Utah:

/s/David F. Lawrence*

/s/S. Paul Holmgren

/s/Simeon Weston

For the state of Wyoming:

/s/John A. Teichert

/s/George L. Christopoulos

/s/J. W. Myers

Approved:

/s/Wallace N. Jibson

Representative of the United

States of America

Attest:

/s/Daniel F. Lawrence

Secretary of the Bear River

Compact Commission

[1955, ch. 218, § 1, p. 450; am. 1979, ch. 322, § 1, p. 862.]

Compiler's notes. The bracketed semicolon at the end of clause 2 of Article II, was inserted by the compiler.

Section 2 of S.L. 1955, ch. 218 read: "The compact set forth in section 1 of this act shall not become operative unless and until it has been ratified and approved by appropriate legislative enactment by the states of Utah and Wyoming and has been consented to by the congress of the United States. The gover-

nor of Idaho shall give notice of ratification and approval of this compact by the Idaho Legislature to the governor of Utah, to the governor of Wyoming and to the President of the United States."

Congress consented to the compact by an act approved March 17, 1958. Public Law 85-348, 72 Stat. 38.

Section 2 of S.L. 1979, ch. 322 read: "The compact set forth in section 1 of this act shall

not become operative unless and until it has been ratified and approved by appropriate legislative enactment by the states of Utah and Wyoming and has been consented to by the Congress of the United States. The governor of Idaho shall give notice of ratification and approval of this compact by the Idaho legislature to the governor of Utah, to the governor of Wyoming and to the president of the United States."

Section 3 of S.L. 1955, ch. 218 declared an existing emergency. Approved March 15, 1955.

Section 3 of S.L. 1979, ch. 322 declared an emergency. Approved April 5, 1979.

Cross ref. Commission administering compact, §§ 42-3501 — 42-3504.

Opinions of Attorney General. The Idaho Water Resource Board has authority to issue revenue bonds, either separately or jointly with the other compacting states, to fund Idaho's share of a joint water project on the Bear River within Idaho, Utah, or Wyoming. However, the Idaho Legislature must authorize construction of the project before the Idaho Water Resource Board may issue the revenue bonds. OAG 89-1.

Because the compact, rather than state law, will control, an interbasin transfer of Bear

River water from a joint project in Idaho to Utah or Wyoming will not create a legal precedent affecting other river basins in the state. OAG 89-1.

The compact restricts the use of Bear River water to within the boundaries of the compacting states. OAG 89-1.

Idaho's share of Bear River water under the Bear River Compact cannot be allocated for use in another state. OAG 89-1.

If a joint water project on the Bear River is developed in Idaho, water allocated for beneficial use in Utah and Wyoming will be charged against Utah's or Wyoming's share of water under the Amended Bear River Compact. OAG 89-1.

The Idaho Water Resource Board could issue revenue bonds to fund Idaho's share of a joint water project constructed by another entity without legislative approval. OAG 89-1.

Bear River water may be appropriated and diverted in Idaho for use in Utah or Wyoming. However, water put to beneficial use in Utah or Wyoming is, by definition, not part of Idaho's share of Bear River water and such water will be charged against Utah's or Wyoming's share of Bear River water under the compact. OAG 89-1.

42-3403. Columbia Interstate Compact ratified. [Repealed.]

Compiler's notes. This section, comprising S.L. 1963, ch. 310, § 1, p. 818, was repealed by S.L. 1975, ch. 20, § 1.

42-3404. Anadromous fish — Compact with Washington and Oregon — Regulatory powers of fish and game representatives of states. — Should congress by virtue of the authority vested in it under article 1, section 10, of the Constitution of the United States, providing for compacts and agreements between states, ratify the following as a definite compact and agreement between the states of Washington, Oregon and Idaho, then, and in that event, there shall exist between the states of Washington, Oregon and Idaho a compact and agreement, the purport of which shall be substantially as follows:

The compact states acknowledge that they have a common interest in the conservation and management of anadromous fish stocks in the Columbia River drainage and they mutually agree to assume joint responsibility in developing sports and commercial fishery programs and regulations which will maintain and preserve the resource for the interest and benefit of all users.

Membership from the compact states shall be the Idaho department of fish and game, the fish commission of the state of Oregon, Oregon wildlife commission, Washington department of fisheries and the Washington department of game or the successor agency to any of the above. The compact members may appoint advisors to serve as needed.

All rules and regulations now existing or which may be necessary for the conservation and management of anadromous fish in the waters of the main stem of the Columbia River from its mouth to the mouth of the Snake River and the waters of the main stem of the Snake River from its mouth to the mouth of the Salmon River, shall be made, changed, altered and amended in whole or in part by a majority vote. In voting on rules and regulations, each state shall be entitled to one (1) vote. Idaho will vote only on those regulations which might have a substantial impact on fish destined for Idaho waters.

The individual states shall be responsible for the management of anadromous fish stocks in pertinent tributary streams and shall be guided in such management by the intent and purpose of this compact. [1967, ch. 37, § 1, p. 59; am. 1969, ch. 6, § 1, p. 9; am. 1975, ch. 233, § 1, p. 637.]

Compiler's notes. Section 2 of S.L. 1975, ch. 233 read: "Section 2. The compact and agreement now existing between the states of Washington and Oregon for the purpose of regulating, protecting or preserving fish in the waters of the Columbia River, or its tributaries, over which the states of Washington

and Oregon have concurrent jurisdiction, or which would be affected by said concurrent jurisdiction shall be of no force and effect upon ratification by the congress of the compact and agreement provided for in section 1 of this 1975 act."

CHAPTER 35

COMMISSIONS TO ADMINISTER COMPACTS

SECTION.

- 42-3501. Bear River Compact commissioners — Appointment.
- 42-3502. Qualifications of commissioners of Bear River Compact.
- 42-3503. Terms of Bear River Compact commissioners — Filling vacancies.
- 42-3504. Remuneration and expenses of Bear River Compact commissioners.
- 42-3505. Columbia Interstate Compact becoming operative upon ratification and enactment of legislation.
- 42-3506. Commissioners of Columbia Com-

SECTION.

- 42-3507. Powers granted to Columbia Compact Commission.
- 42-3508. Per diem and expenses paid Columbia Compact Commission.
- 42-3509. Remuneration and expenses of Columbia Compact commissioners.
- 42-3510. State officers to render assistance to Columbia Compact Commission.
- 42-3511. Powers granted Columbia Compact Commission supplemental to those contained in compact.

42-3501. Bear River Compact commissioners — Appointment. — The governor of the state of Idaho is hereby authorized and directed to appoint three (3) commissioners to represent the state of Idaho on a joint commission to be composed of three (3) commissioners from each of the states of Idaho, Utah, and Wyoming and one (1) commissioner that may be appointed to represent the United States of America, the said joint commission to be constituted for the purpose of administration of the Bear River Compact. [1955, ch. 219, § 1, p. 468.]

Cross ref. Bear River Compact ratified, § 42-3402.

42-3502. Qualifications of commissioners of Bear River Compact.

— Two (2) of the commissioners shall be electors of the state of Idaho who are residents within the watershed of the Bear River in Idaho. One (1) commissioner may be the director of the department of water resources of the state of Idaho. [1955, ch. 219, § 2, p. 468.]

Compiler's notes. The name of the director of the department of water administration (formerly the state reclamation engineer) has been changed to the director of the depart-

ment of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

42-3503. Terms of Bear River Compact commissioners — Filling vacancies. — The appointment of each commissioner shall be for a six (6) year term but may be terminated at the pleasure of the governor: Provided that the appointments of the commissioners first appointed shall terminate at two (2) year intervals beginning with the end of the first even numbered year after the Bear River Compact goes into effect. Vacancies shall be filled for the unexpired term in which the vacancy occurs. [1955, ch. 219, § 3, p. 468.]

42-3504. Remuneration and expenses of Bear River Compact commissioners. — The remuneration and expenses of the commissioners shall be fixed by the governor. The remuneration and expenses of the commissioners and the share of the state of Idaho in the expenses of the Bear River Commission shall be appropriated by the legislature to the department of water resources for these purposes. [1955, ch. 219, § 4, p. 468.]

Compiler's notes. The name of the department of water administration (formerly the department of reclamation) has been

changed to the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

42-3505. Columbia Interstate Compact becoming operative upon ratification and enactment of legislation. — The compact set forth in section 42-3403 shall not become operative unless and until it has been ratified and approved by appropriate legislative enactment by the states of Washington, Oregon and Montana, and has been consented to and approved by the congress of the United States by legislation conforming to the requirement of subdivision A of article XIV of said compact. The governor of Idaho shall give notice of the ratification and approval of this compact by the Idaho legislature to the governors of the states of Washington, Oregon, Montana, Wyoming, Nevada and Utah and to the President of the United States. [1963, ch. 310, § 2, p. 818.]

Compiler's notes. Former §§ 42-3505 — 42-3511 as added by S.L. 1961, ch. 91, §§ 2-8, p. 125 were repealed by S.L. 1963, ch. 310, § 9.

Section 42-3403 referred to in this section has been repealed.

Section 1 of S.L. 1963, ch. 310, was repealed.

42-3506. Commissioners of Columbia Compact Commission — Appointment — Term — Vacancies. — There shall be three (3) members

of the Columbia Compact Commission from the state of Idaho. They shall be appointed by the governor with the consent of the senate and shall hold office at the pleasure of the governor. The terms of each of the initial three (3) members shall begin at the time of appointment, provided said compact shall then have gone into effect; otherwise, shall begin upon the date which said compact shall become effective. The term of one (1) of said three (3) commissioners first appointed shall be two (2) years, one (1) shall be four (4) years, and one (1) shall be six (6) years; and their successors shall be appointed by the governor with the consent of the senate for terms of six (6) years each. Each commissioner shall hold office until his successor shall be appointed or qualified. Vacancies occurring in the office of any such commissioner for any reason or cause shall be filled by appointment by the governor with the consent of the senate for the unexpired term. Any appointment made by the governor while the senate is not in session shall be effective as a temporary appointment until the next meeting of the senate when the governor shall present to that body his nomination for the office. [1963, ch. 310, § 3, p. 818.]

Compiler's notes. Former § 42-3506 was repealed. See Compiler's notes, § 42-3505.

42-3507. Powers granted to Columbia Compact Commission. — There is hereby granted to the commission and the commissioners thereof all the powers provided for in said compact and all powers necessary or incidental to the carrying out of said compact in every particular. [1963, ch. 310, § 4, p. 818.]

Compiler's notes. Former § 42-3507 was repealed. See Compiler's notes, § 42-3505.

42-3508. Per diem and expenses paid Columbia Compact Commission. — Each member of the Commission from the state of Idaho shall be compensated, from funds appropriated by the Legislature for that purpose, as provided by section 59-509(f), Idaho Code, for each day devoted to the business of the Commission. Such member may, regardless of any charter or statutory provision to the contrary, be an officer or employee holding another public position. [1963, ch. 310, § 5, p. 818; am. 1980, ch. 247, § 43, p. 582.]

Compiler's notes. Former § 42-3508 was repealed. See Compiler's notes, § 42-3505. as § 42-1732, § 44 was repealed, and § 45 is compiled as § 47-201.
Section 42 of S.L. 1980, ch. 247 is compiled

42-3509. Remuneration and expenses of Columbia Compact commissioners. — The remuneration and expenses of the commissioners and the share of the state of Idaho in the expenses of the Columbia Compact Commission shall be appropriated by the legislature to the state department of water resources for these purposes. [1963, ch. 310, § 6, p. 818.]

Compiler's notes. Former § 42-3509 was repealed. See Compiler's notes, § 42-3505.

The name of the department of water administration (formerly the department of rec-

lamation) has been changed to the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, § 28 (§ 42-1801a).

42-3510. State officers to render assistance to Columbia Compact Commission. — All officers of this state are hereby authorized and directed to do all things, falling within their respective provinces and jurisdiction, necessary to or incidental to the carrying out of said compact in every particular. All officers, bureaus, departments and persons of and in the government or administration of this state are hereby authorized and directed, at convenient times and upon the request of the said commission, to furnish said commission with information and data possessed by them or any of them, and to aid said commission by any means lying within their legal powers respectively. [1963, ch. 310, § 7, p. 818.]

Compiler's notes. Former § 42-3510 was repealed. See Compiler's notes, § 42-3505.

42-3511. Powers granted Columbia Compact Commission supplemental to those contained in compact. — Any powers herein granted to the commission shall be regarded as in aid of and supplemental to and in no case a limitation upon any of the powers vested in said commission by other laws of this state or by the laws of other signatory states or by congress or by the terms of said compact, which shall be liberally construed. [1963, ch. 310, § 8, p. 818.]

Compiler's notes. Former § 42-3511 was repealed. See Compiler's notes, § 42-3505.

Section 9 of S.L. 1963, ch. 310 repealed all

laws or parts of laws in conflict therewith and specifically repealed S.L. 1955, ch. 91.

CHAPTER 36

WATERSHED PROTECTION AND FLOOD PREVENTION

SECTION.

42-3601. Purpose to prevent erosion, floodwater and sediment damages.

42-3602. Acceptance of provisions of federal act — Cooperation with federal authorities.

SECTION.

42-3603. Agreements authorized for works of improvement.

42-3604. Utilization of administrative appropriations and personnel.

42-3601. Purpose to prevent erosion, floodwater and sediment damages. — Erosion, floodwater, and sediment damages in the watersheds of the rivers and streams of the state of Idaho, causing loss of life and damage to property, constitute a menace to the welfare of the citizens of Idaho; and it is the sense of the legislature of the state of Idaho that the state of Idaho should cooperate with the United States of America, with any political subdivision or public agency in the state of Idaho and with any private person, association, corporation or group of persons, or any agent or agency of any of the foregoing now or hereafter having authority to so cooperate for the purpose of preventing such damages and of furthering the conservation, development, utilization, and disposal of water in Idaho and

thereby of preserving and protecting the land and water resources of the state of Idaho. [1957, ch. 120, § 1, p. 199.]

Collateral References. 93 C.J.S., Waters, § 328.
94 C.J.S., Waters, § 936.

42-3602. Acceptance of provisions of federal act — Cooperation with federal authorities. — To effectuate the purposes of the act, as expressed in section 42-3601 hereof, the state of Idaho hereby accepts the provisions of the “Watershed Protection and Flood Prevention Act” (Aug. 4, 1954; 68 Stat. 666), and present and future amendments thereto, and shall, through the director of the department of lands of the state of Idaho, advise, consult and cooperate with any authorized federal officer or agency or any other authorized body or person whomsoever, or any combination thereof, in planning any number of “works of improvement” in Idaho under the said “Watershed Protection and Flood Prevention Act.” [1957, ch. 120, § 2, p. 199; am. 1974, ch. 17, § 23, p. 308.]

Compiler’s notes. The words “the act” refer to S.L. 1957, ch. 120, compiled herein as §§ 42-3601 — 42-3604.

The Watershed Protection and Flood Prevention Act of 1954 is compiled in 16 U.S.C., §§ 1001-1010.

Section 22 of S.L. 1974, ch. 17, is compiled as § 38-1215.

Sec. to sec. ref. This section is referred to in § 42-3604.

42-3603. Agreements authorized for works of improvement. — The state of Idaho, by and through the director of the department of lands with the approval of the board of land commissioners, is authorized to enter into reasonable agreements with any authorized federal officer or agency or any other authorized body or person whomsoever, or any combination thereof, in constructing and maintaining or in any other manner whatsoever completing and effectuating any number of “works of improvement” under the said “Watershed Protection and Flood Prevention Act.” Provided, however, that no such agreement shall obligate the state of Idaho to bear more than its reasonable share of the cost of such “works of improvement,” considering the benefits accruing to the state of Idaho in relation to benefits accruing to others. [1957, ch. 120, § 3, p. 199; am. 1974, ch. 17, § 24, p. 308.]

Compiler’s notes. The Watershed Protection and Flood Prevention Act is compiled in 16 U.S.C., §§ 1001-1010.

42-3604. Utilization of administrative appropriations and personnel. — For the purpose of executing section 42-3602, Idaho Code, the director of the department of lands is authorized to utilize existing and regular administrative appropriations and personnel. For the purposes of executing the provisions of section 42-3603, Idaho Code, the director is authorized to expend such funds as may now or hereafter be available to him for said purposes and he may likewise expend such moneys, over which he may be given control, as may be granted to the state of Idaho by the

United States of America or anyone else for said purposes. [1957, ch. 120, § 4, p. 199; am. 1974, ch. 17, § 25, p. 308.]

Compiler's notes. Section 5 of S.L. 1957, ch. 120 provided: "The provisions of this act are hereby declared to be separable and if any portion of this act is judicially declared to be unconstitutional, such shall not affect the

remaining portions of this act."

Section 26 of S.L. 1974, ch. 17, is compiled as § 47-201.

Section 75 of S.L. 1974, ch. 17 provided that this act take effect on and after July 1, 1974.

CHAPTER 37

WATERSHED IMPROVEMENT DISTRICTS

SECTION.

- 42-3701. Short title.
- 42-3702. Legislative determinations and declaration of policy.
- 42-3703. Definitions.
- 42-3704. Definition of watershed improvement districts.
- 42-3705. Creation of watershed improvement districts.
- 42-3706. Election of district directors.
- 42-3707. Appointment, qualifications and tenure of directors.
- 42-3708. Powers of directors.
- 42-3709. Submission of proposed project to director of the department of water resources.

SECTION.

- 42-3710. Hearing on proposed projects.
- 42-3711. Appointment of appraisers and appraisal of benefited property.
- 42-3712. Hearing on report of appraisers.
- 42-3713. Appeal from approval of project or determination of benefits or assessments.
- 42-3714. Assessments entered as tax liens in instalments.
- 42-3715. Lands of state and its subdivision.
- 42-3716. Additional assessments for maintenance.
- 42-3717. Discontinuance of districts.

42-3701. Short title. — This act may be known and cited as the Watershed Improvement District Law. [1957, ch. 226, § 1, p. 508.]

Compiler's notes. The words "this act" refer to S.L. 1957, ch. 226 compiled herein as §§ 42-3701 — 42-3717.

Collateral References. 93 C.J.S., Waters, § 328.

94 C.J.S., Waters, § 936.

42-3702. Legislative determinations and declaration of policy. — It is hereby recognized that the protection of life and property from floods, the prevention of damage to lands therefrom, and the orderly development, wise use, conservation and protection of the water resources of the state by the considered and proper use thereof, is of paramount importance to the welfare and prosperity of the people of the state.

To realize these objectives it is hereby declared to be the policy of the state to provide for the prevention of flood damage and the conservation[,] development, utilization and disposal of water in the watersheds of this state and thereby to protect and promote the health, safety and general welfare of the people of this state. [1957, ch. 226, § 2, p. 508.]

Compiler's notes. The bracketed comma in the second paragraph was inserted by the compiler.

42-3703. Definitions. — Whenever used or referred to in this act, unless a different meaning clearly appears from the context, the following terms shall have the following meanings:

1. "District" or "watershed improvement district" means a governmental subdivision of this state and a public body corporate and politic organized in accordance with the provisions of this act for the purposes, with the powers, and subject to the restrictions hereinafter set forth.

2. "Director" means one (1) of the members of the governing body of a district elected or appointed in accordance with the provisions of this act.

3. "Commission" or "state soil conservation commission" means the agency created in section 22-2718, Idaho Code.

4. "Petition" means a petition filed under the provisions of section 42-3705, Idaho Code, for the creation of a district.

5. "Nominating petition" means a petition filed under the provisions of section 42-3706, Idaho Code, to nominate a candidate for the office of director of a watershed improvement district.

6. "State" means the state of Idaho.

7. "Landowner" includes any person, firm or corporation who shall hold title to any lands lying within a district organized under the provisions of this act. A contract purchaser who is occupying the land shall be construed as a landowner.

8. "Qualified elector" means any natural person residing within the boundaries of the state of Idaho, owning land within the boundaries of the district, and qualified under the laws of this state to vote in an election by the people. [1957, ch. 226, § 3, p. 508; am. 1973, ch. 93, § 1, p. 161.]

Compiler's notes. For words "this act" see
Compiler's note, § 42-3701.

42-3704. Definition of watershed improvement districts. — Watershed improvement districts may be established in this state pursuant to this act, and when so established shall be governmental subdivisions of this state and public bodies corporate and politic.

Such watershed improvement districts may be organized within one or more counties of this state and the boundaries of such district may transcend county boundaries. In no instance shall a district involve more than 250,000 acres of private lands. [1957, ch. 226, § 4, p. 508; am. 1972, ch. 195, § 1, p. 483; am. 1989, ch. 295, § 1, p. 723.]

Compiler's notes. For words "this act" see
Compiler's notes, § 42-3701.

42-3705. Creation of watershed improvement districts. — Any fifteen (15) owners of land lying within the limits of the territory proposed to be organized into a watershed improvement district may file a petition with the state soil conservation commission asking that a watershed improvement district be organized to function in the territory described in the petition. In the event that there are less than fifteen (15) persons owning land lying within the limits of the territory proposed to be organized into a district, then and in that case such petition will be deemed sufficient if it contains the signatures of two-thirds ($\frac{2}{3}$) of the owners of land and representing two-thirds ($\frac{2}{3}$) of the acreage of land lying within the limits of

the said territory. Such petition shall set forth:

1. A description of the territory proposed to be organized as a watershed improvement district, which description shall be deemed sufficient if generally accurate.

2. That there is need, in the interest of the public health, safety, and general welfare for a watershed improvement district to function in the territory described in the petition.

3. The proposed name of said district.

4. A request that the state soil conservation commission duly define the boundaries for such district; that an election be held within the territory so defined on the question of the creation of a watershed improvement district in such territory.

After such petition has been filed with the state soil conservation commission it shall be the duty of the commission to define by metes and bounds or by legal subdivisions the boundaries of such proposed district, and to hold an election, subject to the provisions of section 34-106, Idaho Code, within the proposed district upon the proposition of the creation of the district, and to cause notice of such election to be given. The question shall be submitted by ballots upon which the words "For creation of a watershed improvement district of the lands below described and lying in the county(ies) of ..., and" and "Against creation of a watershed improvement district of the lands below described and lying in the county(ies) of ..., and" shall appear with a square before each proposition and a direction to insert an X mark in the square before one or the other of said propositions as the voter may favor or oppose creation of such district. The ballot shall set forth the boundaries of such proposed district as determined by the state soil conservation commission.

All qualified electors who own land within the proposed district shall be eligible to vote in the election.

The state soil conservation commission shall pay all expenses of, and supervise the conduct of, such election. The commission shall conduct the election as provided in chapter 14, title 34, Idaho Code. No informality in the conduct of such election or in any matter relating thereto shall invalidate said election or the result thereof if notice thereof shall have been given substantially as herein provided, and said election shall have been fairly conducted.

If the election shall result in a majority of votes being cast in favor of the creation of such proposed district the state soil conservation commission shall proceed with the organization of the district in the manner hereinafter provided, to wit:

1. The state soil conservation commission shall appoint one (1) director to act with the two (2) directors elected as hereinafter provided, which said directors shall be the governing body of the district.

2. The state soil conservation commission shall present to the secretary of state a certificate stating:

- (a) That a petition for the creation of said district was filed with the state soil conservation commission.

- (b) The name and residence of the directors appointed by said commission.

(c) The name which is proposed for said district.

(d) That an election on such petition was held, and that the majority of votes cast in said election favored the formation of the district.

The secretary of state shall receive, file and record said certificate of the state soil conservation commission, and when said certificate shall be filed and recorded the district shall constitute a governmental subdivision of this state and a public body corporate and politic. The secretary of state shall make and issue to the said directors a certificate of the due organization of the said district. [1957, ch. 226, § 5, p. 508; am. 1995, ch. 118, § 72, p. 417.]

Compiler's notes. The letters enclosed in parentheses so appeared in the law as enacted.

Section 71 of S.L. 1995, ch. 118 is compiled as § 42-3234.

Sec. to sec. ref. This section is referred to in § 42-3703.

42-3706. Election of district directors. — After the date of issuance of the secretary of state of a certificate of organization of a watershed improvement district nominating petitions may be filed with the state soil conservation commission to nominate candidates for directors of such district. The state soil conservation commission shall give notice of an election to be held, subject to the provisions of section 34-106, Idaho Code, for the election of two (2) directors for the district. The names of all nominees on behalf of whom such nominating petitions have been filed in the manner provided in section 34-1404, Idaho Code, shall appear arranged in the alphabetical order of the surnames upon ballots with a square before each name, and direction to insert an X mark in the square before any two (2) names to designate the voter's preference. All qualified electors who own land or reside within the proposed district shall be eligible to vote in said election. The two (2) candidates who shall receive the largest number respectively of the votes cast in such election shall be elected for such district. The state soil conservation commission shall pay all the expenses of such election, supervise the conduct thereof, and publish the results thereof in accordance with the provisions of chapter 14, title 34, Idaho Code. All elections in existing districts following the first election shall be conducted by the district directors of the district involved who shall give notice of such elections and who shall bear the cost thereof.

In any election for director, if after the deadline for filing a declaration of intent as a write-in candidate, it appears that the number of qualified candidates who have been nominated for director positions is equal to the number of directors to be elected, it shall not be necessary for the candidates to stand for election, and the board of directors shall declare such candidates elected as directors, and the secretary of the district shall immediately make and deliver to such persons certificates of election. [1957, ch. 226, § 6, p. 508; am. 1995, ch. 118, § 73, p. 417.]

Compiler's notes. Section 74 of S.L. 1995, ch. 118 is compiled as § 42-3708.

Sec. to sec. ref. This section is referred to in § 42-3703.

42-3707. Appointment, qualifications and tenure of directors. —

The governing body of the district shall consist of three (3) directors elected or appointed as provided hereinabove. The director appointed by the commission shall be an owner of land within the district and shall be a person who by training and experience is qualified to perform the specialized service which will be required in the performance of his duties hereunder. The term of office of each director shall be four (4) years, except that the director first appointed by the state soil conservation commission shall be designated to serve for a term of two (2) years from the date of his appointment. A director shall hold office until his successor has been elected or appointed, and has qualified. Vacancies shall be filled for an unexpired term by a majority of the directors duly qualified and acting at the time the vacancy shall arise. A majority of the directors shall constitute a quorum and the concurrence of a majority in any matter within their duties shall be required for its determination. A director shall receive no compensation for his service, but shall be entitled to expenses, including traveling expenses necessarily incurred in the discharge of his duties.

The directors may employ a secretary, technical experts, and such other employees, permanent and temporary, as they may require, and shall determine their qualifications, duties, and compensation. The directors may employ their own counsel and legal staff. The directors may delegate to their chairman, to one or more directors, or to agents or employees such powers and duties as they may deem proper and necessary. The directors shall furnish to the state soil conservation commission, upon request, copies of such documents or other information concerning their activities as said commission may require in the performance of its duties under this act. The directors shall provide for the keeping of a record of all proceedings, resolutions, regulations and orders issued or adopted; shall provide for an annual audit of its accounts, and shall provide for the execution of surety bonds by any employee or officer who shall be entrusted with funds or property of the district. [1957, ch. 226, § 7, p. 508.]

Compiler's notes. For words "this act" see
Compiler's notes, § 42-3701.

42-3708. Powers of directors. — The directors of a watershed improvement district shall have power:

1. To levy and cause to be collected assessments on real property within the district in an amount not to exceed six hundredths of one per cent (.06%) of the market value for assessment purposes on all taxable property within the district, for the purpose of general administration and operation and maintenance of the district and in addition thereto to separately levy and cause to be collected assessments on real property within the district in an amount not to exceed twenty hundredths of one per cent (.20%) of the market value for assessment purposes on all taxable property within the district for construction of structural works of improvement. Before a levy can be made for any purpose, an election, subject to the provisions of section 34-106, Idaho Code, as herein provided must be held, and the provisions as outlined under sections 42-3712, 42-3713 and 42-3714, Idaho Code, must be

complied with, and assessments can only be levied against lands to be directly benefited.

2. To conduct surveys, investigations and research relating to floodwater, sediment damage and the conservation, utilization, and disposal of water in the district, and the structural works of improvement needed.

3. To obtain options upon and acquire by purchase, exchange, lease, gift, grant, bequest, devise, or otherwise, any property, real or personal, and improve any properties acquired; to receive income from such properties and to expend such income in carrying out the purposes and provisions of this chapter; to sell, lease, or otherwise dispose of any of its property or interest therein in furtherance of the purposes and provisions of this chapter.

4. To develop comprehensive plans for the prevention of floodwater and sediment damage and the conservation, development, utilization, and disposal of water within the district, which plans shall specify the acts, procedures, performances and avoidances which are necessary for effectuation of such plans.

5. To construct, operate and maintain structural works of improvement for the prevention of floodwater and sediment damages, and the conservation, development, utilization, and disposal of water as provided for in the act of the congress of the United States known as the Watershed Protection and Flood Prevention Act (U.S.C., tit. 16, sections 1001-1008) and acts amendatory thereto.

6. To have the right of eminent domain with the power to cause to be condemned and appropriated for the use of the district in the construction, operation, maintenance and upkeep of its structures, waterways, dikes, dams, basins, or any other use necessary in the carrying out of the provisions of this chapter upon the payment of just compensation therefor.

7. To borrow money and to issue negotiable coupon bonds, which bonds shall bear interest, and which bonds shall be due and payable not later than thirty (30) years from the date of issuance, or at such earlier date as may be determined by the directors. The form and terms of said bonds, including their payment and redemption prior to maturity, shall be determined by the directors. Such bonds as may be issued shall be payable solely out of and from the assessments levied upon and a lien upon the lands within the district as provided in this chapter. Such bonds may be issued by the directors only upon the holding of an election within the district as provided by law and upon such election resulting in two-thirds ($\frac{2}{3}$) of the property owners, and representing at least fifty-one per cent (51%) of the land to be benefited, casting their ballots in favor thereof.

8. To enter into contracts or agreements with the United States or any of its officers, agents, or subdivisions, or the state of Idaho or any of its officers, agents or political subdivisions, and to cooperate with such governments, persons or agencies in effectuating, promoting and accomplishing the purposes of this chapter.

9. To bear its allocated share of the cost of any project resulting from any contract or agreement entered into as provided in subsection 8. of this section.

10. To take over, administer and maintain pursuant to any agreement or contract entered into in accordance with the provisions of subsection 8. of

this section any watershed improvement project within its boundaries undertaken in cooperation with the United States or any of its agencies, or with the state of Idaho or any of its agencies, or any combinations thereof.

11. To accept donations, gifts and contributions in money, services, or materials, or otherwise, from the United States or any of its agencies, or the state of Idaho or any of its agencies or any combinations thereof, and to expend such moneys, services, or materials in carrying on its operations.

12. To sue and be sued in the name of the district; to have a seal, which seal shall be judicially noticed; to have perpetual succession unless terminated as hereinafter provided; to make and execute contracts and other instruments necessary or convenient to the exercise of its powers, and to promulgate, amend and repeal rules not consistent with the provisions of this chapter.

13. To exercise all other powers necessary, convenient or incidental to carrying out the purposes and provisions of this chapter. [1957, ch. 226, § 8, p. 508; am. 1970, ch. 133, § 8, p. 309; am. 1980, ch. 136, § 5, p. 297; am. 1995, ch. 82, § 19, p. 218; am. 1995, ch. 118, § 74, p. 417; am. 1996, ch. 322, § 40, p. 1029.]

Compiler's notes. This section was amended by two 1995 acts — ch. 82, § 19, and ch. 118, § 74, both effective July 1, 1995 — which do not appear to conflict and have been compiled together. As a result of compiling these amendments together, the words “per cent” and “twenty hundredths of one per cent (.20%)” in subdivision 1. as added by ch. 118, § 74 have been added in brackets.

The amendment by ch. 82, § 19, in subdivision 1., substituted “six hundredths percent (.06%) of the market value for assessment purposes on all taxable property within the district” for “three (3) mills for each dollar of assessed valuation” and substituted “two tenths percent (.2%) of the market value for assessment purposes on all taxable property within the district” for “ten (10) mills for each dollar of assessed valuation”; in subdivision 7. substituted “two-thirds” for “a two-third”; in subdivisions 9. and 10. substituted “subsection 8 of this section” for “subparagraph 8 hereof”; and in subdivision 12. deleted “and regulations” following “rules”.

The amendments by ch. 118, § 74, in subdivision 1. substituted “six hundredths of one per cent (.06%) of market value for assessment purposes” for “three (3) mills for each dollar of assessed valuation”, substituted “twenty hundredths of one per cent (.20%) of market value for assessment purposes” for

“ten (10) mills for each dollar of assessed valuation”, and substituted “an election, subject to the provisions of section 34-106, Idaho Code,” for “referendum”; in subdivisions 3., 6., 7., 8., 12., and 13. substituted “chapter” for each occurrence of “act”; in the fourth sentence of subdivision 7. deleted “referendum” preceding “election within the district” and substituted “election” for “referendum” preceding “resulting in”; and in subdivisions 9. and 10. substituted “subparagraph 8. of this section” for each occurrence of “subparagraph 8 hereof”.

The reference enclosed in parentheses in subsection (5) so appeared in the law as enacted.

Sections 7 and 9 of S.L. 1970, ch. 133 are compiled herein as §§ 42-3221, 43-402 respectively.

Sections 4 and 6 of S.L. 1980, ch. 136 are compiled as §§ 42-3217 and 50-1006, respectively.

Sections 18 and 20 of S.L. 1995, ch. 82 are compiled as §§ 42-3115 and 46-722, respectively.

Sections 73 and 75 of S.L. 1995, ch. 118 are compiled as §§ 42-3706 and 42-3717, respectively.

Sections 39 and 41 of S.L. 1996, ch. 322 are compiled as §§ 42-3218 and 43-701E, respectively.

42-3709. Submission of proposed project to director of the department of water resources. — Before any contract shall be let or work begun upon any improvement or project within the district the cost of which cannot be exclusively financed by funds on hand, grants in aid, or gifts to the district, or before any contract may be entered into by the district with any

other government agency or body which will obligate the district to contribute financially beyond the extent of the funds of the district then on hand, it shall be the duty of the directors to file with the director of the department of water resources a statement of the proposed improvement or project describing in detail such improvement or project, its scope, geographical location, estimated cost, economic feasibility, the tracts of land considered benefited by such improvement or project, and the proposed method of financing the costs of such improvement or project. The statement shall be accompanied by a general print of the area within the district showing thereon the area which will be affected by such improvement or project, and the plans and specifications for the said improvement or project. [1957, ch. 226, § 9, p. 508.]

Compiler's notes. The name of the director of the department of water administration (formerly the state reclamation engineer) has been changed to the director of the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

42-3710. Hearing on proposed projects. — Not sooner than sixty (60) days after the submission of the plans for any project to the director of the department of water resources as set forth in section 42-3709, and before any contract shall be let or work begun upon any improvement or project within the district the cost of which cannot be exclusively financed by funds on hand, grants in aid, or gifts to the district, or before any contract may be entered into by the district with any governmental agency or body which will obligate the district to contribute financially beyond the extent of funds of the district then on hand, it shall be the duty of the directors to set a time and place within the district for a public hearing upon said proposal, and the directors shall cause a notice thereof to be published in a newspaper of general circulation within the district not less than three (3) times, at least ten (10) days before the date set for the hearing, and in addition thereto shall post a copy of said notice in at least one (1) public place within the district.

At the time and place fixed for such hearing any owner of land situated within the district, or any other interested person, may appear and be heard as to his objections to the said proposal.

Following the said public hearing the directors shall, by resolution, either affirm the proposal with or without modification or amendments, or disapprove the proposal stating therein their findings as to the economic feasibility of the proposed improvement or project, the probable cost of said improvement or project, the benefits to be derived therefrom, and whether or not the benefits accruing to lands within the district would exceed the cost of such improvement or project, whether the benefits will be conferred upon all lands within the district or upon only certain lands in the district, in which latter case the lands to be benefited shall be described as to boundaries, ownership, and approximate acreage, and the proposed method of financing such improvement or project. [1957, ch. 226, § 10, p. 508.]

Compiler's notes. The name of the director of the department of water administration (formerly the state reclamation engineer) has been changed to the director of the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

ment of water resources on the authority of **Sec. to sec. ref.** This section is referred to
S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, in § 42-3712.
§ 28 (§ 42-1801a).

42-3711. Appointment of appraisers and appraisal of benefited property. — If the directors, by resolution, determine that the proposed improvement or project should be constructed and that the costs of said improvement or project should be paid by special assessment against the lands benefited by said improvement or project, the directors shall appoint three (3) disinterested residents of the state to act as appraisers. Said appraisers shall inspect the plans and specifications of the said improvement or project and examine all lands likely to be benefited by such project. The appraisers shall make and file with the directors a detailed report showing all tracts of land within the district found to be benefited, together with the acreage thereof, and the name of the record owner, the amount each tract will be benefited, and the amount of assessment to be levied against each such tract. [1957, ch. 226, § 11, p. 508.]

42-3712. Hearing on report of appraisers. — Upon receiving the report of the appraisers the directors shall fix a time and place within the district for hearing any complaint that may be made regarding the benefits appraised to any tract of land or the assessment proposed to be levied against any tract of land. A notice of such hearing shall be given as provided in section 42-3710.

At the time and place fixed for such hearing the directors shall consider the report of the appraisers and consider and hear any objections filed or voiced thereto.

The directors, by resolution, shall then reject the report of the appraisers or accept the same and ratify it with or without modification or amendments. [1957, ch. 226, § 12, p. 508.]

Sec. to sec. ref. This section is referred to
in §§ 42-3708, 42-3716.

42-3713. Appeal from approval of project or determination of benefits or assessments. — Any owner of land or person having an interest therein upon which an assessment is proposed to be levied may, within ninety (90) days, take an appeal from the resolution of the directors accepting or ratifying the report of the appraisers, or from the resolution of the directors determining that the proposed improvement or project should be constructed by filing a petition with the district court of the county within which the property is located. Such petition shall set forth objections to the resolution of the directors determining that such project or improvement should be constructed, or to the resolution affirming the report of the appraisers. The said court may require the party to frame the issues, and shall set a time for a hearing. Upon demand of any petitioner the court shall impanel a jury to determine such issues of fact as may be framed. The report of the appraisers as confirmed by the directors shall be prima facie evidence of the facts therein determined, and the petitioner shall have the burden of proof as to such issues. After hearing the cause, either with or without a

jury, the court shall make and enter findings, judgment and order confirming the resolution of the directors, with or without amendments or modifications, or may declare the same void in whole. [1957, ch. 226, § 13, p. 508.]

Sec. to sec. ref. This section is referred to in §§ 42-3708, 42-3716.

42-3714. Assessments entered as tax liens in instalments. — Upon the entering of the resolution and no appeal therefrom being filed within the time allowed for such appeal the directors shall transmit to the county auditor a list of all tracts of land so benefited, together with the amount of the assessment upon each tract, and the name of the owner or owners of each said tract. The county auditor shall immediately enter the same upon the tax rolls of the county against the designated lands, together with the amounts of said assessments. Said assessments shall be subject to the same interest and penalties in case of delinquency as in the case of general taxes, and shall be collected in the same manner as in the case of general taxes, and the lands sold for the collection of said assessment shall be subject to the same right of redemption as lands sold for the collection of general taxes; provided, that the said assessments shall not become due and payable except at such time or times and in such amounts as may be designated by the directors, which designation shall be made to the county auditor by the directors by serving written notice upon the county auditor designating the time and the amount of the assessment, and the amount so designated shall be added by the auditor to the general taxes of the owner or owners of said lands and collected therewith, and providing further, that no one (1) yearly call for assessment by said directors shall be in an amount to exceed ten per cent (10%) of the actual amount necessary to defray the costs of the construction of the said improvement or project. The assessments so levied shall constitute liens against the designated tracts of land. [1957, ch. 226, § 14, p. 508.]

Sec. to sec. ref. This section is referred to in §§ 42-3708, 42-3716.

42-3715. Lands of state and its subdivision. — In case of lands belonging to the state, county, school district, or other public corporations are benefited by any improvement or project instituted under the provisions of this act, all benefits shall be assessed against said lands and the same shall be paid by the proper authorities at the same time as the assessments are called and paid in the case of private persons. [1957, ch. 226, § 15, p. 508.]

Compiler's notes. For words "this act" see Compiler's notes, § 42-3701.

42-3716. Additional assessments for maintenance. — Additional assessments for the proper maintenance and/or operation of any improvement or project constructed within the district pursuant to this act may be levied against lands benefited by the improvement or project at the ratio or

proportion established in the original assessment. Such additional [additional] assessments shall be made subject to the same hearing, determinations, confirmance and right of appeal set forth in sections 42-3712, 42-3713 and 42-3714. [1957, ch. 226, § 16, p. 508.]

Compiler's notes. The bracketed word "additional" was inserted by the Compiler.

For words "this act" see Compiler's notes, § 42-3701.

42-3717. Discontinuance of districts. — At any time after three (3) years after the organization of a district under the provisions of this chapter any twenty-five (25) qualified electors or owners of land lying within the boundaries of such district or, if less than twenty-five (25) owners of land or qualified electors reside within the boundaries of such district it would be deemed sufficient if two-thirds ($\frac{2}{3}$) of the resident group, may file a petition with the state soil conservation commission praying that the operations of the district be terminated and the existence of the district discontinued. After such petition has been received by the state soil conservation commission it shall give notice of the holding of an election, subject to the provisions of section 34-106, Idaho Code, which the said commission shall supervise and govern the conduct in accordance with the provisions of chapter 14, title 34, Idaho Code. The question to be submitted by ballots upon which the words "For terminating the existence of the (name of the watershed improvement district to be here inserted)" and "Against terminating the existence of the (name of the watershed improvement district to be inserted here)" shall appear with a square before each proposition, and a direction to insert an X mark in the square before one or the other of said propositions as the voter may favor or oppose discontinuance of such district. All qualified electors who own land or reside within the proposed district shall be eligible to vote in said election. No informality in the conduct of such election or in any matters relating thereto shall invalidate said election or the result thereof if notice thereof shall have been given as herein provided, and said election shall have been fairly conducted.

The state soil conservation commission shall certify the result of such election to the directors of the district. If the state soil conservation commission shall certify that a majority of the votes cast in said election favor the discontinuance of the existence of the district, the directors of the district shall forthwith proceed to terminate the affairs of the district. Any moneys remaining in the treasury of said district following the winding up of the affairs of the district shall be paid by the directors into the state treasury. The directors shall file an application duly verified with the secretary of state for the discontinuance of such district which shall recite that the affairs of the district have been wound up, and shall set forth a full accounting of the winding up of the affairs of said district. The secretary of state shall issue to the directors a certificate of dissolution, and shall record said certificate in his office.

The state soil conservation commission shall not entertain petitions for the discontinuance of any district nor conduct elections upon such petitions more often than once in three (3) years. [1957, ch. 226, § 17, p. 508; am. 1995, ch. 118, § 75, p. 417.]

Compiler's notes. The words enclosed in parentheses so appeared in the law as enacted.
 Section 18 of S.L. 1957, ch. 226 read: "If any portion of this act shall be declared unconstitutional, it shall not invalidate the other provisions thereof."

Sections 74 and 76 of S.L. 1995, ch. 118 are compiled as §§ 42-3708 and 42-4204, respectively.
 Section 19 of S.L. 1957, ch. 226 declared an emergency. Approved March 15, 1957.

CHAPTER 38

ALTERATION OF CHANNELS OF STREAMS

SECTION.
 42-3801. Legislative intent — Stream channels — Alteration.
 42-3802. Definitions.
 42-3803. Alteration of channels — Permit required — Plans.
 42-3804. Application — Review by director.
 42-3805. Decision of director — Hearing — Review by district court.
 42-3806. Existing rights unaffected — Where permit not required.
 42-3807. Reservoirs — Port districts — Exempt.

SECTION.
 42-3808. Emergencies — Waiver by director.
 42-3809. Penalty for violation — Enforcement procedure — Injunctive relief.
 42-3810. Restoration of stream channel — Mitigation of damages.
 42-3811. Violation of act a misdemeanor.
 42-3812. Enforcement of authority.
 42-3813. [Repealed.]

42-3801. Legislative intent — Stream channels — Alteration. —
 The legislature of the state of Idaho hereby declares that the public health, safety and welfare requires that the stream channels of the state and their environments be protected against alteration for the protection of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, and water quality. No alteration of any stream channel shall hereafter be made unless approval therefor has been given as provided in this act. [1971, ch. 337, § 1, p. 1304.]

Sec. to sec. ref. This chapter is referred to in §§ 18-915, 36-1301, 42-221, 42-3812, 42-5226, 47-703A.
Cited in: West v. Smith, 95 Idaho 550, 511 P.2d 1326 (1973); Ritter v. Standal, 99 Idaho 614, 586 P.2d 1058 (1978).

ANALYSIS

In general.
 Prior alterations.

In General.

Section 42-3801 et seq., sometimes known as the Stream Protection Act, regulates alterations of all streams and channels of this state, including navigable streams and chan-

nels, and puts the primary responsibility for administration of the act in the department of water resources. Ritter v. Standal, 98 Idaho 446, 566 P.2d 769 (1977).

Prior Alterations.

A rock-filled jetty installed in the summer of 1960 to serve as a breakwater in a lake was not in violation of §§ 42-3801 — 42-3810 since the statute was enacted in 1971. Randall v. Ganz, 96 Idaho 785, 537 P.2d 65 (1975).

Collateral References. 78 Am. Jur. 2d, Waters, §§ 82, 84.
 93 C.J.S., Waters, §§ 134-169.

42-3802. Definitions. — Whenever used in this act, the term:
 (a) "Person" means any individual, partnership, company, corporation, municipality, county, state or federal agency, or other entity proposing to alter a stream channel.

(b) "Alter" means to obstruct, diminish, destroy, alter, modify, relocate, or change the natural existing shape or direction of water flow of any stream channel within or below the mean high watermark thereof.

(c) "Board" means the Idaho water resource board.

(d) "Stream channel" means a natural watercourse of perceptible extent, with definite bed and banks, which confines and conducts continuously flowing water.

(e) "Department" means the Idaho department of water resources.

(f) "Director" means the director of the Idaho department of water resources.

(g) "Plans" means maps, sketches, engineering drawings, word descriptions and specifications sufficient to describe the extent, nature and location of the proposed stream channel alteration and the proposed method of accomplishing same.

(h) "Mean high watermark" means a water level corresponding to the natural or ordinary high watermark and is the line which the water impresses on the soil by covering it for sufficient periods of time to deprive the soil of its terrestrial vegetation and destroy its value for commonly accepted agricultural purposes. [1971, ch. 337, § 2, p. 1304; am. 1974, ch. 20, § 33, p. 533; am. 1994, ch. 292, § 1, p. 912.]

Compiler's notes. Section 32 of S.L. 1974, ch. 20, is compiled as § 42-1805.

Sec. to sec. ref. This section is referred to in § 42-113.

Cited in: Smith v. King Creek Grazing Ass'n, 105 Idaho 644, 671 P.2d 1107 (Ct. App. 1983).

42-3803. Alteration of channels — Permit required — Plans. —

(a) No person shall engage in any project or activity which will alter a stream channel without first applying to and receiving a permit therefor from the director. Such application shall be submitted not less than sixty (60) days prior to the intended date of commencement of construction of such stream channel alteration and shall be upon forms to be furnished by the director or in such other form as deemed appropriate by memorandum of agreement with other state and federal agencies and shall be accompanied by plans of the proposed stream channel alteration and the statutory filing fee.

(b) The board shall provide that each permit granted shall show whether it constitutes a permit from the department of lands as authorized by the department of lands, or whether an additional permit from the department of lands shall be required.

(c) The board may adopt, revise and rescind such rules and regulations and issue such general orders as may be necessary to effectuate the purposes and policy of this chapter within the limitations and standards set forth in this chapter. Rules, regulations and orders adopted or issued pursuant to this section may include, but are not limited to, minimum standards to govern projects or activities for which a permit or permits have been received under this chapter and regulations governing procedures for processing applications and issuing permits under this chapter. Minimum standards and procedural regulations shall not be adopted pursuant to this section until after they have been offered for review and comment to other

state agencies having an interest in activities regulated under this chapter. Any standards, rules, regulations and orders adopted or issued pursuant to this section shall be promulgated in accordance with the provisions of chapter 52, title 67, Idaho Code, to the extent that the provisions of chapter 52, title 67, Idaho Code, are not inconsistent herewith.

(d) The board may, by regulation, dispense with procedural requirements for permit application and approval contained in this chapter for projects and activities which, in all respects, at least meet minimum standards adopted pursuant to this section. [1971, ch. 337, § 3, p. 1304; am. 1972, ch. 137, § 1, p. 303; am. 1974, ch. 20, § 34, p. 533; am. 1976, ch. 150, § 1, p. 539; am. 1994, ch. 292, § 2, p. 912.]

Compiler's notes. Section 3 of S.L. 1994, ch. 292 is compiled as § 42-3809.

Sec. to sec. ref. This section is referred to in § 42-3809.

Cited in: Ritter v. Standal, 99 Idaho 614, 586 P.2d 1058 (1978); Higginson v. Westergard, 100 Idaho 687, 604 P.2d 51 (1979).

ANALYSIS

Constitutional and statutory authority.
Effect of act.

Constitutional and Statutory Authority.
Subsection (b) recognizes the constitutional and statutory authority of the state land

board and the state department of lands over the beds of navigable waters. Ritter v. Standal, 98 Idaho 446, 566 P.2d 769 (1977).

Effect of Act.

If this act had been in effect when construction of fish ponds in an estuary began, it would not have placed exclusive control over the alteration of navigable streams within the department of water resources or its predecessors, and the sole approval of the department would not have constituted consent of the sovereign to fill in the estuary bed. Ritter v. Standal, 98 Idaho 446, 566 P.2d 769 (1977).

42-3804. Application — Review by director. — Upon the receipt of any application with accompanying plans, it shall be the duty of the director to examine same and to furnish copies of the application and plans to, and consult with, other state agencies having an interest in the stream channel to determine the likely effect of the proposed stream channel alteration upon the fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, and water quality values of the stream. The director shall furnish a copy of each application and all accompanying materials to the department of lands. Within twenty (20) days of the receipt of copies of such application and plans from the director, such other state agencies shall notify the director whether the proposed stream channel alteration will have an unreasonably detrimental effect upon these stream values and shall include with such notification recommendations of alternate plans, if any, determined by such agency to be reasonable to accomplish the purpose of the proposed stream channel alteration without adversely affecting such stream values. [1971, ch. 337, § 4, p. 1304; am. 1974, ch. 20, § 35, p. 533; am. 1976, ch. 150, § 2, p. 539.]

Compliance with Permit.

Where it appeared to the trial court that defendant could have interpreted the phrase "area to be altered", in the application to alter a stream channel, as meaning the eastern bank of the river and that this area was required to have as much water diverted

around it as possible rather than having the entire width of the channel diverted, and where the record indicated that at least one of the agents of the Department of Water Resources also interpreted the work area to mean the same area that defendant believed was affected by the terms of the streambed

alteration permit, the trial court apparently construed the permit as did defendant, thus there was no error in the conclusion of law that defendant's work was in compliance with

the conditions of the permit. *Higginson v. Westergard*, 100 Idaho 687, 604 P.2d 51 (1979).

42-3805. Decision of director — Hearing — Review by district court. — Based upon his own investigation and the recommendations and alternate plans of other state agencies, the director shall prepare and forward to the applicant his decision approving the application in whole or in part or upon conditions, or rejecting the application. With regard to applications which could, if issued, affect endowment lands, the director shall deny such applications upon the objection of the state department of lands, or modify the same as recommended by the department. Within fifteen (15) days of the date of mailing of the decision, the applicant shall notify the director if it refuses to modify its plans in accordance with such decision or that it requests a hearing before the board thereon. If requested, such hearing shall be held in accordance with the provisions of chapter 52, title 67, Idaho Code, and rules adopted by the board. The board shall have power to administer oaths and to require the attendance of such witnesses and the production of such books, records and papers as it may desire at the hearing, and for that purpose, the board may apply to the court for subpoena for any witnesses or a subpoena duces tecum to compel the production of any books, records or papers which shall be served and returned in the same manner as a subpoena in a civil case. In case of any disobedience or neglect to obey a subpoena or subpoena duces tecum, it shall be the duty of the district court in any county of this state in which disobedience, neglect or refusal occurs, or any judge thereof, on application by the board, to compel obedience by proceedings for contempt. Upon the conclusion of the hearing and completion of any investigation conducted by the director the board shall enter its findings in writing approving the decision of the director on the application and plans in whole or in part, or upon conditions, or rejecting the decision of the director on said application and plans for such proposed stream channel alteration.

A copy of the board's findings on the director's decision shall be mailed to the applicant and to each person or organization who appeared at the hearing and gave testimony in support of or in opposition to the proposed stream channel alteration. Any applicant or other person appearing at a hearing shall have the right to have the proceedings of the board and the decision of the director reviewed by the district court in the county where the stream channel alteration is proposed. With the exception that the matter may be reviewed by the district court in the county where the stream channel alteration is proposed, judicial review shall be had pursuant to chapter 52, title 67, Idaho Code. [1971, ch. 337, § 5, p. 1304; am. 1974, ch. 20, § 36, p. 533; 1976, ch. 150, § 3, p. 539; am. 1980, ch. 238, § 21, p. 526; am. 1993, ch. 216, § 39, p. 587.]

Compiler's notes. Section 37 of S.L. 1974, ch. 20, is compiled as § 42-3809.

Section 4 of S.L. 1976, ch. 150, is compiled herein as § 47-1317.

Sections 20 and 22 of S.L. 1980, ch. 238 are compiled as §§ 42-2505 and 42-4005, respectively.

Sections 38 and 40 of S.L. 1993, ch. 216 are

compiled as §§ 42-1737 and 42-4005, respectively.

Section 25 of S.L. 1980, ch. 238 read: "The provisions of this act are hereby declared to be severable and if any provision of this act or

the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of remaining portions of this act."

42-3806. Existing rights unaffected — Where permit not required. — This act shall not operate or be so construed as to impair, diminish, control or divest any existing or vested water rights acquired under the laws of the state of Idaho or the United States, nor to interfere with the diversion of water from streams under existing or vested water right or water right permit for irrigation, domestic, commercial or other uses as recognized and provided for by Idaho water laws.

No permit shall be required from a water user or his agent to clean, maintain, construct in, or repair any stream channel, diversion structure, canal, ditch, or lateral. No permit shall be required from a water user or his agent to remove any obstruction from any stream channel, if such obstruction interferes with, or is likely to interfere with, the delivery of, or use of, water under any existing or vested water right, or water right permit. [1971, ch. 337, § 6, p. 1304.]

42-3807. Reservoirs — Port districts — Exempt. — This act shall not apply to any existing, proposed, or future reservoir projects. This act shall not apply to that portion of any continuous waterway system which will float commercial tug and barge vehicles to ports handling transoceanic traffic, and which is within or adjacent to any port district now existing or hereafter formed under the provisions of title 70, Idaho Code. [1971, ch. 337, § 7, p. 1304.]

42-3808. Emergencies — Waiver by director. — When emergency situations exist requiring immediate action to protect life or property including growing crops, the director may waive the provisions of this act upon request; providing, however, that the extent of stream channel alteration shall be limited only to that amount of work deemed necessary by the director to safeguard life or property including growing crops during the period of emergency. [1971, ch. 337, § 8, p. 1304.]

42-3809. Penalty for violation — Enforcement procedure — Injunctive relief. — (1) Any person who violates any of the provisions of this chapter, any regulation, rule, order or standard of the board promulgated pursuant to section 42-3803, Idaho Code, or of any order or condition of approval of the director issued pursuant thereto, where a copy of the order has been served upon said person in person or by certified mail and said person fails to comply therewith within the time therein provided, or within ten (10) days of such service if not otherwise provided, shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than one hundred fifty dollars (\$150) nor more than five hundred dollars (\$500); provided further, that each day such violation of an order or condition of approval has taken place shall constitute a separate offense

punishable by a fine of not less than one hundred fifty dollars (\$150) for each day until such activity is abated or voluntarily ceased. Any stream channel alteration engaged in by any person without approval having been obtained therefor as prescribed in this act is hereby declared to be a public nuisance and shall be subject to proceedings for immediate abatement.

(2) When the director of the department of water resources determines that any person is in substantial violation of any provision of this chapter or any rule, permit, certificate, condition of approval or order issued or promulgated pursuant to this chapter, the director may commence an administrative enforcement action by issuing a written notice of violation in accordance with the provisions of section 42-1701B, Idaho Code. The director shall have authority and it shall be his duty to seek a temporary injunction from the appropriate district court to restrain a person from altering a stream channel until approval therefor has been obtained by the person as provided in this act. [1971, ch. 337, § 9, p. 1304; am. 1972, ch. 137, § 2, p. 303; am. 1974, ch. 20, § 37, p. 533; 1978, ch. 327, § 1, p. 822; am. 1980, ch. 331, § 2, p. 854; am. 1994, ch. 292, § 3, p. 912; am. 1998, ch. 173, § 10, p. 595.]

Compiler's notes. The words "this act" refer to S.L. 1971, ch. 337, as amended, compiled herein as §§ 42-3801 — 42-3810.

Sections 36 and 38 of S.L. 1974, ch. 20, are compiled as §§ 42-3805 and 42-3903, respectively.

Sections 1 and 3 of S.L. 1980, ch. 331 are compiled as §§ 36-1301 and 42-3811, respectively.

Sections 2 and 4 of S.L. 1994, ch. 292 are compiled as §§ 42-3803 and 42-3812, respectively.

Section 9 of S.L. 1998, ch. 173 is compiled as § 42-1720.

Section 11 of S.L. 1998, ch. 173 repealed § 42-3813.

Section 64 of S.L. 1974, ch. 20 provided that this act take effect on and after July 1, 1974.

42-3810. Restoration of stream channel — Mitigation of damages.

— Any party convicted of unlawful stream channel alteration shall, in addition to the penalties provided for in section 42-3809 of this act, be directed by the court to restore the stream channel to as near its original condition as possible or to effect such other measures as recommended by the director toward mitigation of damages. [1971, ch. 337, § 10, p. 1304.]

Compiler's notes. Section 11 of S.L. 1971, ch. 337 read: "The provisions of this act are hereby declared to be severable and if any provision of this act or the application of such provision to any person or circumstance is declared invalid for any reason, such declara-

tion shall not affect the validity of remaining portions of this act."

Section 12 of S.L. 1971, ch. 337 provided that "this act shall be in full force and effect on and after July 1, 1971."

42-3811. Violation of act a misdemeanor. — Any person who violates any provision of this act or who violates any regulation, rule, order or standard of the board or director relating to the use of vacuum or suction dredges capable of moving two (2) or less cubic yards of material per hour shall be guilty of a misdemeanor. [I.C., § 42-3811, as added by 1980, ch. 331, § 3, p. 854.]

Compiler's notes. Section 2 of S.L. 1980, ch. 331 is compiled as § 42-3809.

Sec. to sec. ref. This section is referred to in § 36-1301.

42-3812. Enforcement of authority. — The director of the department of water resources is hereby vested with the power and authority to enforce the provisions of chapter 38, title 42, Idaho Code, and rules and regulations promulgated pursuant to it. The director may delegate to employees of the department of water resources authority to issue Idaho uniform citations, as provided for by the rules of the court for magistrates division of the district court and district court, to violators of the provisions of chapter 38, title 42, Idaho Code, and rules and regulations promulgated pursuant to it. [I.C., § 42-3812, as added by 1980, ch. 331, § 4, p. 854; am. 1994, ch. 292, § 4, p. 912.]

Compiler's notes. Section 3 of S.L. 1994, ch. 292 is compiled as § 42-3809.

Section 5 of S.L. 1980, ch. 331 declared an emergency. Approved April 2, 1980.

42-3813. Enforcement procedure — Notice — Consent order — Civil action. [Repealed.]

Compiler's notes. This section, which comprised I.C., § 42-3813, as added by 1994,

ch. 292, § 5, p. 912, was repealed by S.L. 1998, ch. 173, § 11, effective July 1, 1998.

CHAPTER 39

WASTE DISPOSAL AND INJECTION WELLS

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- 42-3918. Cease and desist orders — Injection of hazardous and radioactive wastes.
- 42-3919. Criminal penalty — Willful violation — Violation of cease and desist order.

42-3901. Ground water as public resource — Protection. — The legislature of the state of Idaho hereby declares the ground water of this state to be a public resource which must be protected against unreasonable contamination or deterioration of quality to preserve such waters for diversion to beneficial uses; that in order to protect such waters against

contamination or deterioration in quality it is necessary that the construction and use of injection wells be controlled as provided in this chapter. [1971, ch. 301, § 1, p. 1235; am. 1984, ch. 155, § 1, p. 370.]

42-3902. Definitions. — Whenever used in this chapter:

(1) "Aquifer" means any geologic formation that will yield water to a well in sufficient quantities to make production of water from the formation feasible for beneficial use, except when the water in such formation results solely from injection through a waste disposal and injection well.

(2) "Director" means the director of the department of water resources.

(3) "Drinking water source" means an aquifer which contains water having less than 10,000 mg/l total dissolved solids and has not been exempted from this designation by the director of the department of water resources.

(4) "Fluid" means any material or substance which flows or moves whether in a semisolid, liquid, sludge, gaseous or any other form or state.

(5) "Formation" means a body of consolidated or unconsolidated rock characterized by a degree of lithologic homogeneity which is mappable at the earth's surface or traceable in the subsurface.

(6) "Hazardous waste" means any fluid or combination of fluids, excluding radioactive wastes, which because of quantity, concentration or characteristics (physical, chemical or biological) may:

(a) Cause or significantly contribute to an increase in deaths or an increase in serious, irreversible or incapacitating reversible illness; or

(b) Pose a substantial threat to human health or to the environment if improperly treated, stored, disposed of, or managed. Such wastes include, but are not limited to, materials which are toxic, corrosive, ignitable, or reactive, or materials which may have mutagenic, teratogenic, or carcinogenic properties, but do not include solid or dissolved material in domestic sewage or solid or dissolved material in irrigation return flows.

(7) "Injection" means the subsurface emplacement of fluids.

(8) "Injection well" means any excavation or artificial opening into the ground which meets the following three (3) criteria:

(a) It is a bored, drilled or dug hole, or is a driven mine shaft or a driven well point; and

(b) It is deeper than its largest straight-line surface dimension; and

(c) It is used for or intended to be used for injection.

(9) "Irrigation waste water" means surplus water diverted for irrigation but not applied to crops or runoff of surplus water from the cropland as a result of irrigation.

(10) "Licensed driller" means any person holding a valid license to drill water wells in Idaho as provided and defined in section 42-238, Idaho Code.

(11) "Operate" means to allow fluids to enter an injection well by action or by inaction of the operator.

(12) "Operator" means any individual, group of individuals, partnership, company, corporation, municipality, county, state agency, taxing district or federal agency who operates or proposes to operate any injection well.

(13) "Owner" means any individual, group of individuals, partnership, company, corporation, municipality, county, state agency, taxing district, or

federal agency owning land on which any injection well exists or is proposed to be constructed.

(14) "Radioactive material" means any material, solid, liquid or gas which emits radiation spontaneously.

(15) "Radioactive waste" means any fluid which contains radioactive material in concentrations which exceed those established for discharges to water in an unrestricted area by the board of environmental quality under the provisions of chapter 30, title 39, Idaho Code.

(16) "Shallow injection well" means an injection well which is less than or equal to eighteen (18) feet in vertical depth below land surface.

(17) "Sanitary waste" means any fluid generated through domestic activities, such as food preparation, cleaning and personal hygiene.

(18) "Surface runoff water" means runoff water from the natural ground surface and cropland. Runoff from urbanized areas, such as streets, parking lots, airports, and runoff from animal feedlots, agricultural processing facilities and similar facilities are not included within the scope of this term.

(19) "Waste disposal and injection well" means an injection well which is more than eighteen (18) feet in vertical depth below land surface. [1971, ch. 301, § 2, p. 1235; am. 1984, ch. 155, § 2, p. 370; am. 2001, ch. 103, § 84, p. 253.]

Compiler's notes. Sections 83 and 85 of S.L. 2001, ch. 103 are compiled as §§ 42-1805 and 42-3910, respectively.

42-3902A. Prohibition of injection of hazardous wastes and of radioactive wastes. — Construction of an injection well to be used for injection of hazardous wastes or of radioactive wastes into or above a drinking water source is prohibited. Injection of hazardous wastes or of radioactive wastes through an existing injection well into or above a drinking water source is prohibited. Any such injection shall subject any person responsible for said activity to the sanctions and penalties of this chapter in addition to all other applicable sanctions and penalties provided by statute or the common law. [I.C., § 42-3902A, as added by 1984, ch. 155, § 3, p. 370.]

Compiler's notes. Section 4 of S.L. 1984, ch. 155 is compiled as § 42-3903A.

Sec. to sec. ref. This section is referred to in §§ 42-3917, 42-3919.

42-3903. Waste disposal and injection wells — Construction — Modification — Use — Permit required. — No new waste disposal and injection well shall be constructed after the effective date [May 18, 1971] of this act unless a permit therefor has been issued by the director of the department of water resources. No waste disposal and injection well existing on the effective date of this act shall be modified after the effective date of this act unless a permit therefor has been issued by the director. No waste disposal and injection well existing on the effective date of this act shall continue to be used and maintained after January 1, 1974 unless a permit therefor has been issued by the director. [1971, ch. 301, § 3, p. 1235; am. 1974, ch. 20, § 38, p. 533.]

Compiler's notes. Section 37 of S.L. 1974, ch. 20, is compiled as § 42-3809.

42-3903A. Shallow injection wells — Authorization for construction and use. — Construction and use of shallow injection wells shall be authorized by rules and regulations adopted by the water resource board. Shallow injection wells used for the disposal of nonhazardous and nonradioactive sanitary wastes generated in, on, or in conjunction with a single family noncommercial dwelling are exempt from the authorization requirements of this chapter, but shall be subject to the applicable requirements of the Idaho environmental protection and health act of 1972, sections 39-101, et seq., Idaho Code. [I.C., § 42-3903A, as added by 1984, ch. 155, § 4, p. 370.]

Compiler's notes. Section 3 of S.L. 1984, ch. 155 is compiled as § 42-3902A.

42-3904. Application for permit — Owner — Operator responsible — Notice of construction form. — (1) The owner or operator shall make application to the director of the department of water resources for a permit as provided in this chapter. When a facility is owned by one person but operated by another, it shall be the operator's duty to obtain a permit. Such application shall be upon forms furnished by the director which shall require information concerning the location and description of the injection well, the quantity, quality, and nature of the material being or proposed to be injected, the description of the underground formation and aquifer into which the material is proposed to be or is being injected, the availability of alternative sources of disposal, and such other information as will enable the director to determine the effect of injection upon the quality of the ground water, the effect upon the beneficial uses of said ground water, the effect upon the public health and the effect upon public benefits derived therefrom, if any. Such application shall be submitted complete with fees as provided in this chapter. Mine shafts used for the disposal of wastes resulting from the mining and concentration process shall be exempt from the permit requirements of this chapter until an inventory and assessment of the contamination potential posed by such operation is completed.

(2) Owners of new shallow injection wells drilled after July 1, 1997, shall submit a notice of construction form to the department of water resources no later than thirty (30) days prior to commencement of construction for each new well. The notice of construction form shall be submitted with the fee as provided in this chapter on a form provided by the department of water resources. New shallow injection wells used for disposal of storm water from building roof drains are exempt from the notice of construction filing requirements and fees of this chapter. [1971, ch. 301, § 4, p. 1235; am. 1974, ch. 20, § 39, p. 533; am. 1984, ch. 155, § 5, p. 370; am. 1997, ch. 208, § 1, p. 624.]

42-3905. Fees — Transmitted to state treasurer. — (1) Fees provided for in this section shall accompany all applications and notice of

construction forms. No such application or notice of construction form shall be accepted unless accompanied by a filing fee as provided in this section. A separate application shall be filed for each waste disposal and injection well and each shallow injection well for which a permit is required by the rules adopted by the water resource board. The filing fee for each injection well requiring a permit shall be one hundred dollars (\$100) payable to the department of water resources.

(2) The notice of construction form for each new shallow injection well shall be accompanied by a fee of seventy-five dollars (\$75.00) payable to the department of water resources.

(3) All fees received under the provisions of this chapter are deemed to be nonrefundable and shall be transmitted to the state treasurer for deposit in the water administration fund as established under the provisions of section 42-238(a) [42-238a], Idaho Code, except that fees submitted with applications that do not require a permit shall be returned to the applicant. Fees collected may be used by the director of the department of water resources to carry out the provisions of this chapter. [1971, ch. 301, § 5, p. 1235; am. 1972, ch. 180, § 1, p. 460; am. 1974, ch. 20, § 40, p. 533; am. 1984, ch. 155, § 6, p. 370; am. 1997, ch. 208, § 2, p. 624.]

Compiler's notes. The bracketed reference "42-238a" in subsection (3) was inserted by the compiler.

Section 7 of S.L. 1984, ch. 155 contained a

repeal; section 8 is compiled as § 42-3907.

Sec. to sec. ref. This section is referred to in § 42-238a.

42-3906. Review by director of department of health and welfare — Recommendation. [Repealed.]

Compiler's notes. This section, which comprised 1971, ch. 301, § 6, p. 1235; am.

1974, ch. 20, § 41, p. 533, was repealed by S.L. 1984, ch. 155, § 7, effective April 2, 1984.

42-3907. Department of water resources — Public notice and investigation. — (1) Upon receipt of an application or other notice to construct, maintain, modify or abandon an injection well, the director shall give public notice as required by the rules and regulations promulgated under authority of this chapter.

(2) The director shall examine each application and shall make an investigation to determine what effect the use of the proposed or existing injection well will have or is having upon the rights of others to use water for beneficial purposes. For purposes of such investigation, the director may conduct a fact finding or investigative hearing. He may apply to the district court of the county in which the well is located for subpoenas requiring the appearance of witnesses and production of books, records, and papers; or he may administer oaths, and take testimony at any place and time. Employees and agents of the department of water resources may make reasonable entry upon any lands in the state for purposes of making investigations and surveys, or for other purposes necessary to carry out the intent of this chapter. [1971, ch. 301, § 7, p. 1235; am. 1974, ch. 20, § 42, p. 533; am. 1984, ch. 155, § 8, p. 370.]

Compiler's notes. Section 7 of S.L. 1984, ch. 155 contained a repeal; section 6 is compiled as § 42-3905.

42-3908. Permit approving construction and use — Conditions — Rejection of application. — If the director of the department of water resources determines the use of the proposed or existing injection well will not affect the rights of others to use water for beneficial purposes shall issue a permit approving the construction, modification or continued operation of such well. Such permit shall contain conditions, if any, determined to be necessary to protect the public interest in the ground water resource including, but not limited to, the method and manner of operation of the injection well, the period during which the injection well may be operated, a date when such permit shall expire, and periodic reports to the department of water resources of the quality and quantity of the fluids injected. No waste disposal and injection well or shallow injection well, as may be required by rules and regulations adopted under this chapter, shall be used unless a valid permit is in effect in accordance with this chapter.

If the director of the department of water resources determines the use of the proposed or existing injection well will interfere or is interfering with the right of the public to withdraw water for beneficial uses, and the director finds there are no overriding needs existing to justify the use of the injection well, the director may reject the application and forward notice of such rejection to the owner or operator by certified mail. [1971, ch. 301, § 8, p. 1235; am. 1974, ch. 20, § 43, p. 533; am. 1984, ch. 155, § 9, p. 370.]

42-3909. Disapproval of application — Owner or operator entitled to hearing — Procedure — Judicial review. — Any owner or operator aggrieved by the disapproval of an application or by the conditions imposed in a permit shall upon request therefor in writing within thirty (30) days after receipt of notice of such disapproval or conditional approval, be afforded an opportunity for a hearing before the water resources board, such hearing to be conducted in accordance with chapter 52, title 67, Idaho Code, at a place convenient to the owner or operator. Such hearing shall be held for the purpose of determining whether the permit should be issued or whether the conditions imposed in a permit are reasonable, or whether a change in circumstances warrants a change in the conditions imposed in a valid permit. For purposes of such hearing the water resource board shall have power to administer oaths, examine witnesses, and issue in the name of the board subpoenas requiring testimony of witnesses and the production of evidence relevant to any matter in the hearing. A certified transcript of the proceedings and the evidence received at such hearing shall be maintained by the board. The board shall affirm, modify or reject the director's decision, and make its decision in the form of an order to the director. Judicial review of a final determination by the board may be secured by the owner or operator by filing a petition for review as prescribed by chapter 52, title 67, Idaho Code, in the district court of the county wherein the injection well is situated. The petition for review shall be served upon the chairman of the water resource board and upon the attorney general as provided by the

Idaho rules of civil procedure. [1971, ch. 301, § 9, p. 1235; am. 1974, ch. 20, § 44, p. 533; am. 1984, ch. 155, § 10, p. 370.]

42-3910. Cancellation of permit — Notice — Hearing — Review. —

When the director of the department of water resources has reason to believe the operation and use of an injection well, for which a permit has been issued in accordance with this chapter, is interfering with the right of the public to withdraw water for beneficial uses, or is causing unreasonable contamination or deterioration of the quality of the ground water below the adopted water quality standards of the board of environmental quality, he may cancel such permit. Prior to the cancellation of such permit there shall be a hearing before the water resource board for the purpose of determining whether or not the permit should be cancelled. At such hearing the director of the department of water resources shall be the complaining party. For purposes of such hearing, the board shall have power to administer oaths, examine witnesses and issue subpoenas requiring testimony of witnesses and production of evidence relevant to any matter in the hearing. The hearing shall be conducted in accordance with chapter 52, title 67, Idaho Code, and the board shall provide the owner or operator whose permit is proposed to be cancelled with reasonable notice and the opportunity to be heard in accordance with chapter 52, title 67, Idaho Code. A certified transcript of the proceedings and the evidence received at such hearing shall be maintained by the board. The board shall affirm, modify or reject the director's decision, and make its decision in the form of an order to the director. Review of a final determination by the board may be secured by the owner or operator by filing a petition for review as prescribed by chapter 52, title 67, Idaho Code, in the district court of the county wherein the injection well is situated. The petition for review shall be served upon the chairman of the water resource board and upon the attorney general as provided by the Idaho rules of civil procedure. [1971, ch. 301, § 10, p. 1235; am. 1974, ch. 20, § 45, p. 533; am. 1984, ch. 155, § 11, p. 370; am. 2001, ch. 103, § 85, p. 253].]

Compiler's notes. Sections 84 and 86 of S.L. 2001, ch. 103 are compiled as §§ 42-3902 and 46-1019, respectively.

42-3911. Failure to obtain required permit or submit required information — Penalty. —

Any owner or operator who causes to be constructed or consents either expressly or impliedly to the construction of a new waste disposal and injection well without having first obtained a permit therefor from the director of the department of water resources as provided in this chapter shall be guilty of a misdemeanor. Any owner or operator who causes an existing waste disposal and injection well to be modified or consents either expressly or impliedly to the modification of an existing waste disposal and injection well without having first obtained a permit therefor from the director of the department of water resources as provided in this chapter shall be guilty of a misdemeanor. From and after January 1, 1974, any owner or operator who continues to operate and

maintain or consents either expressly or impliedly to the continued operation and maintenance of an existing waste disposal and injection well without having first obtained a permit therefor from the director of the department of water resources as provided in this chapter shall be guilty of a misdemeanor; provided, that no misdemeanor shall occur where an owner or operator applied for a permit before January 1, 1974, and the director of the department of water resources has not approved or rejected said application. Any owner or operator of a proposed or existing injection well who violates the rules and regulations of the water resource board shall be guilty of a misdemeanor. Each and every day that such activity is carried on in violation of this section shall constitute a separate and distinct offense. [1971, ch. 301, § 11, p. 1235; am. 1974, ch. 20, § 46, p. 533; am. 1984, ch. 155, § 12, p. 370.]

42-3912. Drillers — Must be licensed — Approved permits — Certified copies. — It shall be unlawful for any person not a licensed driller to construct a new waste disposal and injection well or modify an existing waste disposal and injection well, except that a driller's license is not required for the construction of a driven mine shaft or dug hole for the purposes of this chapter. All licensed drillers shall obtain a certified copy of the approved permit from the director of the department of water resources prior to construction of any new waste disposal and injection well or prior to the modification of any existing waste and injection well. Failure by a licensed driller to comply with this section shall constitute cause for revocation of a well driller's license in accordance with section 42-238, Idaho Code. [1971, ch. 301, § 12, p. 1235; am. 1974, ch. 20, § 47, p. 533; am. 1984, ch. 155, § 13, p. 370.]

42-3913. Minimum standards — Rules and regulations — Adoption. — The water resource board shall adopt minimum standards for the construction or abandonment of waste disposal and injection wells. Such standards shall require each waste disposal and injection well to be so constructed as to protect the ground water of this state from waste and unreasonable contamination. Each licensed well driller or operator will be furnished with a copy of the adopted standards, and will be required to construct each waste disposal and injection well drilled after the effective date of said rules and regulations in compliance with the determined standards. Failure by a licensed driller to comply with such standards shall constitute cause for revocation of the well driller's license in accordance with section 42-238, Idaho Code.

The water resource board shall also adopt minimum standards for the construction and abandonment of shallow injection wells. Any person who constructs or abandons a shallow injection well without complying with such standards shall be guilty of a misdemeanor. [1971, ch. 301, § 13, p. 1235; am. 1974, ch. 20, § 48, p. 533; am. 1984, ch. 155, § 14, p. 370.]

42-3914. Board to establish standards. — The provisions of this chapter shall not prevent the present or future use of any existing or

proposed injection well which is used exclusively for disposal of irrigation waste water or of surface runoff water where such disposal does not adversely affect drinking water sources, and state or local government entities involved in highway and street construction and maintenance shall be exempt from fees and permit applications for shallow injection wells. The water resource board shall establish criteria and standards for the injection of fluids under the provisions of this chapter which shall not become valid and enforceable until adopted under provisions of the administrative procedures act, chapter 52, title 67, Idaho Code. [1971, ch. 301, § 14, p. 1235; am. 1974, ch. 20, § 49, p. 577; am. 1984, ch. 155, § 15, p. 370.]

Compiler's notes. Section 50 of S.L. 1974, ch. 20, is compiled as § 42-4002.

Section 15 of S.L. 1971, ch. 301 provided that "The provisions of this act are hereby declared to be severable and if any provision of this act or the application of such provision

to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of remaining portions of this act."

Section 64 of S.L. 1974, ch. 20 provided that this act take effect on and after July 1, 1974.

42-3915. Adoption of regulations. — The water resource board shall adopt all regulations authorized by the provisions of chapter 39, title 42, Idaho Code, in conformance with the provisions of chapter 52, title 67, Idaho Code, provided that the board shall not adopt any regulation regarding the inventory of shallow injection wells that is more stringent than federal law or any regulations promulgated pursuant thereto. [I.C., § 42-3915, as added by 1984, ch. 155, § 16, p. 370.]

42-3916. Enforcement procedure — Injunctive relief. — When the director of the department of water resources determines that any person is in substantial violation of any provision of this chapter or any rule, permit, certificate, condition of approval or order issued or promulgated pursuant to this chapter, the director may commence an administrative enforcement action by issuing a written notice of violation in accordance with the provisions of section 42-1701B, Idaho Code. The director shall have the further authority to seek a preliminary or permanent injunction, or both, or a temporary restraining order restraining any person from violating or attempting to violate the provisions of this chapter, of the rules adopted thereunder, or of the permits issued by the director and mandating any person to take action appropriate under the circumstances to correct any violation. In any such action the director need not show irreparable injury for the issuance of a preliminary or permanent injunction, or both, or a temporary restraining order. [I.C., § 42-3916; as added by 1984, ch. 155, § 17, p. 370; am. 1998, ch. 173, § 12, p. 595.]

Compiler's notes. Section 11 of S.L. 1998, ch. 173 repealed § 42-3813.

Section 13 of S.L. 1998, ch. 173 is compiled as § 42-4010.

42-3917. Civil penalties — Injection of hazardous and radioactive wastes. — Any person who constructs, operates, maintains, converts, plugs, abandons, or conducts any other activity in a manner that results or may result in the unauthorized injection of a hazardous waste or of a

radioactive waste through an injection well shall be in violation of section 42-3902A, Idaho Code, and subject to a civil penalty not to exceed two thousand five hundred dollars (\$2,500) for each day in which such action occurs. The director shall have the authority to file an action in the appropriate district court to impose, assess and recover said civil penalties. [I.C., § 42-3917, as added by 1984, ch. 155, § 18, p. 370.]

42-3918. Cease and desist orders — Injection of hazardous and radioactive wastes. — Whenever the director finds that any person has constructed, operated, maintained, converted, plugged, abandoned or conducted any other activity in a manner that results in the unauthorized injection of a hazardous waste or of a radioactive waste through an injection well or whenever the director finds that any person proposes to do or to allow any such acts, then the director may issue a cease and desist order. The cease and desist order shall become effective and final upon issuance thereof. The director shall serve forthwith in accordance with the Idaho rules of civil procedure a certified copy of any such order on that person. That person shall have the right to a hearing in accordance with section 42-1701A, Idaho Code. [I.C., § 42-3918, as added by 1984, ch. 155, § 19, p. 370.]

42-3919. Criminal penalty — Willful violation — Violation of cease and desist order. — Any person who willfully constructs, operates, maintains, converts, plugs, abandons, or conducts any other activity in a manner that results or may result in the injection of a hazardous waste or of a radioactive waste through an injection well in violation of section 42-3902A, Idaho Code, or any person who willfully violates any cease and desist order after the same has been served on that person is guilty of a misdemeanor and:

- (1) May be sentenced to jail for a period not to exceed six (6) months;
- (2) May be fined in an amount not to exceed five thousand dollars (\$5,000) for each offense; and
- (3) Each day of violation shall constitute a separate offense. [I.C., § 42-3919, as added by 1984, ch. 155, § 20, p. 370.]

Compiler's notes. Section 21 of S.L. 1984, ch. 155 declared an emergency. Approved April 2, 1984.

CHAPTER 40

GEOHERMAL RESOURCES ACT

SECTION.

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SECTION.

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42-4013. Cooperative unit agreements — Voluntary — Involuntary.

42-4014. Liberal construction.

42-4015. Statutory construction.

42-4001. Short title. — This act may be known and cited as the Idaho Geothermal Resources Act. [1972, ch. 301, § 2, p. 749.]

Legislative Intent. Section 1 of S.L. 1972, ch. 301 read: "It is hereby declared that the state of Idaho claims the right to regulate the development and use of all of the geothermal resources within this state and that geothermal resources are natural resources of limited quantity and of a unique value to all of the people of the state.

"The legislature of the state of Idaho further declares that the geothermal resources of this state may provide an outstanding opportunity for enhancement of our economy and quality of life with a minimum of environmental degradation through a utilization of this energy source. It is also recognized that the process of utilization and development of our geothermal resources on a large scale may be associated with risks to the maximum sustained yield from these resources, risks to our valuable groundwater resources, and risks to the environment in the immediate locality of and around the installations at which such utilization is done.

"The legislature further finds that there is presently substantial * interest in the

geothermal resources of this state, that regulation in the public interest is imperative, and that regulation must take effect at an early date.

"The legislature does therefore declare that it is the policy and purpose of this state to maximize the benefits to the entire state which may be derived from the utilization of our geothermal resources, while minimizing the detriments and costs of all kinds which could result from their utilization. This policy and purpose is embodied in this act which provides for the immediate regulation of geothermal resource exploration and development in the public interest."

Compiler's notes. The words "this act" refer to S.L. 1972, ch. 301, which is compiled as §§ 42-4001 — 42-4015.

Section 18 of S.L. 1972, ch. 301 declared an emergency. Approved March 27, 1972.

Cross ref. Geothermal resources land leases, §§ 47-1601 — 47-1611.

Sec. to sec. ref. This chapter is referred to in §§ 42-230, 42-233 and 42-238.

42-4002. Definitions. — Whenever used in this act the term:

(a) "Department" means the Idaho department of water resources.

(b) "Director" means the director of the Idaho department of water resources.

(c) "Geothermal resource" means the natural heat energy of the earth, the energy, in whatever form, which may be found in any position and at any depth below the surface of the earth present in, resulting from, or created by, or which may be extracted from such natural heat, and all minerals in solution or other products obtained from the material medium of any geothermal resource. Ground water having a temperature of two hundred twelve (212) degrees Fahrenheit or more in the bottom of a well shall be classified as a geothermal resource. Geothermal resources are found and hereby declared to be sui generis, being neither a mineral resource nor a water resource, but they are also found and hereby declared to be closely related to and possibly affecting and affected by water and mineral resources in many instances.

(d) "Geothermal area" means the same general land area which, in its subsurface, is underlaid or reasonably appears to be underlaid by geothermal resources from or in a single reservoir, pool, or other source or

interrelated sources, as such area or areas may be from time to time designated by the director.

(e) "Material medium" means any substance, including, but not limited to, naturally heated fluids, brines, associated gases, and steam, in whatever form, found at any depth and in any position below the surface of the earth, which contains or transmits the natural heat energy of the earth, but excluding petroleum, oil, hydrocarbon gas, or other hydrocarbon substances.

(f) "Permit" means a permit issued pursuant to this act for the construction and operation of any well or injection well.

(g) "Person" means any individual, natural person, general or limited partnership, joint venture, association, cooperative organization, corporation whether domestic or foreign, agency or subdivision of this or any other state, or any municipal or quasi-municipal entity whether or not it is incorporated.

(h) "Waste" means any physical waste including, but not limited to:

(1) Underground waste resulting from the inefficient, excessive or improper use or dissipation of geothermal energy in or of any geothermal resource pool, reservoir, or other source; or the locating, spacing, construction, equipping, operating, or producing of any well in a manner which results, or tends to result, in reducing the quantity of geothermal energy to be recovered from any geothermal area in this state;

(2) The inefficient above-ground transporting and storage of geothermal energy; and the locating, spacing, equipping, operating, or producing of any well or injection well in a manner causing, or tending to cause, unnecessary or excessive surface loss or destruction of geothermal energy;

(3) The escape into the open air, from a well, of steam or hot water in excess of what is reasonably necessary in the efficient development or production of a well.

(i) "Well" means any excavation or other alteration in the earth's surface or crust by means of which the energy of any geothermal resource and/or its material medium is sought or obtained.

(j) "Injection well" means any special well, converted producing well or reactivated or converted abandoned well employed for injecting material into a geothermal area to maintain pressures in a geothermal reservoir, pool, or other source, or to provide new material or to serve as a material medium therein, or for reinjecting any material medium or the residue thereof or any by-product of geothermal resource exploration or development into the earth.

(k) "Board" means the Idaho water resource board. [1972, ch. 301, § 3, p. 749; am. 1974, ch. 20, § 50, p. 533; am. 1974, ch. 297, § 1, p. 1753; am. 1987, ch. 347, § 14, p. 741.]

Compiler's notes. Section 49 of S.L. 1974, ch. 20, is compiled as § 42-3914.

Section 13 of S.L. 1987, ch. 347 is compiled as § 42-1607.

Sec. to sec. ref. This section is referred to in §§ 42-230 and 63-3022C.

42-4003. Permits — Application — Fee — Exceptions. — (a) Any person who, as owner or operator, proposes to construct a well or to alter a

well or to construct or to alter an injection well shall first apply to the director for a geothermal resource well permit. Such application shall set out the following information on a form or forms prescribed by the department:

(1) The name of any person making the application; if such person is a partnership, joint-venture, association, or other unincorporated group of corporate or natural persons, the names and places of domicile of each of the constituent persons who have general partnership responsibility and authority for and in such unincorporated group of persons; if any person named on a permit application is a corporation, its place of domicile, the names and places of domicile of its principal executive officers, and the names and places of domicile of any person or persons owning a thirty percent (30%) or greater interest, whether legal, beneficial, or a combined legal and beneficial interest, in such corporate person; if the applicant is making an application as an agent for any other person, it shall be clearly so stated and any person who is the applicant's principal shall be subject to each and all of the disclosure requirements of this subdivision; for purposes of this subdivision, the domicile of a corporation is at all of the following:

- a. the place of incorporation,
- b. the principal place of business,
- c. the place, by city and state, of the home office, and in any instance where domicile is required to be disclosed all of these places shall be specified.

(2) The location of the proposed well; and/or the injection well described particularly by the quarter-quarter section according to the township and range system of the United States public lands survey.

(3) The length, size, type, and thickness of casing proposed to be used in such well and/or such injection well and any other devices or techniques to be used in the drilling, operation, and maintenance of such well and/or injection well for the purpose of conserving geothermal resources and their availability, avoiding waste and for the protection of other subsurface natural resources.

(4) The character and composition of the material expected to be derived from such well.

(5) The means proposed to be used to contain and manage the material expected to be derived from such well or injected into such injection well in order to avoid unreasonable damage to life, property, or surface and atmospheric natural resources.

(6) Whether such well or such injection well is proposed to be constructed as a part of a program for exploration or for development of an already explored geothermal resource area.

(7) Such other information as the director may determine to be necessary for the administration of this chapter.

(b) Any application for a permit to construct a well which is made pursuant to this section, if the construction or operation of such well will involve the use of water, or if such well may be expected to yield water to be used, for any beneficial purpose, other than as a mineral source, an energy

source, or otherwise as a material medium, shall be accompanied by an application to appropriate the public waters of this state in the form prescribed in chapter 2, title 42, Idaho Code, and by regulations adopted pursuant thereto, and such application to appropriate the public waters shall be governed in all respects by that chapter.

(c) Any application for a permit made pursuant to this section shall be accompanied by a filing fee of:

(1) One hundred dollars (\$100) if for a well, or

(2) Fifty dollars (\$50.00) for an injection well,

and no application shall be accepted and filed by the director until such filing fee has been deposited with him. All moneys received under provisions of this act shall be deposited with the state treasurer in the water administration fund as provided in section 42-238a, Idaho Code.

(d) No person shall construct or alter a well or an injection well without having first secured a permit therefor; provided however, that the director may, by general rule or regulation adopted pursuant to chapter 52, title 67, Idaho Code, exempt specific categories of wells or injection wells otherwise embraced by this act upon a finding that the purposes of this act do not require that such wells be subject to the permit requirement of this section.

(e) Nothing in this act shall be construed as affecting any valid, vested water rights for water in use on or before July 1, 1987.

(f) The director shall have the authority to and may designate any area of the state a "geothermal area" when the director finds or has reason to believe that such designation is necessary to protect the geothermal resource from waste and to protect other resources of the state from contamination or waste.

(g) No person shall drill a well for any purpose to a depth of three thousand (3,000) feet or more below land surface in a designated "geothermal area" without first obtaining a permit under the provisions of this section. Such permit shall be in addition to any permit required by other provisions of law.

(h) The owner of any well constructed or being constructed pursuant to section 47-320, Idaho Code, which encounters a geothermal resource, and who intends or desires to utilize such resource, shall make application for a geothermal permit as required under this section, provided however, that no additional filing fee shall be required.

(i) A geothermal resource shall be utilized primarily for its heat value. Usage of a geothermal resource primarily for some reason other than its heat value shall not be deemed a beneficial use of the resource. [1972, ch. 301, § 4, p. 749; am. 1974, ch. 20, § 51, p. 533; am. 1974, ch. 297, § 2, p. 1753; am. 1987, ch. 347, § 15, p. 741.]

Compiler's notes. Section 3 of S.L. 1974, ch. 297, is compiled as § 42-4010.

Section 16 of S.L. 1987, ch. 347 is compiled as § 42-4005.

Sec. to sec. ref. This section is referred to in §§ 42-238a and 42-4006.

42-4004. Processing of applications — Investigations — Hearings. — (a) Upon receipt of an application made pursuant to section

42-4003, Idaho Code, it shall be the duty of the director to examine such application to ascertain if it sets forth all information required by that section and all the information necessary for the director to make the determination required by this section. If upon such examination the application is found to be defective, the director shall return such application for correction, or notify the applicant that such application is defective, and the applicant may correct such application within thirty (30) days or make a new application. All applications which comply with the provisions of this act and with the regulations of the water resource board shall be accepted by the director and numbered in a manner which will aid in their identification.

(b) Upon receipt and acceptance of a proper application, the director shall undertake such investigations as necessary to determine that the construction or alteration of the proposed well or injection well will be in the public interest. The director may consider, but is not limited in his consideration to:

(1) The financial resources of the applicant, his principal, or other person who may be legally responsible for the subject well or injection well, and the probability that such person will be financially able to bear all costs for which he might be responsible which may be incident to the construction, operation, and maintenance of the well or injection well proposed to be constructed or altered.

(2) The adequacy of measures proposed to safeguard subsurface, surface, and atmospheric resources from unreasonable degradation, and especially to protect ground-water aquifers and surface-water sources from contamination which would render such water of lesser quality than it would have had but for the contamination.

(3) The possibility that the construction and maintenance of the proposed well will cause waste or will damage any geothermal resource, reservoir, or other source, by unreasonable reduction of pressures or unreasonable reduction of any geothermal resource material medium or in any other manner, so as to render any geothermal resource of unreasonably less value.

(4) The adequacy of measures proposed to safeguard the environment of the area around the site of the proposed well from unreasonable contamination or pollution.

(5) Any possible interdependence between any geothermal resource, reservoir, pool, or other source expected to be affected under the permit and any aquifers or other sources of ground waters used for beneficial uses other than uses as a material medium or a mineral source, and the probability that such interdependence may cause such ground-water sources to be inadequate to meet demands on them under existing water rights.

(c) Any applicant or the director shall have a right to have a public hearing concerning the propriety of issuing a permit for which an application has been made under section 42-4003, Idaho Code. Hearings held under this subdivision of this section shall be governed by rules of procedure adopted by the water resource board pursuant to chapter 52, title 67, Idaho Code. Hearings held under this subdivision shall be held at any location found to be appropriate by the water resource board. [1972, ch. 301, § 5, p. 749; am. 1974, ch. 20, § 52, p. 533.]

42-4005. Permit — Issuance — Bond — Review — Appeal. — (a) If the director finds that the well or the injection well as proposed to be constructed or altered is in the public interest, he shall issue a permit. The director may issue a permit substantially in accordance with the specifications on the application, or the director may limit the scope of the permit granted or may issue a permit subject to conditions.

(b) If the director finds that the well or injection well as it is proposed to be constructed or altered in the application will not be in the public interest, he shall refuse to issue a permit. In no case shall the director issue a permit to construct or alter a well or injection well if he finds that use of the proposed well or injection well may be expected to unreasonably reduce the quality of any surface or ground waters below the quality which such waters would have had but for the proposed well.

(c) If the director refuses to issue a permit, or issues one subject to conditions or limitations, he shall issue a clear statement of his reasons for refusing to issue or issuing the limited permit. The director shall issue a statement of findings of fact and conclusions of law that provide a factual and legal basis for the order. The refusal of the director to issue a permit, together with the clear statement of the reasons for refusing to issue the permit shall be served on the applicant by certified mail. A permit issued conditionally or subject to limitations shall, with the statement of reasons required under this subdivision, be served in the same manner as a refusal to issue a permit.

(d) An applicant denied a permit or issued a limited or conditional permit may seek a public hearing before the water resource board. A certified transcript of the proceedings and the evidence received at such hearing shall be maintained by the board. The board shall affirm, modify or reject the director's decision, and make its decision in the form of an order to the director. The hearing shall be conducted in accordance with chapter 52, title 67, Idaho Code. Judicial review of the final determination by the board may be secured pursuant to chapter 52, title 67, Idaho Code.

(e) The director shall not issue a permit if he finds that the operation of any well under a proposed permit will unreasonably decrease ground water available for prior water rights in any aquifer or other ground water source for water for beneficial uses, other than uses as a mineral source, an energy source, or otherwise as a material medium, unless and until the applicant has also obtained a permit for the appropriation of ground waters under chapter 2, title 42, Idaho Code.

(f) The director shall require, as a condition of every permit, every person who engages in the construction, alteration, testing, or operation of a well to file with the director, on a form prescribed by the director, a bond indemnifying the state of Idaho providing good and sufficient security, conditioned upon the performance of the duties required by this chapter and the proper abandonment of any well covered by such permit. The bond shall be in an amount not less than five thousand dollars (\$5,000) or more than one hundred thousand dollars (\$100,000) as determined by the director based on the size and depth of the well, the complexity of the well, the resource to be recovered, the area of operation, and other relevant factors. [1972, ch. 301,

§ 6, p. 749; am. 1974, ch. 20, § 53, p. 533; am. 1980, ch. 238, § 22, p. 526; am. 1987, ch. 347, § 16, p. 741; am. 1993, ch. 216, § 40, p. 587.]

Compiler's notes. Sections 21 and 23 of S.L. 1980, ch. 238 are compiled as §§ 42-3805 and 42-4012, respectively.

Section 15 of S.L. 1987, ch. 347 is compiled as § 42-4003, and § 17 is compiled as § 42-4010.

Sections 39 and 41 of S.L. 1993, ch. 216 are compiled as §§ 42-3805 and 42-4012, respectively.

42-4006. Permit applications — Consolidation. — The water resource board may, by regulation, provide for the consolidation of permit applications where several wells are proposed to be constructed in a geothermal area either for exploration or for development. Such regulations shall be promulgated according to the provisions of chapter 52, title 67, Idaho Code. A consolidated permit application shall be in substantial compliance with the requirements of section 42-4003, Idaho Code. [1972, ch. 301, § 7, p. 749; am. 1974, ch. 20, § 54, p. 533.]

42-4007. Well abandonment or discontinuance of operation — Notice. — At least five (5) days before any operation to abandon any well or injection well is commenced, the owner or operator thereof shall submit in writing a notification of intention to abandon to the director for approval, except that it shall be permissible to give oral notice followed within twenty-four (24) hours by written confirmation. Such notification shall clearly state the condition of the well or injection well, and the proposed method of abandonment. No person shall commence any operation to abandon a well or an injection well without approval by the director. [1972, ch. 301, § 8, p. 749; am. 1974, ch. 20, § 55, p. 533.]

42-4008. Well abandonment — Order of approval or disapproval. — The director may, before the proposed date for commencing any abandonment operation, approve by order in writing, or, if found to be necessary, approve orally to be followed within forty-eight (48) hours by a written approval order, or disapprove by order in writing, any proposed abandonment. An approval order may be made conditional or limited. Any conditional or limited approval order and any disapproval order shall be accompanied by requests for further tests or other practices than those proposed by the person seeking approval, which tests or practices would remove the disability from the proposed abandonment. [1972, ch. 301, § 9, p. 749; am. 1974, ch. 20, § 56, p. 533.]

42-4009. Well abandonment — Report — Action by director. — (a) Within five (5) days after the completion of the abandonment of any well or injection well, the owner or operator of the abandoned well or injection well shall report, in writing to the director on such form as may be prescribed by the director, on all work done with respect to the abandonment.

(b) If the director finds that the abandonment failed to comply with the director's approval order or is otherwise not in compliance with this act or

any regulation or order adopted or issued pursuant hereto, the director may issue an order disapproving such abandonment and/or requiring the person who abandoned the well or injection well to comply with the provisions of this act and any valid order or regulation adopted pursuant hereto or to do anything necessary to avoid waste and to protect life, property, and the natural resources of this state. Any owner or operator who receives a disapproval order under this section is a person who has commenced to abandon a well or injection well without approval, for purposes of any civil or criminal relief available under this act. [1972, ch. 301, § 10, p. 749; am. 1974, ch. 20, § 57, p. 533.]

42-4010. Powers and duties — Penalties — Enforcement procedure. — (a) The water resource board may adopt, amend, or rescind reasonable rules, regulations, and construction standards necessary to the administration of this chapter in accordance with chapter 52, title 67, Idaho Code.

(b) The board may require that owners or operators of wells or injection wells keep or cause to be kept well logs, core records, and drilling histories of such wells or injection wells. It may require that copies of such logs, records, and/or histories be filed with the director within a reasonable time after well completion. It may further require such other geologic, geochemical, or engineering plans, reports, or records as necessary for the administration of this chapter. Any reports, logs, records, or histories filed with the director shall be available for public inspection subject to disclosure according to chapter 3, title 9, Idaho Code, and shall be kept as confidential by the director for a period of one (1) year from well completion, provided however, that the director may use any such reports, logs, records, or histories in any action in any court to enforce the provisions of this chapter or any order or regulation adopted hereunder.

(c) The director may enter onto private land at any time to inspect any well or geothermal resource development project to determine if such well or project is being constructed, operated, or maintained according to any applicable permits or to determine if the construction, operation, or maintenance of such well or project may involve a threat to life or property or an unreasonable risk to subsurface, surface, or atmospheric resources.

(d) If the director finds that any person is constructing, operating or maintaining any well or injection well not in accordance with any applicable permit or in a fashion so as to involve an unreasonable risk of, or so as to cause, damage to life or property or subsurface, surface, or atmospheric resources, the director may issue an order to such person to correct or to stop such practices as are found to be improper and to mitigate any injury of any sort caused by such practices.

(e) The director may enforce any provision of this chapter or any order or regulation issued or adopted pursuant hereto by an appropriate action in the district court. The director may bring an action in the district court to have enjoined any threatened noncompliance with any provision of this chapter, regulations, or orders of the director, or any threatened harm to life, property, or surface, subsurface, or atmospheric resources which would be

caused by such noncompliance. It shall be the duty of the attorney general to institute and prosecute civil enforcement actions or injunctive actions as provided in this chapter, and to prosecute actions or proceedings for the enforcement of any criminal provisions of this chapter. The attorney general may delegate the authority and duty under this section to prosecute criminal actions to the prosecuting attorney of the county in which such a criminal action may arise.

(f) Any willful violation of or failure to comply with any provision of this chapter, or regulation adopted or order issued pursuant to the chapter, shall be a misdemeanor punishable by a fine of up to ten thousand dollars (\$10,000) for each offense or a sentence of up to six (6) months in a county jail or both; each day of a continuing violation shall be a separate offense under this subdivision. When the director of the department of water resources determines that any person is in substantial violation of any provision of this chapter or any rule, permit, certificate, condition of approval or order issued or promulgated pursuant to this chapter, the director may commence an administrative enforcement action by issuing a written notice of violation in accordance with the provisions of section 42-1701B, Idaho Code. A responsible or principal executive officer of any corporate person may be liable under this subdivision if such corporate person is not in compliance with any provision of this chapter or with any valid order or regulation adopted pursuant hereto.

(g) The director shall undertake such studies, investigations, or research programs as necessary for the proper administration of this chapter and in order to develop experience in and understanding of the entire field of geothermal resource exploration and development in both its technical and regulatory aspects. The director and board shall cooperate with other Idaho state agencies, the state institutions of higher learning, agencies of other states, and agencies of the federal government in the preparation of such investigations, studies, or research projects. The director and board may cooperate with the scientists at the Idaho national engineering laboratory in their research, development, engineering and demonstration of geothermal projects.

(h) The director may enter into cooperative agreements and memoranda of understanding with agencies of other states for the purpose of the administration of geothermal areas which are partially in Idaho and partially in one (1) or more other states. [1972, ch. 301, § 11, p. 749; am. 1974, ch. 20, § 58, p. 533; am. 1974, ch. 297, § 3, p. 1753; am. 1987, ch. 347, § 17, p. 741; am. 1990, ch. 213, § 62, p. 480; am. 1998, ch. 173, § 13, p. 595.]

Compiler's notes. Section 2 of S.L. 1974, ch. 297, is compiled herein as § 42-4003.

Section 16 of S.L. 1987, ch. 347 is compiled as § 42-4005.

Sections 61 and 63 of S.L. 1990, ch. 213 are compiled as §§ 41-4312 and 47-319, respectively.

Sections 12 and 14 of S.L. 1998, ch. 173 are compiled as §§ 42-3916 and 42-5244, respectively.

Section 4 of S.L. 1974, ch. 297, provided the act should take effect on and after July 2, 1974.

Section 111 of S.L. 1990, ch. 213 as amended by § 16 of S.L. 1991, ch. 329 provided that §§ 3 through 45 and 48 through 110 of the act should take effect July 1, 1993 and that §§ 1, 2, 46 and 47 should take effect July 1, 1990.

42-4011. Name of owner on permit — Transfers restricted — Permit amendment, fee. — (a) No well may be owned or operated by any person whose name does not appear on the permit or permit application therefor, nor may any well be transferred to any new owner or operator unless an application to amend such permit has been approved by the director.

(b) No changes in or departure from the procedures, locations, data, or persons specified on the face of a permit shall be permitted under this act until an amendment to such permit is approved by the director. The board may specify forms upon which applications for amendments to permits may be filed with the director. Any application to amend a permit shall be accompanied by a filing fee of fifty dollars (\$50.00), and the director shall not accept an amendment application which is not accompanied by such filing fee. All such filing fees shall be deposited with the state treasurer in the water administration fund as provided in section 42-238a, Idaho Code.

(c) The director shall approve any permit application to amend a permit unless he finds that such amendment will not be in the public interest. If the director refuses to approve such amendment, he shall serve on the applicant, by certified mail, an order disapproving the amendment and setting out its [his] reasons for disapproving the amendment. [1972, ch. 301, § 12, p. 749; am. 1974, ch. 20, § 59, p. 533.]

Compiler's notes. The bracketed word "his" in subsection (c) was inserted by the compiler. **Sec. to sec. ref.** This section is referred to in § 42-238a.

42-4012. Resident agent — Actions — Hearings — Appeals. —

(a) Every permit holder, owner, and operator of any well shall designate to the director an agent who resides in this state upon whom may be served all orders, notices, or permits issued by the director.

(b) Any person adversely affected by any order, including orders following hearings held pursuant to this chapter, served on him by the board or the director may bring an appeal therefrom to the district court within twenty-eight (28) days of such service, or, if he has not had a hearing before the board, he may request a hearing at such time. Such appeals shall be accomplished and reviewed pursuant to chapter 52, title 67, Idaho Code.

(c) Nothing contained in this section shall preempt any right of any person to any writ or other relief available in a civil action.

(d) Nothing contained in this act shall preempt any public nuisance or similar law of this state.

(e) All orders, permits, and notices issued by the director or the board under this act shall also bind and be effective on all successors and assigns of the persons to whom such orders, permits, and notices are addressed. [1972, ch. 301, § 13, p. 749; am. 1974, ch. 20, § 60, p. 533; am. 1980, ch. 238, § 23, p. 526; am. 1993, ch. 216, § 41, p. 587.]

Compiler's notes. Section 22 of S.L. 1980, ch. 238 is compiled as § 42-4005. Section 24 of S.L. 1980, ch. 238, repealed §§ 42-305 — 42-309.

Sections 40 and 42 of S.L. 1993, ch. 216 are compiled as §§ 42-4005 and 47-324, respectively.

Section 25 of S.L. 1980, ch. 238 read: "The

provisions of this act are hereby declared to be severable and if any provision of this act or the application of such provision to any per-

son or circumstance is declared invalid for any reason, such declaration shall not affect the validity of remaining portions of this act."

42-4013. Cooperative unit agreements — Voluntary — Involuntary. — (a) Whenever the director finds that it is in the public interest and especially in the interest of the conservation of natural resources and of the protection of the geothermal resources of this state from waste, the lessors, lessees, operators, owners, or other persons holding or controlling royalty or other interests in the separate properties of the same geothermal area may, with the approval of the board, enter into an agreement for the purpose of bringing about the cooperative development, operation, and maintenance of all or a portion of the geothermal resources of the geothermal area as a unit; or for the purpose of fixing the time, location, and manner of drilling, operating, and maintaining of wells and of injection wells. Any such agreement shall bind the successors and assigns of the parties thereto and shall be enforceable by the parties thereto by an action for specific performance. No such agreement, when approved by the board pursuant to this section, shall be held to violate any of the statutes of this state prohibiting monopolies or acts, arrangements, agreements, contracts, combinations or conspiracies in restraint of trade or commerce to the extent that the provisions of such agreement relate to the purpose of this section. No such agreement authorization shall constitute a waiver of any permit, license, lease, or other authorization required under this act or under any other provision of state law or any regulation adopted by any agency or subdivision of this state. The board may establish procedures to govern the establishment or adoption of such cooperative unit agreements.

(b) Whenever the director finds that a geothermal resource area should be cooperatively operated as a unit to avoid waste, and the persons owning tracts or interests in such area refuse to enter into a cooperative agreement pursuant to subdivision (a) of this section, the board, after notice and hearing, may issue an order that such area shall be operated as a unit. Such order shall provide an equitable sharing of proceeds and liabilities from the geothermal resource area among the several owners of tracts and interests therein. [1972, ch. 301, § 14, p. 749; am. 1974, ch. 20, § 61, p. 533.]

Compiler's notes. Section 62 of S.L. 1971, ch. 20 provided that the appointive members of the water resource board serving on July 1, 1974 continue in office for the terms to which they were originally appointed subject to § 42-1732.

Section 63 of S.L. 1971, ch. 20, provided that the director of the department of water

administration serving on July 1, 1974 continue in office as the director of the department of water resources until January 6, 1975, subject to § 42-1803.

Section 64 of S.L. 1971, ch. 20, provided that this act take effect on and after July 1, 1974.

42-4014. Liberal construction. — This act shall be construed liberally to serve its purposes and policy. [1972, ch. 301, § 15, p. 749.]

Compiler's notes. For words "this act" see Compiler's notes, § 42-4001.

42-4015. Statutory construction. — Whenever the masculine gender is used in this act it shall read as the masculine, feminine, or neuter genders as may be appropriate; the singular form shall also be read as referring to the plural form wherever it is appropriate to do so. [1972, ch. 301, § 16, p. 749.]

Compiler's notes. Section 17 of S.L. 1972, ch. 301 read: "The provisions of this act are hereby declared to be severable and if any provision of this act or the application of such provision to any person or circumstance is

declared invalid for any reason, such declaration shall not affect the validity of remaining portions of this act."

Section 18 of S.L. 1972, ch. 301 declared an emergency. Approved March 27, 1972.

CHAPTER 41

WATER AND SEWER DISTRICT REVENUE BONDS

SECTION.

- 42-4101. Short title.
- 42-4102. Grant of authority.
- 42-4103. Definitions.
- 42-4104. Powers.
- 42-4105. Supervision of works.
- 42-4106. Works to be self-supporting.
- 42-4107. Use of works — Revenue.
- 42-4108. Preliminary expenses.
- 42-4109. Resolution prior to construction — Election.

SECTION.

- 42-4110. Bonds — Form — Conditions.
- 42-4111. Bonds — Issuance — Terms — Conditions.
- 42-4112. Validity of bonds.
- 42-4113. Lien of bonds.
- 42-4114. District not liable on bonds.
- 42-4115. Works and bonds exempt from taxation.

42-4101. Short title. — The following eighteen (18) sections may be cited as the "Water and Sewer District Revenue Bond Act." [I.C., § 42-4101, as added by 1976, ch. 62, § 1, p. 211.]

42-4102. Grant of authority. — Any water and/or sewer district acquiring, constructing, reconstructing, improving, bettering or extending any works pursuant to this act, shall manage such works in the most efficient manner consistent with sound economy and public advantage, to the end that the services of such works shall be furnished at the lowest possible cost. No water and/or sewer district shall operate any works primarily as a source of revenue to the district, but shall operate all such works for the use and benefit of those served by such works and for the promotion of the welfare and for the improvement of the health, safety, comfort and convenience of the inhabitants of the water and/or sewer district. [I.C., § 42-4102, as added by 1976, ch. 62, § 1, p. 211.]

Sec. to sec. ref. This section is referred to in § 42-4104.

Municipal Corporations, Counties, and Other Political Subdivisions, §§ 569-574.

Collateral References. 56 Am. Jur. 2d,

39A C.J.S., Health, § 55, 56.

42-4103. Definitions. — For the purpose of this act, unless a different meaning clearly appears from the context, the following terms shall be ascribed the following meanings:

- (a) The term "works" shall include water systems and sewerage systems;
- (b) The term "water system" shall include reservoirs, storage facilities, water mains, conduits, aqueducts, pipelines, pumping stations, filtration

plants, and all appurtenances and machinery necessary or useful for obtaining, storing, treating, purifying or transporting water for domestic uses or purposes;

(c) The term “sewerage system” shall include intercepting sewers, outfall sewers, force mains, collecting sewers, pumping stations, ejector stations, treatment plants, structures, buildings, machinery, equipment, connections and all other appurtenances necessary, useful or convenient for the collection, transportation, treatment, purification, and disposal of the sewage of any district;

(d) The term “district” shall mean water and/or sewer districts and/or water or sewer subdistricts. [I.C., § 42-4103, as added by 1976, ch. 62, § 1, p. 211; am. 1996, ch. 73, § 2, p. 237.]

Compiler’s notes. Section 1 of S.L. 1996, ch. 73 is compiled as § 42-3218A.

42-4104. Powers. — In addition to the powers which it may now have, any district shall have power under and subject to the following provisions:

(a) To acquire by gift or purchase and to construct, reconstruct, improve, better or extend any works within or without the district, or partially within or partially without the district, or within any part of the district, and acquire by gift or purchase lands or rights in lands or water rights in connection therewith, including easements, rights of way, contract rights, leases, franchises, approaches, dams and reservoirs; to lease any portion of the excess or surplus capacity of any such works to any party located within or without the district, subject to the following conditions: that such capacity shall be returned or replaced by the lessee when and as needed by such district for the purposes set forth in section 42-4102, Idaho Code, as determined by the district; that the district shall not be made subject to any debt or liability thereby; and the district shall not pledge any of its faith or credit in aid to such lessee;

(b) To exercise the right of eminent domain for any of the works, purposes or use provided by this act, in like manner and to the same extent as provided in section 7-720, Idaho Code;

(c) To operate and maintain any works within or without the boundaries of the district, or partially within or without the boundaries of the district, or within any part of the district;

(d) To issue its revenue bonds hereunder to finance, in whole or in part, the cost of the acquisition, construction, reconstruction, improvement, betterment or extension of any works;

(e) To prescribe and collect rates, fees, tolls or charges, including the levy or assessment of such rates, fees, tolls or charges against governmental units, departments or agencies, including the state of Idaho and its subdivisions, for the services, facilities and commodities furnished by such works, and to provide methods of collections and penalties, including denial of service for nonpayment of such rates, fees, tolls or charges;

(f) To pledge an amount of revenue from such works (including improvement, betterment or extensions thereto, thereafter constructed or acquired)

sufficient to pay said bonds and interest as the same shall become due, and to create and maintain reasonable reserves therefor.

Such amount may consist of all or any part or portion of such revenues. In determining such cost, there may be included all costs and estimated costs of the issuance of said bonds; all engineering, inspection, fiscal and legal expenses and interest which it is estimated will accrue during the construction period and for six (6) months thereafter on money borrowed or which it is estimated will be borrowed pursuant to the water and sewer district revenue bond act.

(g) To issue bonds for the purpose of refunding any bonds theretofore issued under authority of the water and sewer district revenue bond act and to pay accrued interest and applicable redemption premiums on the bonds to be refunded, if the bonds to be refunded are due, callable or redeemable by their terms on or prior to the date that the refunding bonds are issued, or will become due, callable or redeemable by their terms within twelve (12) months thereafter, or if the bonds to be refunded, even though not becoming due, callable or redeemable within such period, are voluntarily surrendered by the holders thereof, for cancellation at the time of the issuance of the refunding bonds. All or part of any issue may be refunded and all or part of several issues may be refunded into a single issue of refunding bonds. There may be included with the refunding bonds, as part of a single issue, or in combination in one or more series, bonds for any other purpose or purposes for which bonds are authorized to be issued under the water and sewer district revenue bond act. Refunding bonds shall be issued and secured in such manner as may be provided in the proceedings authorizing their issuance and as otherwise provided in the water and sewer district revenue bond act, and such changes may be made in the security and revenue pledged to the payment of the bonds so refunded, as provided by the governing body in the proceedings authorizing such bonds. No election on the issuance of refunding bonds shall be required, but if by an increase in the amount of bonds or by changes in the security or pledged revenues, the requirements of the constitution for an election shall become applicable, or if refunding bonds are combined into a single issue with bonds authorized for nonrefunding purposes, then such bonds with changes in security or revenues, or such bonds in excess of the amount of bonds refunded, as the case may be, must have been approved at an election as otherwise provided in the water and sewer district revenue bond act and the constitution. Refunding bonds may be exchanged for not less than a like principal amount of bonds authorized to be refunded, may be sold, or may be exchanged in part and sold in part. If sold, the proceeds of the sale, not required for the payment of expenses, and in any event, in an amount sufficient to assure the retirement of the bonds refundable, when such bonds become available for retirement, if not applied to a simultaneous payment and cancellation of the bonds refunded shall be escrowed with a bank or trust company and may be invested in United States government obligations or in obligations unconditionally guaranteed by the United States of America in such manner as may be provided in the authorizing proceedings. [I.C., § 42-4104, as added by 1976, ch. 62, § 1, p. 211.]

Compiler's notes. The words enclosed in parentheses so appeared in the law as enacted.

Cited in: Payette Lakes Water & Sewer Dist. v. Hays, 103 Idaho 717, 653 P.2d 438 (1982).

42-4105. Supervision of works. — The construction, acquisition, improvement, equipment, custody, operation and maintenance of any works under the provisions of this act, and the collection of revenues therefrom for the service rendered thereby shall be under the supervision and control of the governing body of the district. [I.C., § 42-4105, as added by 1976, ch. 62, § 1, p. 211.]

42-4106. Works to be self-supporting. — The commissioners of the district issuing bonds pursuant to this act shall prescribe and collect reasonable rates, fees, tolls or charges for the services, facilities and commodities furnished by such works, and shall revise such rates, fees, tolls or charges from time to time, to provide that all such works shall be and always remain self-supporting. The rates, fees, tolls or charges prescribed shall be such as will produce revenue at least sufficient, (a) to pay when due all bonds and interest thereon for the payment of which such revenue is or shall have been pledged, charged or otherwise encumbered including reserves therefor, and (b) to provide for all expenses of operation and maintenance of such works, including reserves therefor. [I.C., § 42-4106, as added by 1976, ch. 62, § 1, p. 211.]

42-4107. Use of works — Revenue. — Any district issuing bonds under this act for the acquisition, construction, reconstruction, improvement, betterment or extension of any works, shall have the right to appropriate, apply or expend the revenue of such works for the following purposes: (a) to pay when due all bonds and interest thereon, for the payment of which such revenue is or shall have been pledged, charged or otherwise encumbered, including reserves therefor; (b) to provide for all expenses of operation, maintenance, replacement and depreciation of such works, including reserves therefor; (c) to pay and discharge notes, bonds or other obligations and interest thereon, not issued under this act for the payment of which the revenue of such works may have been pledged, charged or encumbered; (d) to pay and discharge notes, bonds or other obligations and interest thereon which do not constitute a lien, charge or encumbrance on the revenue of such works, which may have been issued for the purpose of financing the acquisition, construction, reconstruction, improvement, betterment or extension of such works; and (e) provide a reserve for improvements to such works. Unless and until full and adequate provision has been made for the foregoing purposes, no district shall have the right to transfer the revenue of such works to its general fund. [I.C., § 42-4107, as added by 1976, ch. 62, § 1, p. 211.]

42-4108. Preliminary expenses. — The district may provide for the payment of all necessary preliminary expenses actually incurred in the making of surveys, estimates of costs and revenues, employment of engineers and other employees, making of notices, taking of options, legal and

clerical help and all other expenses necessary to be made and paid prior to the authorization for the issuance of such revenue bonds, provided, that no such expenditures shall be made or paid unless an appropriation has been made therefor in the same manner as is required by law for district funds. Any funds so expended by the district shall be fully reimbursed and repaid to the district out of the sale of such revenue bonds before any other disbursements are made therefrom, and the amount so advanced by the district to pay such preliminary expenses shall be a first charge against the proceeds resulting from the sale of such revenue bonds until the same has been repaid as herein provided. [I.C., § 42-4108, as added by 1976, ch. 62, § 1, p. 211.]

42-4109. Resolution prior to construction — Election. — Before any district shall construct or acquire any works under this act, the commissioners of such district shall enact a resolution or resolutions which shall, (a) set forth a brief and general description of the works, and if the same are to be constructed, a reference to the preliminary report or plans and specifications which shall theretofore have been prepared and filed by an engineer chosen for that purpose; (b) set forth the cost thereof estimated by the engineer chosen as aforesaid; (c) order the construction or acquisition of such works; (d) direct that revenue bonds of the district shall be issued pursuant to this act in such amount as may be necessary to pay the cost of the works; and (e) contain such other provisions as may be necessary in the proposal.

Such resolution shall be passed and approved as provided by law for the enactment of general resolutions, but such district shall not, without the assent of a majority of the qualified electors voting at an election to be held for such purpose, issue revenue bonds for the purpose of providing funds to own, purchase, construct, extend or equip, within and without the corporate limits of such district, water systems, sewerage systems, water treatment plants and sewerage treatment plants, the principal and interest of which to be paid solely from the revenue derived from rates and charges for the use of, and the service rendered by such systems, plants and facilities.

Said resolutions shall provide for the holding of said election in the manner set forth in chapter 14, title 34, Idaho Code. The notice of election shall set forth the purpose of said resolution, the amount of bonds authorized by it, the maturity dates of said bonds, the maximum rate of interest they shall draw, the voting places, the hours between which the polls will be open and the qualifications of voters who may vote thereat. Such election shall be conducted as are other district elections. The voting at such elections must be by ballot, and the ballots used shall be substantially as follows:

“In favor of issuing revenue bonds for the purposes provided by Resolution No.”

“Against the issuance of revenue bonds for the purposes provided by Resolution No.”

If, at such election, a majority of the qualified electors, voting at such election, vote in favor of issuing such revenue bonds, then such district may

issue such bonds and create such indebtedness or liability in the manner and for the purpose specified in said resolution. [I.C., § 42-4109, as added by 1976, ch. 62, § 1, p. 211; am. 1994, ch. 51, § 1, p. 89.]

42-4110. Bonds — Form — Conditions. — Revenue bonds issued under authority of this act shall be sold, executed and delivered at public or private sale in the manner as provided by the municipal bond law. Revenue bonds may also be sold by electronic bidding as provided in section 57-233, Idaho Code. The resolution authorizing the issuance of said bonds shall prescribe the form of bonds. Said bonds shall bear interest at a rate or rates, payable annually, or at such lesser intervals as may be prescribed by resolution; may be in one (1) or more series, bear such date or dates, mature at such time or times, and be redeemable before maturity at the option of the district; may be payable in such medium of payment, at such place or places, may carry such registration privileges, may be subject to such terms of redemption, may contain such terms, covenants and conditions, and may be in such form, either coupon or registered, as such resolution may provide. Said bonds shall be sold at not less than par with accrued interest. Pending preparation of the bonds, interim certificates, in such form and with such provisions as the commissioners may determine, may be issued. Said bonds and interim certificates shall be fully negotiable within the meaning of and for all the purposes of the negotiable instruments law.

Notwithstanding the provisions of the municipal bond law, the governing body in any proceedings authorizing bonds under this act may:

(a) Provide for the initial issuance of one (1) or more bonds, in this act called "bond," aggregating the amount of the entire issue;

(b) Make such provision for installment payments of the principal amount of any such bond as it may consider desirable;

(c) Provide for the making of any such bond payable to bearer or otherwise, registrable as to principal or as to both principal and interest, and where interest accruing thereon is not represented by interest coupons, for the endorsing or payments of interest on such bonds; and

(d) Further make provision in any such proceedings for the manner and circumstances in and under which any such bond may in the future, at the request of the holder thereof, be converted into bonds of smaller denominations, which bonds of smaller denominations may in turn be either coupon bonds or bonds registrable as to principal, or principal and interest, or both. [I.C., § 42-4110, as added by 1976, ch. 62, § 1, p. 211; am. 2001, ch. 264, § 1, p. 967.]

Compiler's notes. Section 2 of S.L. 2001, ch. 264, is compiled as § 57-214.

42-4111. Bonds — Issuance — Terms — Conditions. — Whenever revenue bonds are authorized to be issued, the district commissioners shall by resolution provide for the issuance thereof. The resolution authorizing the issuance of said revenue bonds, for the purpose authorized, shall contain covenants as to:

- (a) The purpose or purposes to which the proceeds of the sale of said bonds may be applied and the use and disposition thereof;
- (b) The use and disposition of the revenue of the works for which said bonds are to be issued, including the creation and maintenance of reserves;
- (c) The issuance of other or additional bonds payable from the revenue of such works;
- (d) The operation and maintenance of such works;
- (e) The insurance to be carried thereon, the use and disposition of insurance moneys;
- (f) Books of account and inspection and audit thereof;
- (g) The terms and conditions upon which the holders thereof or any trustee therefor shall be entitled to the appointment of a receiver which receiver may enter and take possession of such works, operate and maintain the same, prescribe rates, fees, tolls or charges and collect, receive and apply all revenue thereafter arising therefrom in the same manner as the district itself might do. The provisions of this section and of any such resolution shall be a contract with the holder of said bonds and the duties of the district and its commissioners under this section and under such resolution, shall be enforceable by the holder by mandamus or other appropriate suit, action or proceedings at law or in equity. [I.C., § 42-4111, as added by 1976, ch. 62, § 1, p. 211.]

42-4112. Validity of bonds. — Any resolution authorizing said bonds may provide that the bonds shall contain a recital that they are issued pursuant to the water and sewer district revenue bond act, which recital shall be conclusive evidence of their validity and of the regularity of their issuance. [I.C., § 42-4112, as added by 1976, ch. 62, § 1, p. 211.]

42-4113. Lien of bonds. — All bonds of the same issue shall, subject to the prior and superior rights of outstanding bonds, claims or obligations, have prior and paramount lien on the revenue of the works for which said bonds have been issued, except that where provision is made in the resolution authorizing any issue or series of bonds for the issuance of additional bonds in the future on a parity therewith pursuant to procedures or restrictions provided in such resolution, additional bonds may be issued in the future on a parity with such issue or series in the manner so provided in such resolution. All bonds of the same issue shall be equally and ratably secured without priority by reason of number, date of bonds, date of sale, date of execution, or date of delivery, by a lien on said revenue in accordance with the provisions of the water and sewer revenue bond act and the resolution authorizing said bonds. [I.C., § 42-4113, as added by 1976, ch. 62, § 1, p. 211.]

42-4114. District not liable on bonds. — Bonds issued pursuant to the water and sewer district revenue bond act shall not be a debt of the district and the district shall not be liable thereon, nor shall they be payable out of any funds other than the revenue pledged to the payment thereof. Each bond issued under the water and sewer district revenue bond act shall

recite, in substance, that said bond, including interest thereon, is payable solely from the revenue pledged to the payment thereof. Bonds may be issued under the water and sewer district revenue bond act notwithstanding and without regard to any limitation or restriction on the amount or percentage of indebtedness, or of outstanding obligations of a district. [I.C., § 42-4114, as added by 1976, ch. 62, § 1, p. 211.]

42-4115. Works and bonds exempt from taxation. — So long as a district shall own any works, the property and revenue of such works shall be exempt from taxation. Bonds issued under the water and sewer district revenue bond act and the income therefrom shall be exempt from taxation, except transfer and estate taxes. [I.C., § 42-4115, as added by 1976, ch. 62, § 1, p. 211.]

Compiler's notes. Section 2 of S.L. 1976, ch. 62, read: "The district is hereby authorized to issue and sell any revenue bonds authorized by the electorate on or after January 1, 1974."

Section 3 of S.L. 1976, ch. 62, read: "The provisions of this act are hereby declared to be

severable and if any provision of this act or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of remaining portions of this act."

Section 4 of S.L. 1976, ch. 62, declared an emergency. Approved March 10, 1976.

CHAPTER 42

GROUND WATER RECHARGE

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- 42-4230. Exclusion to be recorded.
- 42-4231. Severability.

42-4201. Jerome, Lincoln, Gooding and Twin Falls counties — Project to recharge ground water basins — Director's authority to issue permit — Limitations. — (1) The welfare of the people of the state of Idaho is dependent upon the conservation, development, augmentation and optimum use of the water resources of this state. The legislature deems it essential therefore that every effort be made to foster and encourage water projects designed to promote these objectives. The legislature hereby acknowledges that the proposed project to recharge ground water basins in Jerome, Lincoln and Gooding counties by means of the storage of unappropriated waters of the Snake River and its tributaries in underground lava beds within that vicinity represents a unique and innovative endeavor to further water conservation and increase the water available for beneficial use. The legislature approves this undertaking as a pilot effort to bring about maximum realization of our water resource potential and finds, in particular, that this project shall serve the interests of the public and advance the multiple use water policy of this state by:

- (a) sustaining and increasing the flow of springs in the general vicinity of the Hagerman Valley;
- (b) increasing the water available for withdrawal from ground water basins located in Jerome, Gooding and Lincoln counties;
- (c) supplementing the supply of water available for irrigation downstream from the Hagerman Valley;
- (d) providing additional aquatic habitats for migratory fowl and wildlife; and
- (e) increasing and sustaining the flow of the Snake River during the summer months and in times of drought when additional flow is needed for the generation of hydroelectric power and the maintenance of water recreation facilities.

(2) In view of the public betterment to be achieved by the completion of this water project, the legislature hereby declares that the appropriation and underground storage of water by the aquifer recharge district hereinafter created for purposes of ground water recharge shall constitute a beneficial use and hereby authorizes the department of water resources to issue to the aquifer recharge district a permit, pursuant to section 42-203 [42-203A], Idaho Code, for the appropriation and underground storage of the unappropriated waters of the Snake River in Jerome, Lincoln and Gooding counties and its tributaries in Gooding and Lincoln counties. The department of water resources is further authorized to issue to the aquifer recharge district a license confirming the right to appropriate such waters for the beneficial use herein established upon compliance by the district with the requirements specified in chapter 2, title 42, Idaho Code. The rights acquired by the aquifer recharge district pursuant to any permit and license obtained as herein authorized shall be secondary to all prior perfected water rights, including those held by any privately-owned electrical generating company to appropriate waters in the reaches of the Snake River downstream from the Milner diversion for purposes of hydroelectric power generation.

(3) The director of the department of water resources may regulate the amount of water which the aquifer recharge district may appropriate from the Snake River and may reduce such amount, even though there is sufficient water to supply the entire amount originally authorized, but only if the following conditions are met:

- (a) the amount of water available for appropriation by the district at the time the reduction is sought exceeds two hundred thousand (200,000) acre feet per year and the reduction, if granted, will not operate to deplete that amount to less than two hundred thousand (200,000) acre feet per year;
 - (b) the persons or entities seeking the reduction propose to use the water for purposes of surface reservoir storage and appropriation by the district of the entire amount originally authorized will prevent or adversely affect accomplishment of those purposes;
 - (c) the persons or entities seeking the reduction present substantial and compelling evidence to show that the accomplishment of such purposes will be prevented or adversely affected and the director finds on the basis of such evidence that sufficient justification for the reduction exists.
- Even if the foregoing conditions are satisfied and a reduction is granted, such a reduction shall remain in effect only so long as the amount of water available for appropriation by the district exceeds two hundred thousand (200,000) acre feet per year.

The provisions of this subsection shall not apply to appropriation of water by the district from the Big Wood River or the Little Wood River.

(4) To insure that other water rights are not injured by the operations of the aquifer recharge district, the director of the department of water resources shall have the authority to approve, disapprove, or require alterations in the methods employed by the district to achieve ground water recharge. In the event that the director determines that the district's methods of operation are adversely affecting existing water rights or are creating conditions adverse to the beneficial use of water under existing water rights, the director shall order the cessation of operations until such alterations as may be ordered by the director have been accomplished or such adverse effects otherwise have been corrected.

(5) The fee required for an application for a permit to appropriate water as provided in section 42-221, Idaho Code, is hereby waived from the effective date of this act until July 1, 1997, for recharge projects for recharge districts formed under this section. [I.C., § 42-4201, as added by 1978, ch. 293, § 1, p. 723; am. 1994, ch. 273, § 1, p. 849; am. 1995, ch. 338, § 1, p. 1117.]

Compiler's notes. The bracketed reference "42-203A" in subsection (2) of this section was inserted by the compiler since § 42-203 was amended and redesignated as § 42-203A by S.L. 1985, ch. 17, § 1.

Section 2 of S.L. 1994, ch. 273 declared an emergency. Approved March 30, 1994.

Sec. to sec. ref. This chapter is referred to in § 43-304.

This section is referred to in § 42-4223.

42-4201A. Recharge of ground water basins — Director's authority to issue permit. — (1) The welfare of the people of the state of Idaho is dependent upon the conservation, development, augmentation and opti-

imum use of the water resources of this state. The legislature deems it essential therefore that every effort be made to foster and encourage water projects and water use that will augment ground water basin recharge. The legislature hereby acknowledges that certain water uses and proposed projects to recharge water basins in the state by means of the storage of unappropriated waters of the public waters of the state in underground aquifers represents a unique and innovative endeavor to further water conservation and increase the water available for beneficial use.

(2) In view of the public betterment to be achieved by the completion of aquifer recharge projects, the legislature hereby declares that the appropriation and underground storage of water by any person, aquifer recharge district, irrigation district, canal company or water district for purposes of ground water recharge shall constitute a beneficial use and hereby authorizes the department of water resources to issue a permit, pursuant to section 42-203 [42-203A], Idaho Code, for the appropriation and underground storage of the unappropriated waters of the state. The department of water resources is further authorized to issue a license confirming the right to appropriate such waters for the beneficial use herein established upon compliance with the requirements specified in chapter 2, title 42, Idaho Code. The rights acquired pursuant to any permit and license obtained as herein authorized shall be secondary to all prior perfected water rights, including those water rights for power purposes that may otherwise be subordinated by contract entered into by the governor and Idaho power company on October 25, 1984, and ratified by the legislature pursuant to section 42-203B, Idaho Code.

(3) The director of the department of water resources may regulate the amount of water which may be diverted for recharge purposes and may reduce such amount, even though there is sufficient water to supply the entire amount originally authorized by permit or license. To facilitate necessary financing of an aquifer recharge project, the director may fix a term of years in the permit or license during which the amount of water authorized to be diverted shall not be reduced by the director under the provisions of this subsection.

(4) To insure that other water rights are not injured by the operations of an aquifer recharge project, the director of the department of water resources shall have the authority to approve, disapprove, or require alterations in the methods employed to achieve ground water recharge. In the event that the director determines that the methods of operation are adversely affecting existing water rights or are creating conditions adverse to the beneficial use of water under existing water rights, the director shall order the cessation of operations until such alterations as may be ordered by the director have been accomplished or such adverse effects otherwise have been corrected. [I.C., § 42-4201A, as added by 1982, ch. 204, § 1, p. 538; am. 1985, ch. 120, § 1, p. 292; am. 1994, ch. 274, § 1, p. 851.]

Compiler's notes. Concerning the contract of October 25, 1984, referred to in subsection (2), see S.L. 1985, ch. 14.

The bracketed reference "42-203A" in sub-

section (2) of this section was inserted by the compiler since § 42-203 was amended and redesignated as § 42-203A by S.L. 1985, ch. 17, § 1.

Section 2 of S.L. 1985, ch. 120 is compiled as § 43-304. emergency. Approved March 30, 1994.
Section 2 of S.L. 1994, ch. 274 declared an emergency. Approved March 30, 1994.
Sec. to sec. ref. This section is referred to in §§ 42-4223, 42-5225, and 43-343.

42-4202. Aquifer recharge district — Formation. — For purposes of formation of the aquifer recharge district, a petition shall be presented to the department of water resources which shall set forth the object of the organization of the district and the benefits to be provided by the district. The petition shall be accompanied by a map of the proposed district which shall indicate the proposed boundaries of the district, the nature and location of the proposed diversion works and other facilities by means of which water is to be diverted into the recharge area, shall delineate the underground water basin or basins to be affected by the recharge, and shall designate the location of any streams or springs which shall be affected by the recharge. The petition and map shall be accompanied by a statement describing the details of the contemplated diversion works and facilities and an estimate of the cost of constructing such works and facilities, which statement and estimates shall be certified to by an engineer licensed by the state of Idaho.

The petition shall be signed by no less than fifty (50) percent of the water users located within the proposed boundaries of the district. For purposes of this act, “water users” shall include the following:

(1) Individuals, or entities, exclusive of privately owned electrical generating companies, who are the holders of title or evidence of title to property, but without the boundaries of a municipality, who are the current holders of a right, acquired in accordance with the provisions of chapter 2, title 42, Idaho Code, to appropriate water in an amount equal to or in excess of one (1) cubic foot per second, and who divert water from underground basins within the area of recharge by means of a well or wells, or who divert water from springs or other water courses emerging from such underground basins, or both.

(2) Municipalities which obtain water from underground basins in the area of recharge. A municipality may elect to be included within the proposed district by a majority vote of the members of its city council. The mayor of any municipality so electing may sign the petition on behalf of the municipality, and such municipality shall constitute one water user for purposes of securing the minimum number of signatures required for the petition. [I.C., § 42-4202, as added by 1978, ch. 293, § 1, p. 723; am. 1979, ch. 8, § 1, p. 10; am. 1982, ch. 204, § 2, p. 538.]

Compiler’s notes. The words “this act” refer to S.L. 1978, ch. 293 which was compiled as most sections within §§ 42-4201 — 42-4231. Section 3 of S.L. 1982, ch. 204 is compiled as § 42-4204.
Sec. to sec. ref. This section is referred to in §§ 42-4206, 42-4207, 42-4224 and 42-4228.

42-4203. Formation of district — Declaration by director. — After receipt of the petition, map and statement, the director shall review and examine the same and may require the submission of such additional or revised data concerning the boundaries of the proposed district, the location and nature of the diversion works and facilities to be constructed, the costs

of construction or any other matter relevant to the formation of the district as he may deem necessary. The director shall conduct a hearing on the petition and supporting documents. Notice of the time and place of the hearing shall be published by the director in a newspaper or newspapers published in each of the counties or a newspaper of general circulation therein at least three (3) weeks before the date of the hearing.

Within ninety (90) days after the hearing has been concluded, the director after due consideration of all relevant data and testimony, shall determine whether the proposed district will provide the benefits described, whether the boundaries proposed are proper with respect to the benefits to be provided, and whether the formation of the district will serve the interests of the water users proposed to be benefited. On the basis of his determination, the director shall enter an order either establishing the aquifer recharge district and defining the boundaries thereof to reflect the area to be benefited, or denying the formation of the district. If the director orders formation of the district, he shall cause copies of the order, duly certified, to be filed with the secretary of state and board of county commissioners, county recorder, county assessor and county treasurer of each county in which any part of the district is situated. [I.C., § 42-4203, as added by 1978, ch. 293, § 1, p. 723; am. 1979, ch. 8, § 2, p. 10.]

Compiler's notes. Section 3 of S.L. 1979, ch. 8 declared an emergency. Approved March 1, 1979.

42-4204. Board of directors — Composition — Appointment of first board — Election of subsequent boards. — (1) The board of directors of the aquifer recharge district shall consist of five (5) members. Each member shall be a water user, or representative of a water user within the district. The members of the board shall be as follows:

- (a) one (1) member shall be a member of a lateral ditch water user's association, canal company, irrigation district or similar organization;
- (b) one (1) member shall be an owner or operator of a commercial fish hatchery licensed in accordance with the provisions of section 22-4602, Idaho Code;
- (c) one (1) member shall be a farmer or rancher who is an appropriator of groundwater and whose diversion thereof is accomplished primarily through the operation of a well or wells;
- (d) one (1) member shall be a member of the city council of a municipality within the district;
- (e) one (1) member shall be generally representative of the interests of water users within the district.

(2) The first board of directors shall be appointed by the director of the department of water resources. Water users within the district, or groups thereof, may submit to the director, or the director may solicit therefrom, the names of qualified individuals to be considered for appointment to the board.

(3) The term of office of the directors shall be determined by lot so that three (3) members shall serve for a term of two (2) years and two (2)

members shall serve for a term of one (1) year. Thereafter, members shall serve two (2) year terms and shall be elected as hereinafter provided.

(4) On the first Tuesday in February following the expiration of the term of those members serving for one (1) year, and on the first Tuesday in February of each year thereafter, an election shall be held in accordance with the provisions of chapter 14, title 34, Idaho Code, at which directors to succeed those whose terms have expired will be elected. Each director so elected shall possess the qualifications required of all members of the board and in addition shall possess the qualifications of the director whom he is to succeed in office.

In any election for director, if after the deadline for filing a declaration of intent as a write-in candidate, it appears that only one (1) qualified candidate has been nominated for a directors position, it shall not be necessary for the candidate to stand for election, and the board of trustees of the district shall declare such candidate elected as director, and the secretary of the district shall immediately make and deliver to such person a certificate of election. [I.C., § 42-4204, as added by 1978, ch. 293, § 1, p. 723; am. 1982, ch. 204, § 3, p. 538; am. 1985, ch. 10, § 1, p. 13; am. 1992, ch. 273, § 3, p. 844; am. 1995, ch. 118, § 76, p. 417.]

Compiler's notes. Sections 2 and 4 of S.L. 1982, ch. 204 are compiled as §§ 42-4202 and 42-4212, respectively.

Section 2 of S.L. 1985, ch. 10 is compiled as § 42-4207.

Section 2 of S.L. 1992, ch. 273 contained a

repeal and § 1 is compiled as §§ 22-4601 — 22-4605.

Sections 75 and 77 of S.L. 1995, ch. 118 are compiled as §§ 42-3717 and 42-4207, respectively.

42-4205. Municipalities — Manner of voting for directors. — Each municipality which has elected to be and is included within the district shall be entitled to one (1) vote for each director to be elected and the vote of the majority of the members of the city council of each such municipality shall constitute the vote of the municipality for each director to be elected. The voting shall be conducted at a regular meeting of the city council or a special meeting called by the mayor for that purpose to be held on or within a week prior to the date set for election. The voting results shall be certified to by the mayor and forwarded to the secretary of the district prior to the date set for canvassing of election returns by the board of directors. The provisions of section 42-4209, Idaho Code, shall not apply to municipalities. [I.C., § 42-4205, as added by 1978, ch. 293, § 1, p. 723.]

42-4206. Water users other than municipalities — Qualifications for voting. — Any water user, as defined in section 42-4202(1), Idaho Code, or a representative thereof, within the district who possesses the qualifications required of electors under the general laws of the state and who resides within a county or portion thereof situated within the district shall be entitled to vote at any election held under the provisions of this chapter. [I.C., § 42-4206, as added by 1978, ch. 293, § 1, p. 723.]

Sec. to sec. ref. This section is referred to in § 42-5107.

42-4207. Registration required. — Pursuant to the provisions of section 34-1402, Idaho Code, registration shall be required of qualified electors, as defined in section 42-4206, Idaho Code, in any election held in the aquifer recharge district. In addition to the requirements for registration, the election official shall also verify that the elector is a water user, as defined in section 42-4202(1), Idaho Code, or a representative of such a water user, within the district. [I.C., § 42-4207, as added by 1978, ch. 293, § 1, p. 723; am. 1985, ch. 10, § 2, p. 13; am. 1995, ch. 118, § 77, p. 417.]

Compiler's notes. Sections 1 and 3 of S.L. 1985, ch. 10 are compiled as §§ 42-4204 and 42-4211, respectively. Section 76 of S.L. 1995, ch. 118 is compiled as § 42-4204.

42-4208. Notice of election. — The secretary of the district shall give notice of all elections in the district by publication of the notice in accordance with the provisions of section 34-1406, Idaho Code. Notices shall state the time of said election and the location of polling places within the district and the directors to be elected or other question to be voted upon, as the case may be. [I.C., § 42-4208, as added by 1978, ch. 293, § 1, p. 723; am. 1995, ch. 118, § 78, p. 417.]

42-4209. Conduct of elections. — The election shall be conducted in accordance with the general laws of the state including the provisions of chapter 14, title 34, Idaho Code.

The board of directors shall designate polling places in such number as it may deem necessary. At least ten (10) days before the holding of any election, the board shall appoint three (3) electors to serve as judges of election at each polling place. The judges shall perform the same duties as judges of election under the general laws of the state. Immediately after the election, the judges of election shall forward the official results to the secretary of the district. [I.C., § 42-4209, as added by 1978, ch. 293, § 1, p. 723; am. 1995, ch. 118, § 79, p. 417.]

Compiler's notes. Section 80 of S.L. 1995, ch. 118 is compiled as § 42-4409. **Sec. to sec. ref.** This section is referred to in § 42-4205.

42-4210. Canvass of returns — Declaration of winners. — On the first Monday after each election, or at a time designated by the board of directors, the board shall meet at its usual place of meeting and proceed to canvass the returns. By order entered on its minutes, the board shall declare elected the person or persons having the highest number of votes for each office. [I.C., § 42-4210, as added by 1978, ch. 293, § 1, p. 723.]

42-4211. Board of directors — Officers — Meetings — Compensation — Vacancies. — (1) The board of directors annually shall elect a chairman from their number and shall appoint a secretary and a treasurer to hold office during the pleasure of the board. The treasurer shall on his appointment execute and file with the secretary an official bond in such amount as may be fixed by the board of directors, and shall thereafter from time to time execute and file such further bonds as may be required by the

board in amounts fixed by it, which amounts shall be at least fifty percent (50%) of the maximum probable amount of money in the treasurer's hands at any one time. All such official bonds shall be executed by a lawfully qualified surety company.

(2) The board of directors shall hold a regular annual meeting and may hold such special meetings as may be necessary for the proper transaction of business. Special meetings may be held on seventy-two (72) hours' notice of the chairman or a majority of the members. A majority shall constitute a quorum for the transaction of business and the concurrence of a majority of the members shall be necessary to constitute the action of the board. All meetings of the board shall be public and all records of the board shall be open to the inspection of any member water user, or representative thereof during business hours.

(3) The members of the board shall each receive not more than twenty-five dollars (\$25.00) nor less than five dollars (\$5.00) per day for each day spent attending the meetings or while engaged in official business of the board, and actual and necessary travel expenses. The term "actual and necessary expenses" shall include all traveling and lodging expenses necessarily incurred by any director when absent from his residence in the performance of the duties of his office. The board shall fix the compensation to be paid to the other officers of the district.

(4) In case of a vacancy in the office of director occurring otherwise than by the expiration of a term, the remaining members of the board of directors shall fill such vacancy by appointing thereto a qualified water user, member of the district, or representative thereof, possessing the qualifications of the director whose office has become vacant to serve the remainder of the term. [I.C., § 42-4211, as added by 1978, ch. 293, § 1, p. 723; am. 1985, ch. 10, § 3, p. 13.]

Compiler's notes. Section 2 of S.L. 1985, ch. 10 is compiled as § 42-4207.

Section 4 of S.L. 1985, ch. 10 declared an emergency. Approved February 26, 1985.

42-4212. Powers and duties of the board of directors. — The board shall have the following powers and duties:

- (1) to manage and conduct the business and affairs of the districts;
- (2) to employ and appoint such agents, officers and employees as may be required and prescribe their duties;
- (3) to make and execute all necessary contracts, including contracts for the construction of diversion works and other facilities, contracts for the transportation of water through existing canals or other diversion works owned or operated by a canal company or companies or other entity or entities, and contracts with those persons and/or entities designated in section 42-4223, Idaho Code, for the purposes therein specified;
- (4) to construct and operate diversion works, recharge ponding areas and injection wells, subject to such standards and specifications as the director of the department of water resources shall determine;
- (5) to obtain from the federal government such permits as may be required for the accomplishment of the purposes of the district;

(6) to enter upon any land and make surveys for purposes of determining the best location for the diversion works and other facilities necessary to accomplish the purposes of the district;

(7) to acquire, either by purchase, condemnation or other legal means, all lands and other property necessary for the construction, use and supply, maintenance, repair and improvement of diversion works and facilities. The power of condemnation shall be limited to the acquisition of land and/or easements for right-of-way purposes only. The appropriation and storage underground of waters by the aquifer recharge district, together with the acquisition of such rights-of-way for the construction, maintenance and improvement of such diversion works and facilities as are necessary to the accomplishment of the purposes of the district is hereby declared to be a public use, subject to the regulation and control of the state in the manner prescribed by law.

(8) to levy assessments for the maintenance and operation of the diversion works and facilities of the district, as well as assessments for the payment of such fees as are charged to the district by any canal company or companies or other entity or entities owning or operating canals or other diversion works used by the district;

(9) to levy assessments for the retirement of indebtedness incurred for purposes of financing construction of the diversion works and facilities of the district and the construction of such capital improvements thereto as are deemed necessary by the board;

(10) to incur indebtedness, the term of which shall not exceed ten (10) years, by contract with a money-lending institution;

(11) to do any and every lawful act necessary to be done that the provisions of this chapter may be carried out.

(12) At such intervals as the director of the department of water resources shall establish, the board of directors shall report to the director, in the form and manner prescribed by him, concerning the operations of the district. The report shall indicate the amount of water being diverted by the district for purposes of recharge, the locations of the points of recharge, the flow of water at those discharge points affected by the recharge and such other information as the director may require.

(13) The board of directors annually shall submit to the director of the department of water resources a financial report setting forth the financial condition of the district. The report shall be in the form prescribed by the director and shall specify the amount of the assessments levied by the district for that year, the outstanding obligations of the district, and such other information as the director may require. The director shall have the authority to conduct an audit of the financial transactions and operations of the district. [I.C., § 42-4212, as added by 1978, ch. 293, § 1, p. 723; am. 1982, ch. 204, § 4, p. 538.]

42-4213. Legal title to property. — The legal title to all property acquired under the provisions of this chapter shall immediately, and by operation of law, vest in the aquifer recharge district and shall be held by the district in trust for, and is hereby dedicated and set apart to, the uses and purposes set forth in this chapter. The board of directors is hereby authorized and empowered to hold, use, acquire, manage, occupy and possess said property as herein provided. [I.C., § 42-4213, as added by 1978, ch. 293, § 1, p. 723.]

42-4214. Conveyance of property — Actions. — The board is hereby authorized and empowered to take conveyance of or other assurances for all property acquired by it under the provisions of this chapter in the name of the district for the purposes herein expressed. The board may institute and maintain any and all actions and proceedings, and suits at law and in equity necessary or proper to [in] order to carry out the provisions of this chapter, or to enforce, maintain, protect or preserve any and all rights created by this chapter or acquired in pursuance thereof. In all courts, actions, suits or proceedings the board may sue, appear and defend, in person or by attorneys and in the name of the aquifer recharge district. [I.C., § 42-4214, as added by 1978, ch. 293, § 1, p. 723.]

Compiler's notes. The bracketed word "in" in the second sentence was inserted by the compiler.

42-4215. Levy of assessments. — The secretary of the board of directors shall be the assessor of the district, and on or before August 1 of each year shall prepare an assessment book containing a full and accurate list of all water users within the district.

At a regular meeting of the board between August 1 and November 1 of each year, the board of directors shall determine the amount necessary to be raised for the maintenance and operation of the works and facilities of the district and the payment of such fees as may be charged to the district for the use of canals or other diversion works owned or operated by a canal company or companies or other entity or entities, and shall levy assessments against the water users in the district sufficient to raise such amount. Moneys received in payment of such assessments shall be deposited in a separate fund to be known as the maintenance and operation fund. The board also may levy assessments against the water users in the district for the repayment of indebtedness incurred by the board on behalf of the district, as provided in section 42-4216, Idaho Code. Money received in payment of such assessments shall be deposited in a separate fund to be known as the debt retirement fund. The board of directors may, in addition, determine the amount necessary to pay the expenses of making the assessment book, giving notice of assessments and making collections thereof and may levy assessments against the water users in the district sufficient to raise such amount. Moneys received in payment of such assessments shall be deposited in a separate fund to be known as the assessment expense fund.

Each water user shall pay a proportionate share of the total of all amounts to be raised for the purposes aforementioned, which share shall be based on the ratio which the quantity of water such water user is authorized to appropriate under his water right or rights bears to the total quantity of water authorized for appropriation under the water rights of all water users in the district; provided, however, that the combined annual assessment against each water user shall not exceed ten dollars (\$10.00) per second foot of water the water user is entitled to appropriate under his water right or rights. [I.C., § 42-4215, as added by 1978, ch. 293, § 1, p. 723.]

Sec. to sec. ref. This section is referred to in §§ 42-4217, 42-4219 and 42-4228.

42-4216. Power to incur indebtedness — Assessments to secure repayment. — In order to secure funds for the construction of diversion works and facilities of the district, or the construction of any capital improvements thereto, the board of directors may, by resolution duly adopted and entered upon the minutes, incur indebtedness by contract with a money-lending institution; provided, however, that the term of such indebtedness shall not exceed ten (10) years. To secure the repayment of any indebtedness so incurred, the board shall levy assessments over the term of the indebtedness in amounts sufficient to repay the interest and principal as it falls due. Such assessments shall be levied in the manner and shall be subject to the limitations set forth in section 42-4215, Idaho Code. [I.C., § 42-4216, as added by 1978, ch. 293, § 1, p. 723.]

42-4217. Lending institutions — Right to compel assessments — Alternative remedy. — If in any year the board of directors fails to levy assessments for the repayment of indebtedness in amounts sufficient to meet a payment or payments falling due, the lender may bring an action in the district court of any county in which the district is situated to compel the board to levy assessments in amounts sufficient to insure the payment thereof; provided, however, that the board may not be compelled to increase assessments for the repayment of indebtedness if the maximum annual assessment limitation specified in section 42-4215, Idaho Code, will be exceeded thereby. In the event that the maximum annual assessment limitation has been reached and the assessments for repayment of indebtedness nevertheless will be insufficient to meet a payment of [or] payments falling due, the lender may, in the alternative, seek an order requiring that moneys received by the district in payment of assessments for all purposes be first expended for the repayment of that portion of the indebtedness falling due. [I.C., § 42-4217, as added by 1978, ch. 293, § 1, p. 723.]

Compiler's notes. The bracketed word "or" in the second sentence was inserted by the compiler.

42-4218. Lien of assessment. — From and after January 1 of any year, all assessments, other than those levied against municipalities, shall be

liens against the property of water users to which the water rights used to determine assessments are appurtenant. Such liens shall not be removed until the assessments are paid or the property is sold for the payment thereof. [I.C., § 42-4218, as added by 1978, ch. 293, § 1, p. 723.]

Sec. to sec. ref. This section is referred to in § 42-4228.

42-4219. Payment of assessments — When delinquent — Interest and penalties. — Assessments shall be due and payable on or before December 31 of each year. On or before the first day of December, the treasurer of the district shall publish a notice for a period of not less than two (2) weeks in a newspaper published or having general circulation in each of the counties in which any part of the district is situated setting forth the date by which assessments must be paid and the times and places at which payment may be made.

Assessments unpaid on December 31 shall be delinquent and shall bear interest at the rate of eight percent (8%) per annum until paid. Delinquent assessments, in addition, shall be subject to a penalty in the amount of fifty cents (\$.50) per second foot of water the water user is entitled to appropriate under the water right or rights forming the basis of his assessment.

The maximum annual assessment limitation specified in section 42-4215, Idaho Code, shall apply only to the amount of the assessment itself, and the interest and penalty herein prescribed shall be collectible along with the amount of the delinquent assessment, notwithstanding that the assessment itself is at the maximum specified in that section. [I.C., § 42-4219, as added by 1978, ch. 293, § 1, p. 723.]

Sec. to sec. ref. This section is referred to in §§ 42-4222 and 42-4228.

42-4220. Entry of delinquent assessments — Filing of delinquency list. — On or before the 15th day of January of each year the treasurer shall enter the amount of all delinquent assessments upon the assessment book, which entry shall be considered to be dated as of the first day of January. Such entry shall have the force and effect of a sale to the treasurer of the district as grantee in trust for the district of all property to which a lien has attached as a result of such unpaid assessments.

The treasurer shall compile a list of such delinquency entries which shall contain the names of the persons or entities to whom the assessments were directed and the amount of such delinquent assessments together with the amount of the penalties to be added thereto. A certified copy of the delinquency list shall be filed with the county recorder of each county in which the properties affected by such delinquent assessments are located. [I.C., § 42-4220, as added by 1978, ch. 293, § 1, p. 723.]

Sec. to sec. ref. This section is referred to in §§ 42-4222 and 42-4228.

42-4221. Redemption and sale of property subject to delinquent assessments. — The manner in which property subject to a lien for nonpayment of assessments may be redeemed, and if not redeemed, shall be sold as provided in sections 43-712, 43-715 through 43-721, 43-724 and 43-726, Idaho Code, to the extent that the provisions thereof are in keeping with the provisions of this chapter. [I.C., § 42-4221, as added by 1978, ch. 293, § 1, p. 723.]

Sec. to sec. ref. This section is referred to in § 42-4228.

42-4222. Municipalities — Special tax to procure funds for payment of assessments. — Municipalities shall be solely liable for payment of the assessments levied against them, but in order that sufficient funds shall be available therefore, municipalities within the district are hereby empowered and directed to levy a special tax upon all the taxable property within the municipality in an amount equal to the assessment.

Assessments against municipalities unpaid on the date specified in section 42-4219, Idaho Code, shall become delinquent, shall bear interest and shall be subject to the penalty as therein provided, but the provisions of sections 42-4220 and 42-4221, Idaho Code, shall not apply thereto. The board of directors may proceed in any other manner authorized by law for the collection of any such delinquent assessments. [I.C., § 42-4222, as added by 1978, ch. 293, § 1, p. 723.]

Sec. to sec. ref. This section is referred to in § 42-4228.

42-4223. Contracts to receive benefits. — Any privately owned electrical generating company, or any person or entity who has acquired or is in the process of acquiring a right to appropriate water downstream from the boundaries of the district may enter into a contract with the board of directors of the aquifer recharge district for the receipt of benefits from the district. The consideration to be paid by any company, person or entity so contracting shall be as specified in the contract. Approval of any such contract by the director of the department of water resources shall be required before the contract shall become effective.

A contract executed and approved as herein provided may be used by the department of water resources as the basis for issuance of a permit to the electrical generating company or downstream appropriator for the appropriation and storage of such water as shall become available thereto as a result of the functioning of the district. Water appropriated under any such permit shall be deemed to be stored water and the use and manner of appropriation thereof shall be subject to all applicable limitations and restrictions imposed by law, including the provisions of subsection (3) of section 42-4201 or subsection (3) of section 42-4201A, Idaho Code.

Prior to the formation of the aquifer recharge district, any such electrical generating company or downstream appropriator may file with the director of the department of water resources a letter of intent to enter into such a

contract. [I.C., § 42-4223, as added by 1978, ch. 293, § 1, p. 723; am. 1982, ch. 204, § 5, p. 538.]

Compiler's notes. Section 4 of S.L. 1982, ch. 204 is compiled as § 42-4212.

Sec. to sec. ref. This section is referred to in § 42-4212.

42-4224. Water users subject to inclusion within the district. —

(1) All water users, as defined in section 42-4202(1), Idaho Code, included within the district and who have not obtained exclusion as hereinafter provided, shall remain within and be subject to assessment by the district, notwithstanding the absence of their signatures on the petition for formation of the district, and notwithstanding any change in the ownership or control of the property of the water user, whether by way of transfer, exchange, conveyance, assignment, lease, or otherwise, to which the water right or rights used to determine assessments are appurtenant. Municipal water users, as defined in section 42-4202(2), Idaho Code, included within the district shall remain at their election, within and be subject to assessment by the district unless excluded in the manner hereinafter provided.

(2) Any water user, as defined in section 42-4202(1), Idaho Code, who has obtained exclusion from the district, but who nevertheless is benefited by the district, shall remain excluded; provided, however, that any person or entity succeeding the water user in the ownership or control of property, whether by way of transfer, exchange, conveyance, assignment, lease, or otherwise, to which is appurtenant a water right that, barring the exclusion, would have been used to determine assessments, shall be deemed included within and subject to assessment by the district.

(3) Any individual or entity whose permit to appropriate water was acquired after the formation of the district, but who qualifies as a water user under section 42-4202(1), Idaho Code, in all other respects, shall be deemed included within and subject to assessment by the district if benefited either directly or indirectly by the district. [I.C., § 42-4224, as added by 1978, ch. 293, § 1, p. 723.]

42-4225. Exclusion from the district — Procedure — Grounds for exclusion. — After the formation of the district, any water user included within the district may file with the board of directors a petition in writing praying for exclusion from the district. All water users seeking exclusion as are united in interest or to which the same state of facts apply may unite in the same petition. The grounds for exclusion and the time limitations for filing any petition hereunder shall be as follows:

(1) The water user will not be benefited by the functioning of the district. A petition alleging this ground for exclusion must be filed within ninety (90) days after the formal appointment of the first board of directors by the department of water resources. Any such petition filed after the ninety (90) day period has elapsed shall not be accepted or considered.

(2) The water user has not benefited by the functioning of the district. A petition alleging this ground for exclusion shall be filed no earlier than five (5) years after the declaration of the formation of the district by the director of the department of water resources.

A petition alleging either of the foregoing grounds for exclusion shall be acknowledged by all the petitioners and shall state in detail the reasons why it is claimed that the petitioners should be excluded from the district.

Immediately after their formal appointment, the board of directors shall cause notice of the deadline for filing petitions under the provisions of subsection (1) of this section and a copy of the order of formation of the district and a map indicating the boundaries of the district to be posted in three (3) public places in each county in which a part of the district is situated. In addition, the board shall publish notice of the deadline and the locations at which the order of formation and map of the district may be inspected for at least four (4) successive weeks in a newspaper published or having general circulation in each of the counties in which any part of the district is situated. [I.C., § 42-4225, as added by 1978, ch. 293, § 1, p. 723.]

Sec. to sec. ref. This section is referred to in § 42-4228.

42-4226. Hearing — Notice — Entry of order. — (1) The petition shall be heard by the board of directors within sixty (60) days of filing of the petition and if no hearing is held within that time the petitioner or petitioners shall be deemed excluded from the district. If, prior to the date set for the hearing, the board issues an order excluding the petitioner or petitioners, no hearing need be held. The board shall give each petitioner notice of the time and place of the hearing in writing not less than fifteen (15) days prior to the hearing. It shall be sufficient to mail such notice by certified or registered mail to each petitioner's mailing address as indicated on the petition.

(2) At the hearing, if any, the petitioner or petitioners must establish by competent evidence the allegations of the petition. The chairman of the board is hereby empowered to administer oaths for the purpose of the hearing. If the allegations of the petition are established the board shall enter an order excluding the petitioner or petitioners, or any of them, from the district, which order shall reflect the nature of any outstanding and/or continuing liabilities to which the petitioner so excluded shall remain subject under the provisions of section 42-4228, Idaho Code. [I.C., § 42-4226, as added by 1978, ch. 293, § 1, p. 723.]

42-4227. Appeal. — An appeal shall lie from a decision of the board of directors denying the petition or any part thereof to the district court of the county where the water user or water users are located. The appeal shall be taken in the same manner as appeals are taken from the board of county commissioners. If the district court excludes the water user or water users, or any of them, the time of exclusion shall date from the time of the hearing before the board of directors. The order of the district court excluding a water user or water users shall reflect the nature of any outstanding and/or continuing liabilities to which each water user so excluded shall remain subject under the provisions of section 42-4228, Idaho Code. [I.C., § 42-4227, as added by 1978, ch. 293, § 1, p. 723.]

42-4228. Effect of exclusion on liability for assessments. — Any water user excluded from the district on the grounds specified in section 42-4225(1), Idaho Code, shall not be subject to assessment by the district for any purpose. Any water user excluded from the district on the grounds specified in section 42-4225(2), Idaho Code, shall not be subject to assessment for maintenance and operation of the works and facilities of the district or for assessment expenses after the entry of the order of exclusion, or in case of appeal, the effective date of exclusion, but shall remain subject to the following liabilities until discharged:

(1) Such excluded water user shall remain liable for payment of assessments previously levied and unpaid at the time of the entry of the order of exclusion, or in case of appeal, the effective date of exclusion;

(2) Such excluded water user, notwithstanding his exclusion, shall remain liable to pay his proportionate share, such share to be computed as specified in section 42-4215, Idaho Code, of any indebtedness of the district already incurred and outstanding at the time of the entry of the order of exclusion, or in case of appeal, the effective date of exclusion, but such water user shall not be liable upon any indebtedness incurred thereafter.

Any water user, as defined in section 42-4202(1), Idaho Code, who, after exclusion, remains subject to either or both of the liabilities specified herein shall, in addition, remain subject to the provisions of sections 42-4218, 42-4219, 42-4220 and 42-4221, Idaho Code, until such liabilities have been discharged. Any municipal water user, as defined in section 42-4202(2), Idaho Code, who, after exclusion, remains subject to either or both of the liabilities specified herein, shall, in addition, remain subject to the provisions of section 42-4222, Idaho Code, until such liabilities have been discharged.

Upon the discharge of any liability, the district shall issue to the water user its certificate of full payment executed by the chairman of the board and the secretary of the district, and acknowledged so that the certificate may be recorded in the records of the county wherein the property of the water user affected by such liability and the discharge thereof is situate. [I.C., § 42-4228, as added by 1978, ch. 293, § 1, p. 723.]

Sec. to sec. ref. This section is referred to in § 42-4226.

42-4229. Costs. — On appeal, costs shall be taxed as in other civil cases. Costs of recording the order of exclusion shall be borne by petitioners when the order is entered by the board of directors and by the aquifer recharge district when entered by the district court. [I.C., § 42-4229, as added by 1978, ch. 293, § 1, p. 723.]

42-4230. Exclusion to be recorded. — The decision and order of the board of directors, or of the district court in case of appeal, excluding the petitioner or petitioners from the district shall be filed for record in the recorder's office of the counties within which the district is situated. [I.C., § 42-4230, as added by 1978, ch. 293, § 1, p. 723.]

42-4231. Severability. — The provisions of this act are hereby declared to be severable and if any provision of this act or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of remaining portions of this act. [I.C., § 42-4231, as added by 1978, ch. 293, § 1, p. 723.]

Compiler's notes. The words "this act" refer to S.L. 1978, ch. 293 compiled as §§ 42-4201 — 42-4231.

Section 2 of S.L. 1978, ch. 293 declared an emergency. Approved March 29, 1978.

CHAPTER 43

[RESERVED]

CHAPTER 44

LEEVE DISTRICT ACT

SECTION.

- 42-4401. Short title.
- 42-4402. Policy of state.
- 42-4403. Definitions.
- 42-4404. Corporate powers of levee districts.
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SECTION.

- 42-4411. Election.
- 42-4412. Entry of order.
- 42-4413. Finality of order.
- 42-4414. Officers — Meetings.
- 42-4415. Vacancies.
- 42-4416. Commissioners — Powers and duties.
- 42-4417. Maintenance of system — District not to be operated for profit.
- 42-4418. Interested persons — Right of examination.

42-4401. Short title. — The provisions of this chapter may be known and cited as the "Levee District Act." [I.C., § 42-4401, as added by 1990, ch. 396, § 1, p. 1108.]

42-4402. Policy of state. — It is hereby recognized by the legislature that the protection of life and property from the containment of water stored for irrigation, the storage of winter flows and excess waters for irrigation purposes, and flood waters are of great importance to this state. It is therefore declared to be the policy of the state to provide for the storage and containment of irrigation water and the prevention of flood damage in a manner consistent with the conservation and wise development of our water resources and thereby to protect and promote the health, safety and general welfare of the people of this state. [I.C., § 42-4402, as added by 1990, ch. 396, § 1, p. 1108.]

42-4403. Definitions. — As used in this chapter:

(1) "Board" or "board of commissioners" means the board of commissioners of the levee district.

(2) "Commissioner" means a member of the board of commissioners of the levee district.

(3) "District" means any levee district organized under the provisions of this chapter.

(4) "Levee" means a retaining structure alongside a natural lake which has a length that is two hundred (200) times or more greater than its greatest height measured from the lowest elevation of the toe to the maximum crest elevation of the retaining structure.

(5) "State" means the state of Idaho. [I.C., § 42-4403, as added by 1990, ch. 396, § 1, p. 1108.]

42-4404. Corporate powers of levee districts. — Any portion of a county requiring the maintenance, operation, or construction of a levee to contain irrigation water or to prevent flooding, may be organized into a levee district, and when so organized such district and the board of commissioners hereinafter provided for shall have and possess the power herein conferred by law upon such district and board of commissioners, and said district shall be known and designated as levee district no. of the county of, of the state of Idaho, and shall have the right to sue and be sued by and in the name of its board of commissioners hereinafter provided for, and shall have perpetual succession and shall adopt and use a seal. The commissioners hereinafter provided for and their successors in office shall, from the time of the organization of such levee district, have the power and it shall be their duty, to manage and conduct the business and affairs of the district, and make and execute all necessary contracts, employ and appoint such agents, officers and employees as may be required, and prescribe their duties, and perform such other acts as herein provided, or that may hereafter be provided by law. [I.C., § 42-4404, as added by 1990, ch. 396, § 1, p. 1108.]

42-4405. Petition for organization. — For the purpose of the formation of a levee district a petition shall be presented to the clerk of the district court of the county in which the greater portion of the lands of the proposed levee district are located. The petition must be signed by at least one-fourth (¼) of the taxpayers of the district who pay a general tax on real property which is owned by them within the proposed district. The petition shall set forth:

- (1) The name of the proposed district;
- (2) The object of the organization of the proposed levee district;
- (3) A designation of the temporary boundaries of the district;
- (4) The approximate number of acres of land in the proposed district therein;
- (5) A description of the levee to be maintained, operated or constructed;
- (6) The general location of the levee;
- (7) A statement that the establishment of the district and the proposed maintenance, operation or construction of the levee will be conducive to the public health, convenience and welfare, or increase the public revenue, or that the establishment of said district and the maintenance, operation, or construction of the levee is a proper and advantageous method of accomplishing the relief sought; and

(8) A prayer for organization of the district. [I.C., § 42-4405, as added by 1990, ch. 396, § 1, p. 1108.]

42-4406. Petition — Bond — Condition for withdrawal of names.

— The petitioners for formation of a levee district shall, at the time of the filing of the petition, file a bond with the clerk of the district court of the county in which the proposed district is to be located. The bond shall run to the state of Idaho and shall be in the penal sum of one thousand dollars (\$1,000) with two (2) or more sureties, to be approved by the judge of the district court.

In case said district be not established, then all costs shall be collectible on such bond. Any person having a charge against said district shall have a right of action on such bond.

After the petition seeking formation of a levee district is filed with the clerk of said court, no petitioner shall be allowed to withdraw his name or land therefrom without tendering into court his pro rata share of all costs and expenses incurred by petitioners to the date of such withdrawal. [I.C., § 42-4406, as added by 1990, ch. 396, § 1, p. 1108.]

42-4407. Jurisdiction to establish districts. — The district court sitting in and for any county in this state, or any judge thereof in vacation, is hereby vested with jurisdiction, power and authority to establish levee districts which may be entirely within or partly within and partly without the judicial district in which said court is located. [I.C., § 42-4407, as added by 1990, ch. 396, § 1, p. 1108.]

42-4408. Action on petition — Notice of hearing. — Immediately after the filing of the petition for formation of a levee district the judge of the court shall fix a time for the hearing on the petition by order made by him, which order shall provide that said petition and notice of hearing be published for at least three (3) successive weeks in some weekly newspaper or newspapers, printed and published in said county or counties in which the lands are situated, and in case no such paper is published in such county, then in some paper of general circulation therein; together with a notice of the time and place at which such judge will consider said petition. The last date of publication shall be not less than ten (10) days nor more than twenty (20) days before the date of the hearing. [I.C., § 42-4408, as added by 1990, ch. 396, § 1, p. 1108.]

42-4409. Hearings on petitions — Objection to inclusion. — On the day fixed for such hearing or at any adjournment thereof the court shall ascertain from the tax rolls of the county or counties in which the district is located or into which it extends, the total number of taxpayers within the proposed district who pay a general tax on real property owned by them within the district.

If the court finds that no petition has been signed and presented in conformity with this chapter, or that the material facts are not as set forth in the petition filed, it shall dismiss said proceedings and adjudge the costs

against the signers of the petition in such proportion as it shall deem just and equitable. No appeal or writ of error shall lie from an order dismissing said proceedings; but nothing herein shall be construed to prevent the filing of a subsequent petition or petitions for similar improvements or for a similar district, and the right so to renew such proceedings is hereby expressly granted and authorized.

Any time after the filing of the petition for the organization of a district and before the day fixed for the hearing thereon, the owner or owners of any real property within the proposed district may file an objection with the court stating reasons why said property should not be included therein, why his land or any part thereof will not be benefited by the proposed district, and praying that said property be excluded therefrom. Such objection shall be duly verified and shall describe the property sought to be excluded. The court shall, at the hearing, examine and take testimony and evidence on all objections to inclusion in the district. In case any owner of real estate included in said proposed district shall satisfy the court that his real estate, or any part thereof, has been wrongfully included therein or will not be benefited thereby then the court shall exclude such real estate as will not be benefited.

Upon said hearing, if it shall appear that a petition for the organization of a district has been signed and presented as hereinabove provided, in conformity with this chapter, and the allegations of the petition are true, the court shall, by order duly entered of record, direct that the question of the organization of the district be submitted to the qualified electors of the district at an election to be held, subject to the provisions of section 34-106, Idaho Code, for that purpose, and such order shall appoint three (3) qualified electors of the district as judges of said election. The clerk of the court having jurisdiction shall publish notice of the time and place of an election to be held in the district.

Such election shall be held and conducted in the same manner as general elections in this state, except that the court shall establish as many election precincts within such proposed district as are deemed necessary, shall define the boundaries thereof, which precincts and boundaries may thereafter be changed by the board of commissioners of such district if so organized. [I.C., § 42-4409, as added by 1990, ch. 396, § 1, p. 1108; am. 1995, ch. 118, § 80, p. 417.]

Compiler's notes. Section 79 of S.L. 1995, ch. 118 is compiled as § 42-4209.

42-4410. Nominees for board of commissioners. — If upon the hearing as provided in section 42-4409, Idaho Code, the court shall order an election for the creation of the district, nominees for the board of commissioners of the district shall be nominated by the filing of petitions in accordance with the provisions of section 34-1404, Idaho Code. The court shall order that the names of persons whom the court finds to have been properly nominated shall be listed upon a ballot submitted to the electors at such election. [I.C., § 42-4410, as added by 1990, ch. 396, § 1, p. 1108; am. 1995, ch. 118, § 81, p. 417.]

Compiler's notes. Section 82 of S.L. 1995, ch. 118 is compiled as § 42-4416.

42-4411. Election. — In the event the court makes its order providing for such election, it shall prescribe the form of the question and ballot relating to the creation of the district, and also the form of the ballot relating to the election of the commissioners, provided, that all matters may be contained upon one (1) ballot to be submitted to the voters.

At such election the voters shall vote for or against the organization of the district, and for three (3) qualified electors, who shall constitute the board of commissioners of the district, if organized, one (1) commissioner to act until the first biennial election, one (1) until the second, and one (1) until the third biennial election.

The judges of election shall certify the returns of the election to the district court having jurisdiction. [I.C., § 42-4411, as added by 1990, ch. 396, § 1, p. 1108.]

42-4412. Entry of order. — If a majority of the votes cast at the election are in favor of the organization of the levee district, the district court shall declare the levee district organized, shall give it a corporate name by which, in all proceedings, it shall thereafter be known, and designate the first board of commissioners to have been elected. Thereupon the district shall be a governmental subdivision of the state of Idaho and a body corporate with all the powers of a public or quasi-municipal corporation. [I.C., § 42-4412, as added by 1990, ch. 396, § 1, p. 1108.]

42-4413. Finality of order. — If an order be entered establishing the district, such order shall be deemed final and no appeal or writ of error shall lie therefrom, and the entry of such order shall finally and conclusively establish the regular organization of the said district against all persons except the state of Idaho, in an action in the nature of a writ of quo warranto, commenced by the attorney general within thirty (30) days after said decree declaring such district organized as herein provided, and not otherwise. The organization of said district shall not be directly or collaterally questioned in any suit, action or proceeding except as herein expressly authorized. [I.C., § 42-4413, as added by 1990, ch. 396, § 1, p. 1108.]

42-4414. Officers — Meetings. — The board of commissioners of such district shall elect one (1) of their number chairman and one (1) secretary, and shall keep minutes of all their proceedings. The levee district commissioners shall hold their meetings for the transaction of business at any place in the county or counties in which the district is located. [I.C., § 42-4414, as added by 1990, ch. 396, § 1, p. 1108.]

42-4415. Vacancies. — In case a vacancy or vacancies occur in said board by death, failure to appoint, failure to qualify, or resignation of one (1) or more of the members thereof, such vacancy or vacancies shall be filled at once by appointment by the remaining commissioners and said appointee

shall serve for the unexpired term or until his successor is elected. [I.C., § 42-4415, as added by 1990, ch. 396, § 1, p. 1108.]

42-4416. Commissioners — Powers and duties. — The board of commissioners of levee districts shall have the following powers and duties:

(1) To annually fix and determine the amount of money required to be raised by taxation to supply funds for costs of maintenance, operation, and/or construction of the levees and equipment of the district, and to levy and cause to be collected assessments on real property within the district in an amount not to exceed eight hundredths percent (.08%) of each dollar of market value for assessment purposes; provided, however, that a higher levy may be approved and ratified by the qualified voters at an election to be held, subject to the provisions of section 34-106, Idaho Code, for that purpose, and said levy shall be certified by the board to the board of county commissioners of the county, or counties, in which said district is located, with directions that at the time and in the manner required by law for levying taxes for county purposes, such board, or boards, of county commissioners shall levy such tax upon the real property within the boundaries of the district. Such certification of levies shall be prepared and forwarded by the board of the levee district to the board, or boards, of county commissioners on or before September 1, of each year.

Such levies shall be levied and collected in the manner provided by law, and the moneys collected shall be turned over to the treasurer or treasurers, of the county, or counties, in which said district is located.

Said moneys shall be public funds and subject to the provisions of the public depository laws of the state.

(2) To employ such personnel as may be necessary to carry out the purposes and objects of this chapter, with the full power to bind said district for the compensation of such personnel.

(3) To sue and be sued in the name of the district; to have a seal, which seal shall be judicially noticed; to have perpetual succession unless terminated as hereinafter provided; to make and execute contracts and other instruments necessary or convenient to the exercise of its power and to promulgate, amend and repeal rules and regulations not consistent with the provisions of this chapter.

(4) To manage and conduct the business and affairs of the district, both within and without the district.

(5) To maintain, operate and/or construct levees for containment of irrigation water and for the prevention of floodwater whether within or without the boundaries of the district, and to enter into contract for the purposes set forth above; provided, however, that the board shall not enter into contracts that necessitate an expenditure in excess of five thousand dollars (\$5,000), without first advertising for sealed competitive bids as herein provided. However, where it is determined by order of the board that there is an existing emergency, the requirement for sealed competitive bids shall not apply.

(6) To prescribe the duties of officers, agents and employees as may be required.

(7) To establish the fiscal year of the district and to keep records of all business transactions of the district.

(8) To prepare a statement of the financial condition of the district at the end of each fiscal year according to generally accepted accounting principles, and publish in at least one (1) issue of some newspaper published, or in general circulation in, the county, or counties, in which such district is located and to file a certified copy of such financial report with the director of the department of water resources.

(9) To have an audit of the financial affairs of the district as required in section 67-450B, Idaho Code.

(10) To obtain options upon and acquire by purchase, exchange, lease, gift, grant, bequest, devise, or otherwise, any property, real or personal, and improve any properties acquired; to receive income from such properties and to expend such income in carrying out the purposes and provisions of this chapter; to lease any of its property or interest therein in furtherance of the purposes and provisions of this chapter, provided that no contract or agreement for the acquisition, purchase or repair of personal property involving expenditure in excess of one thousand dollars (\$1,000), shall be entered into without first advertising for sealed competitive bids as herein provided.

(11) To have the power of eminent domain for the use of the district in the maintenance, operation, and construction of its levees or any other use necessary in the carrying out of the provisions of this chapter.

(12) To convey rights of way and easements for highways, public roads, public utilities, and for other purposes, over district property, as shall be determined by the board to be in the best interests of the district.

(13) To convey, by deed, bill of sale, or other appropriate instrument, all of the estate and interest of the district, in any real or personal property. Prior to such sale or conveyance, the board shall have the property appraised by three (3) disinterested residents of the district, which appraisal shall be entered in the minutes of the board. The property may be sold at public auction or at a private sale by sealed competitive bids, as the board shall determine, to the highest cash bidder, provided that in no case shall any property of a district be sold for less than its appraised value. All sales by sealed competitive bids shall be advertised as herein provided.

(14) To enter into contracts or agreements with the United States or any of its officers, agents or subdivisions, or with the state or any of its officers, persons or agencies in effectuating, promoting and accomplishing the purposes of this chapter, provided that the district has sufficient moneys on hand, or in their budget for the year in which said contract is entered into, to defray the expenditure of funds called for in such contract without the creation of any indebtedness.

Whenever any such contract shall, by its terms, require the expenditure of funds by the district in excess of the moneys on hand or the funds to be realized from their budget for the year in which said contract is entered into, then such contract may not be entered into by the district until ratified by two-thirds ($\frac{2}{3}$) of the qualified voters voting at an election to be held, subject to the provisions of section 34-106, Idaho Code, for that purpose, according to the provisions of this chapter.

(15) To bear its allocated share of the cost of any project resulting from any contract or agreement entered into as provided herein.

(16) To take over, administer and maintain pursuant to any agreement or contract entered into in accordance with the provisions of this chapter, any levee project within or without the boundaries of the district undertaken in cooperation with the United States or any of its agencies, or with the state of Idaho or any of its agencies, or any combinations thereof.

(17) To accept donations, gifts and contributions in money, services, or materials or otherwise, from the United States or any of its agencies, or the state of Idaho or any of its agencies or any combinations thereof, and to expend such moneys, services, or materials in carrying on its operations.

(18) To exercise all other powers necessary, convenient or incidental to carrying out the purposes and provisions of this chapter. [I.C., § 42-4416, as added by 1990, ch. 396, § 1, p. 1108; am. 1993, ch. 327, § 22, p. 1186; am. 1993, ch. 387, § 14, p. 1417; am. 1995, ch. 118, § 82, p. 417.]

Compiler's notes. Section 41 of S.L. 1993, ch. 327 read: "All employees employed by the Joint Senate Finance-House Appropriations Committee, the Legislative Auditor or Legislative Budget Office on June 30, 1993, shall be transferred to the Legislative Council and shall be deemed to be employees of the Legislative Council on July 1, 1993. All moneys which have been appropriated to and been encumbered by the Joint Senate Finance-House Appropriations Committee, the Legislative Budget Office and the Legislative Auditor on June 30, 1993, shall be transferred to the Legislative Council and shall be deemed to be encumbered by that body. All moneys

appropriated to the Joint Senate Finance-House Appropriations Committee for the Legislative Auditor and the Legislative Budget Office are deemed appropriated to the Legislative Council for the same period and purpose."

Sections 21 and 23 of S.L. 1993, ch. 327 are compiled as §§ 42-3115 and 50-1010, respectively.

Sections 13 and 15 of S.L. 1993, ch. 387 are compiled as §§ 42-3209 and 50-1010, respectively.

Sections 81 and 83 of S.L. 1995, ch. 118 are compiled as §§ 42-4410 and 42-5104, respectively.

42-4417. Maintenance of system — District not to be operated for profit. — Any levee district organized under the provisions of this chapter is not to be conducted or operated for profit or with the view of paying dividends, but solely for the benefit and welfare of the residents and property owners of said district. [I.C., § 42-4417, as added by 1990, ch. 396, § 1, p. 1108.]

42-4418. Interested persons — Right of examination. — Any person or corporation having an interest in, or lien upon, any land situate within the boundaries of a levee district now organized or existing, or hereafter organized under the laws of the state of Idaho, and which land has been, or hereafter may be, assessed for benefits for the maintenance, operation, or construction of levees in such district, as provided in this chapter, as shown by the assessment roll of said district, confirmed by the court, shall have the right personally, or through his agents, attorneys or auditors to examine the books, records and accounts of the board of commissioners and to make copies thereof. [I.C., § 42-4418, as added by 1990, ch. 396, § 1, p. 1108.]

CHAPTERS 45 to 50

[RESERVED]

CHAPTER 51

GROUND WATER MANAGEMENT DISTRICTS

SECTION.

- 42-5101. Legislative intent.
- 42-5102. Ground water management district formation.
- 42-5103. Formation of district — Declaration by director.
- 42-5104. Board of directors — Composition — Appointment of first board — Election of subsequent boards.
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SECTION.

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42-5101. Legislative intent. — The legislature hereby declares that the welfare of the people of Idaho is dependent upon the effective management of the ground water resources of this state. The legislature further declares that a need exists for the creation of special districts to provide for financing of repair or abandonment of wells in aquifers which have experienced or are experiencing declines in water level or water pressures because of flow, leakage, and waste from improper construction, maintenance and operation of wells drilled into the aquifer. Creation of these special districts may be initiated upon petition submitted by those owning the rights to use the ground water from any aquifers or parts of an aquifer that has been designated as a critical ground water area pursuant to section 42-233a, Idaho Code, or as a ground water management area pursuant to section 42-233b, Idaho Code. [I.C., § 42-5101, as added by 1987, ch. 349, § 1, p. 764.]

Sec. to sec. ref. This chapter is referred to in §§ 42-1601 and 63-3622O.

42-5102. Ground water management district formation. — For purposes of formation of a ground water management district, a petition shall be presented to the department of water resources which shall set forth the object of the organization of the district and the benefits to be provided by the district. The petition shall be accompanied by a map of the proposed district which shall indicate the proposed boundaries of the district, which shall include territory only within the boundaries of a critical ground water area or ground water management area designated by the director of the department of water resources.

The petition shall be signed by no less than fifty percent (50%), measured by the quantities of their various water rights, of the water users located within the proposed boundaries of the district. For purposes of this chapter, "water users" shall include the following:

(1) Individuals, or entities, who are the current holders of a right, acquired in accordance with the provisions of chapter 2, title 42, Idaho Code, or chapter 14, title 42, Idaho Code, to appropriate water and to divert water from the aquifer by means of a well or wells, or who divert water from springs or other water courses emerging from such aquifer, or both.

(2) Cities which obtain water from the aquifer. A city may elect to be included within the proposed district by a majority vote of the members of its city council. The mayor of any city so electing may sign the petition on behalf of the city, and such city shall constitute one (1) water user for purposes of securing the minimum number of signatures required for the petition.

(3) Federal, state, or county government agencies which obtain water from the aquifer. [I.C., § 42-5102, as added by 1987, ch. 349, § 1, p. 764.]

Sec. to sec. ref. This section is referred to in §§ 42-5106, 42-5107, 42-5116, 42-5125 and 42-5129.

42-5103. Formation of district — Declaration by director. — After receipt of the petition and map, the director shall review and examine the same and may require the submission of such additional or revised data concerning the boundaries of the proposed district, the costs of repairs or abandonment of improperly constructed wells or any other matter relevant to the formation of the district as he may deem necessary. The director shall conduct a hearing on the petition and supporting documents. Notice of the time and place of the hearing shall be published by the director in a newspaper or newspapers published in each of the counties or a newspaper of general circulation therein at least three (3) weeks before the date of the hearing.

Within ninety (90) days after the hearing has been concluded, the director after due consideration of all relevant data and testimony shall determine whether the proposed district will provide the benefits described, whether the boundaries proposed are proper with respect to the benefits to be provided, and whether the formation of the district will serve the interest of the water users proposed to be benefited. On the basis of his determination, the director shall enter an order either establishing the ground water

management district and defining the boundaries thereof to reflect the area to be benefited or denying the formation of the district. If the director orders formation of the district, he shall cause copies of the order, duly certified, to be filed with the secretary of the state and board of county commissioners, county recorder, county assessor and county treasurer of each county in which any part of the district is situated. [I.C., § 42-5103, as added by 1987, ch. 349, § 1, p. 764.]

42-5104. Board of directors — Composition — Appointment of first board — Election of subsequent boards. — (1) The board of directors of the ground water management district shall consist of three (3) members. Each member shall be a water user, or representative of a water user within the district.

(2) The first board of directors shall be appointed by the director of the department of water resources. Water users within the district, or groups thereof, may submit to the director, or the director may solicit therefrom, the names of qualified individuals to be considered for appointment to the board.

(3) The term of office of the directors shall be determined by lot so that one (1) member shall serve for a term of three (3) years, one (1) member shall serve for a term of two (2) years, and one (1) member shall serve for a term of one (1) year. Thereafter, members shall serve a three (3) year term and shall be elected as hereinafter provided. If a vacancy occurs, the director shall appoint a successor to serve the remainder of the term.

(4) On the first Tuesday in February following the expiration of the term of the member serving for one (1) year, and on the first Tuesday in February of each year thereafter, an election shall be held at which a director to succeed the one whose term has expired will be elected. Each director so elected shall be a water user or a representative of a water user within the district.

In any election for director, if after the deadline for filing a declaration of intent as a write-in candidate, it appears that only one (1) qualified candidate has been nominated for a directors position, it shall not be necessary for the candidate to stand for election, and the board of directors of the district shall declare such candidate elected as director and the secretary of the district shall immediately make and deliver to such person a certificate of election. [I.C., § 42-5104, as added by 1987, ch. 349, § 1, p. 764; am. 1995, ch. 118, § 83, p. 417.]

Compiler's notes. Sections 82 and 84 of S.L. 1995, ch. 118 are compiled as §§ 42-4416 and 42-5107, respectively.

42-5105. Cities — Manner of voting for directors. — Each city which has elected to be and is included within the district shall be entitled to one (1) vote and the vote of the majority of the members of the city council of each such city shall constitute the vote of the city. The voting shall be conducted at a regular meeting of the city council or a special meeting called by the mayor for that purpose to be held on or within a week prior to the date

set for election. The voting results shall be certified to by the mayor and forwarded to the secretary of the district prior to the date set for canvassing of election returns by the board of directors. The provisions of section 42-5107, Idaho Code, shall not apply to cities or other government agencies. [I.C., § 42-5105, as added by 1987, ch. 349, § 1, p. 764.]

42-5106. Water users other than cities — Qualifications for voting. — Any water user, as defined in subsection (1) of section 42-5102, Idaho Code, or a representative thereof, within the district who possesses the qualifications required of electors under the general laws of the state shall be entitled to vote at any election held under the provisions of this chapter. A representative of a water user shall be so designated by written proxy signed by the water user except that the vote of a federal, state, or county government may be cast by an elected or appointed official of the agency, or his designee. [I.C., § 42-5106, as added by 1987, ch. 349, § 1, p. 764.]

42-5107. Registration required. — Pursuant to the provisions of section 34-1402, Idaho Code, registration shall be required of qualified electors, as defined in section 42-4206, Idaho Code, in any election held in the ground water management district. In addition to the requirements specified in section 34-1402, Idaho Code, the election official shall also verify that the elector is a water user, as defined in subsection (1) of section 42-5102, Idaho Code, or a representative of such water user, within the district. [I.C., § 42-5107, as added by 1987, ch. 349, § 1, p. 764; am. 1995, ch. 118, § 84, p. 417.]

Compiler's notes. Section 83 of S.L. 1995, ch. 118 is compiled as § 42-5104.

Sec. to sec. ref. This section is referred to in §§ 42-5105, 42-5115.

42-5108. Notice of election. — The secretary of the district shall give notice of all elections in the district by publication of the notice in accordance with the provisions of section 34-1406, Idaho Code. Notices shall state the time of the election and the location of polling places within the district and the directors to be elected or other question to be voted upon, as the case may be. [I.C., § 42-5108, as added by 1987, ch. 349, § 1, p. 764; am. 1995, ch. 118, § 85, p. 417.]

42-5109. Conduct of elections. — The election shall be conducted in accordance with the general laws of the state including the provisions of chapter 14, title 34, Idaho Code.

The board of directors shall designate polling places in such number as it may deem necessary. At least ten (10) days before the holding of any election, the board shall appoint three (3) electors to serve as judges of election at each polling place. The judges shall perform the same duties as judges of election under the general laws of the state. Immediately after the election, the judges of election shall forward the official results to the secretary of the district. [I.C., § 42-5109, as added by 1987, ch. 349, § 1, p. 764; am. 1995, ch. 118, § 86, p. 417.]

Compiler's notes. Section 87 of S.L. 1995, ch. 118 is compiled as § 42-5115.

42-5110. Canvass of returns — Declaration of winners. — On the first Monday after each election, or at a time designated by the board of directors, the board shall meet at its usual place of meeting and proceed to canvass the returns. By order entered on its minutes, the board shall declare elected the person or persons having the highest number of votes for each office. [I.C., § 42-5110, as added by 1987, ch. 349, § 1, p. 764.]

42-5111. Board of directors — Officers — Meetings — Compensation — Vacancies. — (1) The board of directors annually shall elect a chairman from their number and shall appoint a secretary and a treasurer to hold office at the pleasure of the board. The treasurer shall on his appointment execute and file with the secretary an official bond in such amount as may be fixed by the board of directors, and shall thereafter from time to time execute and file such further bonds as may be required by the board in amounts fixed by it, which amounts shall be at least fifty percent (50%) of the maximum probable amount of money in the treasurer's hands at any one (1) time. All such official bonds shall be executed by a lawfully qualified surety company.

(2) The board of directors shall hold a regular annual meeting and may hold such special meetings as may be necessary for the proper transaction of business. Special meetings may be held on seventy-two (72) hours' notice of the chairman or a majority of the members. A majority shall constitute a quorum for the transaction of business and the concurrence of a majority of the members shall be necessary to constitute the action of the board. All meetings of the board shall be public and all records of the board shall be open to the inspection of any member water user, or representative thereof during business hours.

(3) The members of the board shall each receive not more than twenty-five dollars (\$25.00) nor less than five dollars (\$5.00) per day for each day spent attending the meetings or while engaged in official business of the board, and actual and necessary travel expenses. The term "actual and necessary expenses" shall include all traveling and lodging expenses necessarily incurred by any director when absent from his residence in the performance of the duties of his office. The board shall fix the compensation to be paid to the other officers of the district.

(4) In case of a vacancy in the office of director occurring otherwise than by the expiration of a term, the remaining members of the board of directors shall fill such vacancy by appointing thereto a qualified water user, member of the district, or representative thereof, possessing the qualifications of the director whose office has become vacant to serve the remainder of the term. [I.C., § 42-5111, as added by 1987, ch. 349, § 1, p. 764.]

42-5112. Powers and duties of board of directors. — The board shall have the following powers and duties:

(1) To manage and conduct the business and affairs of the district;

(2) To employ and appoint such agents, officers and employees as may be required to perform the duties as set out in this chapter and prescribe their duties;

(3) To incur indebtedness, for the purpose of financing repair or abandonment of wells in the district, the term of which shall not exceed ten (10) years, by contract with a money-lending institution, including the Idaho water resource board;

(4) To levy assessments for the retirement of indebtedness incurred for purposes of financing repair or abandonment of wells in the district and for the cost of operating the district, including participating in state and/or federal aquifer monitoring programs;

(5) To contract with owners of wells in the district which require repair or abandonment as ordered by the director of the Idaho department of water resources to effectuate repair or abandonment of such wells. The contracts may include financial participation in repair or abandonment, as necessary, to meet minimum well construction standards adopted by the Idaho water resource board, as follows:

(a) Repair of wells which owners intend to continue to use: grants of up to fifty percent (50%) of total cost of repair; loans at interest rates and terms determined by the board of directors of up to one hundred percent (100%) of total cost of repair;

(b) Abandonment of wells which owners do not intend to continue to use: grants or loans of up to one hundred percent (100%) of total cost; total cost of repair or abandonment includes all costs, including technical evaluation, design and inspections;

(6) To contract with the director of the department of water resources to evaluate proposed contracts with well owners to evaluate the repairs or other work proposed and the costs of the proposed work;

(7) To adopt rules, in accordance with the administrative procedure act, chapter 52, title 67, Idaho Code, for determining the percentage of the total repair or abandonment cost that the district will grant or loan, the maximum amounts of grants and loans and their terms, a procedure for determining which water users will be given the financial assistance offered by the district, and a limitation on the total indebtedness of the district. For the purposes of chapter 52, title 67, Idaho Code, the district shall be considered an agency. Among the factors to be considered by the board of directors in the adopted rules shall be the following:

(a) Characteristics of the well to be repaired or abandoned; i.e., location, depth, diameter, depth to water or water pressure in the well, rate of leakage above and below land surface, and the purpose of the well;

(b) Financial ability of the owner;

(c) Estimated relative impact of the repair or abandonment on water levels or pressures in the aquifer and in surrounding wells;

(d) Total number and estimated total cost of repairs to be made in the district as compared to the repayment capability from allowable annual assessments to be collected by the district; and

(e) Orders and recommendations of the director of the Idaho department of water resources;

(8) To accept gifts and grants or to enter into cost share agreements with any person, corporation, association or governmental agency in furtherance of the purposes of this chapter;

(9) To enter upon any land to make inventories, surveys, and monitoring or construction inspections in furtherance of the purposes of this chapter;

(10) To do any and every lawful act necessary to be done that the provisions of this chapter may be carried out;

(11) At such intervals as the director of the department of water resources shall establish, the board of directors shall report to the director, in the form and manner prescribed by him, concerning the operations of the district;

(12) The board of directors annually shall submit to the director of the department of water resources a financial report setting forth the financial condition of the district. The report shall be in the form prescribed by the director and shall specify the amount of the assessments levied by the district for the year, the outstanding obligations of the district, and such other information as the director may require. The director shall have the authority to conduct an audit of the financial transactions and operations of the district.

(13) To adopt and implement a plan for the repair of leaking artesian wells within the district. [I.C., § 42-5112, as added by 1987, ch. 349, § 1, p. 764; am. 1995, ch. 294, § 2, p. 1036.]

Compiler's notes. Section 1 of S.L. 1995, ch. 294 is compiled as § 42-1601.

42-5113. Levy of assessments. — The secretary of the board of directors shall be the assessor of the district, and on or before August 1 of each year shall prepare an assessment book containing a full and accurate list of all water users within the district.

At a regular meeting of the board between August 1 and November 1 of each year, the board of directors shall determine the amount necessary to be raised for payment of the annual payment on any and all indebtedness of the district for the following year. Money received in payment of such assessments shall be deposited in a separate fund to be known as the debt retirement fund. The board of directors may, in addition, determine the amount necessary to pay the expenses of making the assessment book, giving notice of assessments and making collections thereof and for the cost of contracts with state or federal agencies for monitoring programs, or evaluation of proposed contracts, and may levy assessments against the water users in the district sufficient to raise such amount. Money received in payment of such assessments shall be deposited in a separate fund to be known as the operating expense fund.

Each water user shall pay a proportionate share of the total of all amounts to be raised for the purposes aforementioned, which share shall be based on the ratio which the quantity of water such water user is authorized to appropriate under his water right or rights bears to the total quantity of water authorized for appropriation under the water rights of all water users in the district; provided, however, that the combined annual assessment

against each water user shall not exceed one hundred dollars (\$100) per second foot of water the water user is entitled to appropriate under his water right or rights, except, that the district may establish a ten dollar (\$10.00) minimum assessment for any water user. [I.C., § 42-5113, as added by 1987, ch. 349, § 1, p. 764.]

Sec. to sec. ref. This section is referred to in §§ 42-5114, 42-5120, 42-5122, and 42-5129.

42-5114. Power to incur indebtedness — Assessments to secure repayment. — In order to secure funds for the repair or abandonment of wells in the district, the board of directors may, by resolution duly adopted and entered upon the minutes, incur indebtedness by contract with a money-lending institution; provided, however, that the term of such indebtedness shall not exceed ten (10) years. To secure the repayment of any indebtedness so incurred, the board shall levy assessments over the term of the indebtedness in amounts sufficient to repay the interest and principal as it falls due. Such assessments shall be levied in the manner and shall be subject to the limitations set forth in section 42-5113, Idaho Code, and may only be levied if the indebtedness has been approved at the election contained in sections 42-5115 through 42-5119, Idaho Code. [I.C., § 42-5114, as added by 1987, ch. 349, § 1, p. 764.]

Sec. to sec. ref. This section is referred to in § 42-5126.

42-5115. Election for indebtedness — Referendum petition. — Whenever the board shall by resolution adopted by a two-thirds ($\frac{2}{3}$) majority of the said board, determine that the interest of said district and the public interest or necessity demand the reconstruction, rehabilitation, replacement and improvement of any well or other related structures and works together with all necessary appurtenances related thereto, in order to preserve, restore, protect and maintain rights of storage, diversion and delivery of water necessary and appurtenant to the purposes for which such district and other like similarly situated districts were organized and shall set forth the amount of obligation or contract indebtedness proposed to be issued by the district under the provisions of this chapter, said board shall be required to order the submission of the proposition of issuing such contract indebtedness for the purposes set forth in said resolution to the vote of the qualified electors of the district as defined in section 42-5107, Idaho Code, at an election to be held, subject to the provisions of section 34-106, Idaho Code, for that purpose only if within fifteen (15) days after the passage of such resolution a referendum petition signed by legal voters equal in number to not less than ten per cent (10%) of the electors of the district, based upon the aggregate vote cast at the general election of officers of the district next preceding the filing of such referendum petition, shall be filed with the secretary of the district requesting that an election upon the issuance of such contract indebtedness be held and conducted under the provisions of this section. The resolution, in addition to such declaration of

public interest or necessity, shall recite the objects and purposes for which the indebtedness is proposed to be incurred, the estimated cost of the reconstruction, rehabilitation, replacement or improvement as the case may be, the amount of principal of the indebtedness to be incurred therefor, and the sources of the revenues and assessments pledged to the payment of the indebtedness. The election upon the assessments shall be held at the same time as and shall be combined with any such election required to be held upon the indebtedness question pursuant to a referendum petition.

Any such election required to be held hereunder shall be called by resolution, which resolution shall also fix the date upon which such election shall be held, subject to the provisions of section 34-106, Idaho Code, the manner of holding the same and the method of voting for or against the incurring of the indebtedness. Such resolution shall also fix the compensation to be paid the officers of the election and shall designate the precincts and polling places and shall appoint for each polling place, from each precinct from the electors thereof, the officers of such election, which officers shall consist of three (3) judges, one (1) of whom shall act as clerk, who shall constitute a board of election for each polling place. The description of precincts may be made by reference to any order or orders of the board of county commissioners of the county or counties in which the district or any part thereof is situated, or by reference to any previous order, or resolution of the board or by detailed description of such precincts. Precincts established by the boards of the various counties may be consolidated for elections held hereunder. The resolution calling the election shall prescribe an official notice of election in accordance with the provisions of section 34-1406, Idaho Code.

The respective election boards shall conduct the election in their respective precincts in the manner prescribed by law for the holding of district elections to the extent the same shall apply and shall make their returns to the secretary of the district. At any regular or special meeting of the board held within ten (10) days following the date of such election, the returns thereof shall be canvassed and the results thereof declared.

In the event that no referendum petition is filed, or if so filed, if it shall appear from said returns that a two-thirds ($\frac{2}{3}$) majority of the qualified electors of the district who shall have voted on any proposition submitted hereunder at such election voted in favor of such proposition, the district shall thereupon be authorized to incur such indebtedness or obligations, or enter into such contracts, all for the purpose or purposes and object or objects provided for in the proposition submitted hereunder or in the resolution therefor, and in the amount so provided. Submission of the proposition of incurring such obligation or other indebtedness at such an election shall not prevent or prohibit submission of the same or other propositions at subsequent election or elections called for such purpose. [I.C., § 42-5115, as added by 1987, ch. 349, § 1, p. 764; am. 1995, ch. 118, § 87, p. 417.]

42-5116. Judicial examination. — Prior to the incurring of indebtedness, the board shall file a petition in the district court of the county in which the office of the board is located, pursuant to the provisions of sections 43-406 to 43-408, inclusive, Idaho Code, as if the district were an irrigation district. Whenever any district which is required to file a petition hereunder has or proposes to enter into a contract or contracts with one or more districts pursuant to law, and such other district or districts is authorized or required to bring a confirmation proceeding or proceedings pursuant to the provisions of section 43-406 or of section 43-1808, Idaho Code, with respect to such contracts or the levy of assessments or the apportionment of costs, the boards of each of such other districts shall join in the filing of such petition, and the district court in which such petition is filed shall have jurisdiction to hear the petition and to grant the relief prayed for therein. Each such petition shall pray for a judicial examination and determination of any power conferred hereby or by any amendment hereto or of any assessment levied or of any apportionment of costs or of any act, proceeding or contract of the district or districts, whether or not said contracts shall have been executed, including proposed contracts for the reconstruction, rehabilitation, replacement and improvement of any such well and other related structures and works and appurtenances, falling water contracts, contracts with other districts and contracts with other public and private persons, firms, corporations and associations. Such petition shall set forth the facts whereon the validity of such powers, assessments, apportionments, acts, proceedings or contracts is founded. Notice of the filing of said petition shall be given by the clerk of the court by mailing, and by publication in at least one (1) newspaper published and of general circulation within the boundaries of each district joining in the petition, or if no newspaper is so published within any district, then in a newspaper published in the same county in which any part of such district is located which is of general circulation in such district, pursuant to and in accordance with the requirements of section 43-407, Idaho Code, as if the district were an irrigation district under the seal thereof, stating in brief outline the contents of the petition and showing where a full copy of any contract or contracts, therein mentioned, may be examined.

Any water user as defined in section 42-5102, Idaho Code, in any district joining in the petition or any other person interested in the contracts or proposed contracts may appear and answer said petition at any time prior to the date fixed for said hearing or within such further time as may be allowed by the court; and the petition shall be taken as confessed by all persons who fail so to appear. The said petition and notice shall be sufficient to give the court jurisdiction and, upon hearing, the court shall examine into and determine all matters and things affecting the question submitted, shall examine all of the proceedings of all of the districts as set forth in the petition, shall hear all objections either filed in said proceeding or brought up from the hearings before any of the boards, shall correct all errors in the assessments and apportionments of costs, shall ratify, approve and confirm all apportionments of costs and assessments levied, shall make such findings with reference thereto and render a judgment and decree thereon

approving and confirming all of the powers, assessments, apportionments, acts, proceedings and contracts of each of the districts as set forth in the petition as the case warrants. Costs may be divided or apportioned among the contesting parties in the discretion of the trial court. Review of the judgment of the court may be had as in other similar cases, except that such review must be applied for within thirty (30) days after the time of the rendition of such judgment, or within such additional time as may be allowed by the court within thirty (30) days. The Idaho Rules of Civil Procedure shall govern in matters of pleading and practice where not otherwise specified herein. The court shall disregard any error, irregularity or omission which does not affect the substantial rights of the parties. Except as provided herein, the provisions of sections 43-406 through 43-408, Idaho Code, shall apply to the proceeding herein authorized as though the ground water management district were an irrigation district. [I.C., § 42-5116, as added by 1987, ch. 349, § 1, p. 764.]

42-5117. Judicial proceedings to test validity. — In the event that any official required to participate in any act leading to the calling or holding of the required election or the execution of any required contract shall refuse to perform such act alleging as his reason illegality of the proposed election or the proposed contract, the board may institute judicial proceedings to compel such steps to be taken and legality of the election or the contract to be determined. All cases in which there may arise a question of the validity of any proceeding under this act shall be advanced as a matter of immediate public interest and concern, and heard at the earliest practicable moment. The courts shall be open at all times for the purposes of this act. [I.C., § 42-5117, as added by 1987, ch. 349, § 1, p. 764.]

Compiler's notes. The words "this act" refer to S.L. 1987, ch. 349 compiled as §§ 42-5101 — 42-5132.

42-5118. Tax exemption. — Interim notes, and the interest thereon, issued pursuant to the authority contained in this chapter shall be exempt from taxation under the Idaho income tax law. [I.C., § 42-5118, as added by 1987, ch. 349, § 1, p. 764.]

42-5119. Liberal construction. — Any restrictions, limitations or regulations relative to the execution of such contracts pursuant to the authority herein contained in any other act shall not apply to the execution of such contracts pursuant to the authority herein contained. Any act inconsistent herewith shall be deemed modified to conform with the provisions of this chapter for the purpose of this chapter only. This chapter being necessary to secure and preserve the public health, safety, convenience and welfare, and for the security of public and private property, it shall be liberally construed to effect the purposes of this chapter. [I.C., § 42-5119, as added by 1987, ch. 349, § 1, p. 764.]

42-5120. Lending institutions — Right to compel assessments — Alternative remedy. — If in any year the board of directors fails to levy

assessments for the repayment of indebtedness in amounts sufficient to meet a payment or payments falling due, the lender may bring an action in the district court of any county in which the district is situated to compel the board to levy assessments in amounts sufficient to insure the payment thereof; provided, however, that the board may not be compelled to increase assessments for the repayment of indebtedness if the maximum annual assessment limitation specified in section 42-5113, Idaho Code, will be exceeded thereby. In the event that the maximum annual assessment limitation has been reached and the assessments for repayment of indebtedness nevertheless will be insufficient to meet a payment or payments falling due, the lender may, in the alternative, seek an order requiring that moneys received by the district in payment of assessments for all purposes be first expended for the repayment of that portion of the indebtedness falling due. [I.C., § 42-5120, as added by 1987, ch. 349, § 1, p. 764.]

42-5121. Lien of assessment. — From and after January 1 of any year, all assessments, other than those levied against municipalities, shall be liens against the property of water users to which the water rights used to determine assessments are appurtenant. Such liens shall not be removed until the assessments are paid or the property is sold for the payment thereof. [I.C., § 42-5121, as added by 1987, ch. 349, § 1, p. 764.]

Sec. to sec. ref. This section is referred to in § 42-5129.

42-5122. Payment of assessments — When delinquent — Interest and penalties. — Assessments shall be due and payable on or before December 31 of each year. On or before the first day of December, the treasurer of the district shall publish a notice for a period of not less than two (2) weeks in a newspaper published or having general circulation in each of the counties in which any part of the district is situated setting forth the date by which assessments must be paid and the times and places at which payment may be made. The treasurer of the district shall mail by regular mail a billing to each water user. The billing shall be mailed on or before the first day of December.

Assessments unpaid on December 31 shall be delinquent and shall bear interest at the rate of fifteen percent (15%) per annum until paid. Delinquent assessments, in addition, shall be subject to a penalty in the amount of fifteen dollars (\$15.00) per delinquent assessment.

The maximum annual assessment limitation specified in section 42-5113, Idaho Code, shall apply only to the amount of the assessment itself, and the interest and penalty herein prescribed shall be collectible along with the amount of the delinquent assessment, notwithstanding that the assessment itself is at the maximum specified in that section. [I.C., § 42-5122, as added by 1987, ch. 349, § 1, p. 764.]

Sec. to sec. ref. This section is referred to in § 42-5129.

42-5123. Entry of delinquent assessments — Filing of delinquency list. — On or before the 15th day of January of each year the treasurer shall enter the amount of all delinquent assessments upon the assessment book, which entry shall be considered to be dated as of the first day of January. Such entry shall have the force and effect of a sale to the treasurer of the district as grantee in trust for the district of all property to which a lien has attached as a result of such unpaid assessments.

The treasurer shall compile a list of such delinquency entries which shall contain the names of the persons or entities to whom the assessments were directed and the amount of such delinquent assessments together with the amount of the penalties to be added thereto. A certified copy of the delinquency list shall be filed with the county recorder of each county in which the properties affected by such delinquent assessments are located, and the treasurer shall then provide by certified mail a notice of delinquency to each water user having a delinquent assessment. [I.C., § 42-5123, as added by 1987, ch. 349, § 1, p. 764.]

Sec. to sec. ref. This section is referred to in § 42-5129.

42-5124. Redemption and sale of property subject to delinquent assessments. — The manner in which property subject to a lien for nonpayment of assessments may be redeemed, and if not redeemed, shall be sold as provided in sections 43-712, 43-715 through 43-721, 43-724 and 43-726, Idaho Code, to the extent that the provisions thereof are in keeping with the provisions of this chapter. [I.C., § 42-5124, as added by 1987, ch. 349, § 1, p. 764.]

Sec. to sec. ref. This section is referred to in § 42-5129.

42-5125. Water users subject to inclusion within the district. — (1) All water users, as defined in subsection (1) of section 42-5102, Idaho Code, included within the district and who have not obtained exclusion as hereinafter provided, shall remain within and be subject to assessment by the district, notwithstanding the absence of their signatures on the petition for formation of the district, and notwithstanding any change in the ownership or control of the property of the water user, whether by way of transfer, exchange, conveyance, assignment, lease, or otherwise, to which the water right or rights used to determine assessments are appurtenant. Municipal water users, as defined in subsection (2) of section 42-5102, Idaho Code, included within the district shall remain upon their election, within and be subject to assessment by the district unless excluded in the manner hereinafter provided.

(2) Any water user, as defined in subsection (1) of section 42-5102, Idaho Code, who has obtained exclusion from the district, but who nevertheless is benefited by the district, shall remain excluded; provided, however, that any person or entity succeeding the water user in the ownership or control of property, whether by way of transfer, exchange, conveyance, assignment,

lease, or otherwise, to which is appurtenant a water right that, barring the exclusion, would have been used to determine assessments, shall be deemed included within and subject to assessment by the district.

(3) Any individual or entity whose permit to appropriate water was acquired after the formation of the district but who qualifies as a water user under subsection (1) of section 42-5102, Idaho Code, in all other respects, shall be deemed included within and subject to assessment by the district if benefited either directly or indirectly by the district. [I.C., § 42-5125, as added by 1987, ch. 349, § 1, p. 764.]

42-5126. Exclusion from the district — Procedure — Grounds for exclusion. — (1) After the formation of the district, any water user included within the district may file with the board of directors a petition in writing, praying for exclusion from the district. All water users seeking exclusion as are united in interest or to which the same state of facts apply may unite in the same petition. The grounds for exclusion and the time limitations for filing any petition hereunder shall be as follows:

(a) The water user will not be benefited by the functioning of the district. A petition alleging this ground for exclusion must be filed within ninety (90) days after the adoption of a resolution to incur indebtedness as authorized in section 42-5114, Idaho Code. Any such petition filed after the ninety (90) day period has elapsed shall not be accepted or considered, except upon a showing of good cause for the delay.

(b) The water user has not benefited by the functioning of the district. A petition alleging this ground for exclusion shall be filed no earlier than five (5) years after the adoption of a resolution to incur indebtedness as authorized in section 42-5114, Idaho Code.

(c) A petition alleging either of the foregoing grounds for exclusion shall be acknowledged by all the petitioners and shall state in detail the reasons why it is claimed that the petitioners should be excluded from the district.

(2) Immediately after the formal appointment, the board of directors shall cause notice of the deadline for filing petitions under the provisions of subsection (1) of this section and a copy of the order of formation of the district and a map indicating the boundaries of the district to be posted in three (3) public places in each county in which a part of the district is situated. In addition, the board shall publish notice of the deadline and the location at which the order of formation and map of the district may be inspected for at least four (4) successive weeks in a newspaper published or having general circulation in each of the counties in which any part of the district is situated. [I.C., § 42-5126, as added by 1987, ch. 349, § 1, p. 764.]

Sec. to sec. ref. This section is referred to in § 42-5129.

42-5127. Hearing — Notice — Entry of order. — (1) The petition shall be heard by the board of directors within sixty (60) days of filing of the petition and if no hearing is held within that time the petitioner or petitioners shall be deemed excluded from the district. If, prior to the date

set for the hearing, the board issues an order excluding the petitioner or petitioners, no hearing need be held. The board shall give each petitioner notice of the time and place of the hearing in writing not less than fifteen (15) days prior to the hearing. It shall be sufficient to mail such notice by certified or registered mail to each petitioner's mailing address as indicated on the petition.

(2) At the hearing, if any, the petitioner or petitioners must establish by competent evidence the allegations of the petition. The chairman of the board is hereby empowered to administer oaths for the purpose of the hearing. If the allegations of the petition are established the board shall enter an order excluding the petitioner or petitioners, or any of them, from the district, which order shall reflect the nature of any outstanding and/or continuing liabilities to which the petitioner so excluded shall remain subject under the provisions of section 42-5129, Idaho Code. [I.C., § 42-5127, as added by 1987, ch. 349, § 1, p. 764.]

42-5128. Appeal. — An appeal shall lie from a decision of the board of directors denying the petition or any part thereof to the district court of the county where the water user or water users are located. The appeal shall be taken in the same manner as appeals are taken from the board of county commissioners. If the district court excludes the water user or water users, or any of them, the time of exclusion shall date from the time of the hearing before the board of directors. The order of the district court excluding a water user or water users shall reflect the nature of any outstanding and/or continuing liabilities to which each water user so excluded shall remain subject under the provisions of section 42-5129, Idaho Code. [I.C., § 42-5128, as added by 1987, ch. 349, § 1, p. 764.]

42-5129. Effect of exclusion on liability for assessments. — Any water user excluded from the district on the grounds specified in subsection (1) of section 42-5126, Idaho Code, shall not be subject to assessment by the district for any purpose. Any water user excluded from the district on the grounds specified in subsection (2) of section 42-5126, Idaho Code, shall not be subject to assessment for operation of the district or for assessment expenses after the entry of the order of exclusion, or in case of appeal, the effective date of exclusion, but shall remain subject to the following liabilities until discharged:

(1) Such excluded water user shall remain liable for payment of assessments previously levied and unpaid at the time of the entry of the order of exclusion, or in case of appeal, the effective date of exclusion.

(2) Such excluded water user, notwithstanding his exclusion, shall remain liable to pay his proportionate share, such share to be computed as specified in section 42-5113, Idaho Code, of any indebtedness of the district already incurred and outstanding at the time of the entry of the order of exclusion, or in case of appeal, the effective date of exclusion, but such water user shall not be liable upon any indebtedness incurred thereafter.

Any water user, as defined in section 42-5102, Idaho Code, who, after exclusion, remains subject to either or both of the liabilities specified herein

shall, in addition, remain subject to the provisions of sections 42-5121, 42-5122, 42-5123 and 42-5124, Idaho Code, until such liabilities have been discharged.

Upon the discharge of any liability, the district shall issue to the water user its certificate of full payment executed by the chairman of the board and the secretary of the district, and acknowledged so that the certificate may be recorded in the records of the county wherein the property of the water user affected by such liability and the discharge thereof is situated. [I.C., § 42-5129, as added by 1987, ch. 349, § 1, p. 764.]

Sec. to sec. ref. This section is referred to in §§ 42-5127 and 42-5128.

42-5130. Costs. — On appeal, costs shall be taxed as in other civil cases. Costs of recording the order of exclusion shall be borne by petitioners when the order is entered by the board of directors and by the ground water management district when entered by the district court. [I.C., § 42-5130, as added by 1987, ch. 349, § 1, p. 764.]

42-5131. Exclusion to be recorded. — The decision and order of the board of directors, or of the district court in case of appeal, excluding the petitioner or petitioners from the district shall be filed for record in the recorder's office of the counties within which the district is situated. [I.C., § 42-5131, as added by 1987, ch. 349, § 1, p. 764.]

42-5132. Severability. — The provisions of this act are hereby declared to be severable and if any provision of this act or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of remaining portions of this act. [I.C., § 42-5132, as added by 1987, ch. 349, § 1, p. 764.]

Compiler's notes. The words "this act" refer to S.L. 1987, ch. 349, which is compiled as §§ 42-5101 to 42-5132.

CHAPTER 52

GROUND WATER DISTRICTS

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42-5201. Short title — Title of districts — Definitions. — This chapter is known as the "Ground Water District Act"; the districts created hereunder may be termed "ground water districts." When used in this

chapter, and unless otherwise specified, the following terms shall be defined as follows:

(1) "Board" means the board of directors of a ground water district organized pursuant to this chapter.

(2) "Corporation" means a corporation or limited liability company.

(3) "County commission" means the board of county commissioners or any other governing board or authority for a county, as provided by law.

(4) "Department" means the Idaho department of water resources.

(5) "Director" means the director of the department of water resources.

(6) "District" means a ground water district established, or to be established, pursuant to this chapter.

(7) "Ground water" when used in this chapter means water under the surface of the ground whatever may be the geologic structure in which it is standing or moving, as provided in section 42-230(a), Idaho Code.

(8) "Ground water user" means the legal or beneficial owner of a ground water right, or the user of a ground water right pursuant to lease or contract of a ground water right to divert ground water of the state for a beneficial use or purpose, except for those diverting under rights used solely for domestic or stock use as defined by sections 42-111 and 42-1401A, Idaho Code. A ground water user is within the boundary of a ground water district if the well or other point of diversion used by that ground water user is within the boundary. A husband and wife together diverting ground water pursuant to right shall constitute one (1) ground water user. Ground water user includes both a ground water irrigator and a nonirrigator as defined in this chapter.

(9) "Ground water irrigator" means a ground water user holding a ground water right for irrigation purposes within a ground water district.

(10) "Land" or "lands," when used in the context of the property of a ground water user subject to district assessment under this chapter, means the real property where ground water is diverted or placed to beneficial use, including the facilities in or through which a ground water user makes beneficial use of ground waters.

(11) "Nonirrigator" means a ground water user holding a ground water right for commercial, municipal, or industrial purposes within a ground water district. A ground water user will be deemed a nonirrigator for purposes of this chapter even though: (a) some component of the user's ground water use is for irrigation; or (b) the user holds a ground water right for irrigation that is incidental to, or normally associated with, the user's commercial, municipal or industrial purpose.

(12) "Member" means a ground water user whose lands, facilities and/or water rights are included in and subject to a ground water district and its policies.

(13) "Mitigation plan" means a plan to prevent or compensate for material injury to holders of senior water rights caused by the diversion and use of water by the holders of junior priority ground water rights who are participants in the mitigation plan.

(14) "Person" means an individual, partnership, trust, estate, association, corporation, municipal corporation, the state of Idaho and any of its

agencies, the United States, an Indian tribe, a public corporation, or any other public or private entity.

(15) "Public corporation" means counties, city and counties, cities, school districts, municipal water districts, irrigation districts, recharge districts, water districts, park districts, subdistricts, and all other governmental agencies of this state, having the power of levying or providing for the levy of general or special taxes or special assessments, and any political subdivision of another state of the United States.

(16) "Water right" means the legal right to divert and beneficially use the public waters of the state of Idaho where such right is evidenced by a decree, a permit or a license issued by the department, a beneficial or constitutional use right evidenced by an adjudication claim or claim based on section 42-243, Idaho Code, or a right based on federal law. [I.C., § 42-5201, as added by 1995, ch. 290, § 1, p. 982; am. 1997, ch. 374, § 7, p. 1192.]

Compiler's notes. Section 2 of S.L. 1995, ch. 290 declared an emergency. Approved March 21, 1995.

Section 6 of S.L. 1997, ch. 374 is compiled as § 42-1424.

Section 8 of S.L. 1997, ch. 374 declared an

emergency. Approved March 24, 1997.

Sec. to sec. ref. This chapter is referred to in §§ 34-1401 and 42-706.

This section is referred to in §§ 42-5210, 42-5212, 42-5214.

42-5202. Establishment of ground water districts. — Whenever fifty (50) or a majority, whichever is less, of the ground water users in a particular geographic area desire to organize a ground water district, they may propose the organization of a district and the election of its initial board of directors under this chapter. [I.C., § 42-5202, as added by 1995, ch. 290, § 1, p. 982.]

42-5203. Petition for organization — Map — Bond. — (1) A petition shall be first presented to the county commission of the county in which the greatest proportion of cubic feet per second of ground water rights of the proposed district is situated, which petition shall:

- (a) Be signed by the required number of ground water users in such proposed district;
- (b) State that the petitioners desire to have their lands included within and subject to the assessments of the district for purposes consistent with this chapter;
- (c) Set forth and describe by township, range and section, with the degree of certainty required by law in a tax roll, the boundary of the area where, if a ground water user is located within that boundary, that ground water user would be included in a ground water district, and shall request that the area described be organized into a ground water district;
- (d) Propose a name for the district;
- (e) Be accompanied by a list, identifying the ground water users within such proposed district by name, address, ground water right number, point of diversion, and cubic feet per second per ground water right, certified by the director of the department of water resources as accurately reflecting the records of the department;

- (f) Be accompanied by a map which shall indicate the proposed boundaries of the district, and which may propose division boundaries as specified in section 42-5208, Idaho Code;
 - (g) Propose between three (3) and seven (7) divisions and division boundaries;
 - (h) Include nominations for a director for each division, each of which shall be signed by not less than six (6) ground water users in the proposed district;
 - (i) Be accompanied by bond, to be approved by the county commission, in double the amount of the probable cost to the county and the department of organizing such district, conditioned that the bondsmen will pay all said costs, in case organization of the district is unsuccessful.
- (2) The petition, together with all maps and papers filed therewith, shall, during the county's office hours, be open to public inspection at the office of the county clerk between the date of filing and the date of the final hearing thereon. The boundaries specified in the petition shall be proposed in such manner that the greatest distance between two (2) wells in the district shall be no more than thirty (30) miles unless good cause is shown to the county commission for including a larger area.
- (3) Lands of ground water users do not have to be contiguous within a ground water district, and such district may be organized even though its boundaries may overlap with other districts formed pursuant to title 43, Idaho Code, or other titles of the Idaho Code.
- (4) If the district is organized, the costs of organization shall be assessed against the members of the district. [I.C., § 42-5203, as added by 1995, ch. 290, § 1, p. 982.]

Sec. to sec. ref. This section is referred to in §§ 42-5213 and 42-5273.

42-5204. Notice of presentation to county commission. — The petition may be filed with the county clerk, upon verifying with the county assessment roll or other evidence of entitlement whether the petition is valid, at any time, and upon such filing the clerk forthwith shall cause a notice to be published in a newspaper printed within the county (counties) within the boundaries specified in the petition, or if no newspaper is printed in any of the affected counties, then in newspapers of general circulation in the affected county (counties). The notice shall state that (giving the first name on the petition) and others have filed a petition for the organization of a ground water district. The notice shall state the numbers of the townships, ranges, and sections where, if a ground water user is within those townships, ranges, and sections, that ground water user would be within the proposed district. The notice shall further state the time at which such petition will be presented to the county commission, which time shall be during a regular meeting of the commission or a special meeting called for that purpose, and the notice shall be published at least once a week for two (2) consecutive weeks before the day on which the petition is to be presented. [I.C., § 42-5204, as added by 1995, ch. 290, § 1, p. 982.]

Compiler's notes. The words enclosed in parentheses so appeared in the law as enacted.

Sec. to sec. ref. This section is referred to in § 42-5209.

42-5205. Notice of county commission hearing. — When the petition is presented, the county commission shall set a time for a hearing on the petition, which shall not be less than four (4) nor more than eight (8) weeks from the date of presentation, unless extended by the county commission for good cause. A notice of the time of such hearing shall be published by the county clerk, at the direction of the commission, at least three (3) weeks before the time of such hearing, in a newspaper or newspapers as required in section 42-5204, Idaho Code. [I.C., § 42-5205, as added by 1995, ch. 290, § 1, p. 982.]

42-5206. Examination by department of water resources — Report to county commission — Amendment of plan. — (1) A copy of the petition and all maps and other papers filed with the county commission shall be filed with the department on the same day the petition is filed with the county commission.

(2) The department shall examine the petition, maps and other papers submitted in support of it, and, taking into account hydrological factors, patterns of ground water use, or other attributes of the area that may aid the county commission, prepare a report upon the boundaries proposed for the district and submit the report to the county commission at least two (2) weeks before the meeting set for the commission to hear the petition. [I.C., § 42-5206, as added by 1995, ch. 290, § 1, p. 982.]

Sec. to sec. ref. This section is referred to in § 42-5212.

42-5207. Organization hearing before county commission — Order of county commission. — (1) After receiving the report of the department of water resources, the county commission shall conduct a hearing on the petition. If the county commission determines that the requisite number of signatures were not gathered on the petition, the board shall adjourn the hearings for two (2) weeks for the purpose of enabling the petitioners to gather additional signatures. The petitioners may amend the boundaries of the proposed district at the hearing to include or exclude lands of those ground water irrigators who provide written notice or who appear at the hearing requesting that their lands be either included or excluded, to meet the recommendations of the department, or as they may find advisable to achieve suitable district boundaries. The county commission shall accept any additional nominations of persons to be directors at the hearing or the nominations may be filed with the county clerk. The nominations must be signed by at least six (6) ground water users from the proposed district.

(2) When the county commission has determined to proceed with the petition, it may adjourn the hearing from time to time, not exceeding four (4) weeks in all, and on final hearing, the county commission:

(a) May make such other changes in the proposed boundaries of the district and divisions within the district as it may find proper; and

(b) Shall make an order on its records describing the area which it shall have determined to include in the district, and stating that lands of ground water users within such area will be organized into a ground water district if the vote of the electors accepts organization of the district.

(3) The county commission shall notify the department of the final action by mailing or faxing a copy of the order to the department within seven (7) days of the board's decision. If the boundaries of the proposed ground water district differ from the boundaries contained in the department's original report, the department shall prepare a revised list of the ground water users within such proposed district by name, address, ground water right number, point of diversion, and cubic feet per second per ground water right and return it to the county commission. [I.C., § 42-5207, as added by 1995, ch. 290, § 1, p. 982.]

42-5208. Divisions of district for election of directors. — The county commission shall also make an order dividing the district into not less than three (3) nor more than seven (7) divisions, each division to contain approximately the same amount, measured in cubic feet per second, of ground water rights as each other division. The divisions shall be numbered first, second, third, etc., and one (1) director, who shall be a ground water user in the division, shall be elected from each division of the district at large. The number of divisions into which the district shall be divided shall be specified in the petition for the organization of the district, and if not otherwise specified shall be three (3). [I.C., § 42-5208, as added by 1995, ch. 290, § 1, p. 982.]

Sec. to sec. ref. This section is referred to in § 42-5203.

42-5209. Notice of election. — The county commission shall give notice of an election to be held in accordance with section 34-106, Idaho Code, in the proposed district for the purpose of determining whether the district shall be organized under this chapter, and, if so, who shall be its initial directors. The notice shall describe the area, with the certainty required in an ordinary deed, where, if a ground water user is located within that area, that ground water user would be included in the district and shall state the name of the proposed district as designated by the commission, and shall state that a map showing the area of the district is on file in the office of the county clerk, which map, if not previously made, shall be made by the petitioners after the determination of the commissioners of the boundary of the proposed district, and shall state the names of those individuals who have been nominated for director's positions. The notice shall be published for four (4) weeks prior to such election, in a newspaper or newspapers as required in section 42-5204, Idaho Code. The notice shall require the electors to cast ballots which shall contain the words "ground water district—yes," or "ground water district—no," and also to cast ballots for at least one (1) person from each division for director of the district. [I.C., § 42-5209, as added by 1995, ch. 290, § 1, p. 982.]

Sec. to sec. ref. This section is referred to in § 42-5273.

42-5210. Qualifications of voters for district elections. — (1) Any ground water irrigator, and any nonirrigator who is a member for all purposes, within the proposed district shall be entitled to vote at any election held under the provisions of this chapter. The production of documentation of a water right as described in section 42-5201(16), Idaho Code, shall be sufficient evidence of ground water use for purposes of acting as an elector under this chapter. A representative of a ground water user shall be so designated by written proxy signed by the ground water user except that the vote of a state or county government may be cast by an elected or appointed official of the agency, or his designee. A corporation or partnership shall vote or otherwise act by a single individual who is authorized by the corporation or partnership to act on its behalf. A corporation or partnership must furnish the election officials a written designation stating the name of the individual who is authorized to vote and otherwise act for the corporation or partnership.

(2) Any ground water user who becomes a member of a district solely for mitigation purposes:

(a) Shall be entitled to vote only in those district elections concerning whether to incur indebtedness as specified in section 42-5234, Idaho Code; and

(b) Shall be ineligible to nominate directors or officers of the district, to serve in such capacities, or otherwise to participate in the governance of the district.

(3) A nonirrigator may participate in the election to determine whether a district will be formed only according to the following provisions:

(a) The nonirrigator shall notify the judges of election in writing at least ten (10) working days prior to the date of the election that such person supports the formation of the district, elects to become either a member for all purposes, or a member only for mitigation purposes as described in section 42-5214, Idaho Code, should it be formed, and, by such notice, casts its vote(s) in favor of formation.

(b) The notification shall contain a legal description of the land through which the nonirrigator places ground waters to beneficial use, a statement of the amount of such person's ground water right in cubic feet per second of diversions, and a copy of the ground water right documentation described in section 42-5201(16), Idaho Code.

(c) Once the judges of election have accepted the notification described in subsection (3) (b) of this section, they shall duly record the nonirrigator's vote(s) in favor of district formation in the canvassing of votes carried out pursuant to section 42-5213, Idaho Code.

(d) If the voting results in the formation of the district, the nonirrigator who provided such notification thereafter shall be a full member or member for mitigation purposes of such district, whichever the case may be, and shall have all obligations, rights, and limitations attaching thereto.

(4) Each ground water user shall have one (1) vote for each cubic foot per second, or proportion thereof (rounded to the nearest tenth of a cubic foot per second), for which such ground water user holds a ground water right whose point of diversion is within the proposed district boundaries. [I.C., § 42-5210, as added by 1995, ch. 290, § 1, p. 982; am. 1996, ch. 298, § 4, p. 977.]

Compiler's notes. The words enclosed in parentheses so appeared in the law as enacted. Sections 3 and 5 of S.L. 1996, ch. 298 are compiled as §§ 42-706 and 42-5214, respectively.
Sec. to sec. ref. This section is referred to in §§ 42-5214, 42-5234 and 42-5264.

42-5211. Conduct of elections. — (1) Elections shall be conducted as nearly as practicable in accordance with the general laws of the state; provided, no particular form of ballot shall be required, and that the provisions of the election laws as to the form and distribution of ballots shall not apply.

(2) The county commission shall establish one (1) or more election precincts, not exceeding seven (7), as may be necessary, and define the boundaries thereof, which boundaries, when the district is divided into precincts, shall be the same as the division boundaries above-provided for and which said precincts may thereafter be changed by the board of directors of such district as may be necessary; provided, that districts shall have not less than three (3), nor more than seven (7) voting precincts.

(3) The county commission shall also appoint three (3) judges of election for each such election precinct, who shall perform the same duties as near as may be as judges of election, under the general laws of the state. [I.C., § 42-5211, as added by 1995, ch. 290, § 1, p. 982.]

Sec. to sec. ref. Sections 42-5211 — 42-5213 are referred to in § 42-5264.

42-5212. Registration not required. — No registration shall be required in any ground water district election, but in lieu thereof the judges of election shall require every elector to subscribe to an elector's oath as prerequisite to casting his vote, and such oath shall be the usual elector's oath with the following words added thereto, "I am a resident of county, and I am a ground water user within the (proposed) ground water district, or I am a representative of a ground water user within the (proposed) ground water district" and present evidence of such ground water use pursuant to [section] 42-5201(16), Idaho Code, if they do not appear on the department's list as provided in section 42-5206, Idaho Code. [I.C., § 42-5212, as added by 1995, ch. 290, § 1, p. 982.]

Compiler's notes. The bracketed word "section" was inserted by the compiler. The words enclosed in parentheses so appeared in the law as enacted.

42-5213. Canvass of votes — Completion of organization. — (1) Immediately after any election for voting upon the organization of a ground water district, the judges of the election shall forward the official results of said election to the county clerk. The county commission shall

meet within ten (10) days after the election returns are received, and canvass the votes cast. If it appears that two-thirds ($\frac{2}{3}$) of the votes cast are "ground water district—yes," the commission shall, by order entered on its minutes, declare such territory duly organized as a ground water district, under the name designated, shall declare that a map showing the area of the district is on file in the office of the county clerk and shall declare the persons receiving respectively the highest number of votes for director from each division to be duly elected as directors. The county commission shall cause a copy of such order, duly certified, to be immediately filed for record in the office of the county recorder of each county in which any portion of such district is situated, and shall mail a certified copy of the order to the director.

(2) If it shall appear, however, that more than one-third ($\frac{1}{3}$) of the votes cast are "ground water district—no," then a record of that fact shall be duly entered upon the minutes of the board, and all proceedings in regard to the organization of the district shall be void, and the expenses properly incurred thereunder may be collected on the bond provided for in section 42-5203, Idaho Code. [I.C., § 42-5213, as added by 1995, ch. 290, § 1, p. 982.]

Sec. to sec. ref. This section is referred to in § 42-5210.

42-5214. Ground water users included within the district. —

(1) All ground water irrigators within the boundaries of the district are members of the district and subject to assessments, rights and responsibilities established by the district as set forth in this chapter, notwithstanding any change in the ownership or control of the property of the water user, whether by way of transfer, exchange, conveyance, assignment, lease, or otherwise, to which the water right or rights used to determine assessments are appurtenant, unless excluded from the district pursuant to sections 42-5251 through 42-5257, Idaho Code.

(2) All nonirrigators within the boundaries of the district who voted according to notice as provided in section 42-5210(3), Idaho Code, are members of the district as specified in such notice.

(3) A nonirrigator also may become a member of a district by providing, within sixty (60) days after the date on which the district is formed, written notice to the district board that the nonirrigator wishes to join the district either as a member for all purposes or as a member for mitigation purposes only. Upon providing such notice, the nonirrigator shall be either a member for all purposes or a member for mitigation purposes only, as specified in the notice, and shall be subject to assessment accordingly as provided in this chapter. After such sixty (60) day period, a nonirrigator may become a member of a district only through the annexation procedure described in sections 42-5245 through 42-5249, Idaho Code.

(4) Except as provided for municipal, commercial, industrial, federal and tribal ground water users in subsection (1) of this section, any person whose permit to appropriate ground water was acquired after the formation of the district, or who appropriates ground water for uses not requiring a permit after the formation of the district, but qualifies as a ground water user

under subsection (10) [(8)] of section 42-5201, Idaho Code, within the area of the district in all other respects, shall be deemed included within and subject to assessment by the district, if benefitted either directly or indirectly by the district. [I.C., § 42-5214, as added by 1995, ch. 290, § 1, p. 982; am. 1996, ch. 298, § 5, p. 977.]

Compiler's notes. The bracketed number "(8)" in subsection (4) was inserted by the compiler.

Sections 4 and 6 of S.L. 1996, ch. 298 are

compiled as §§ 42-5210 and 42-5216, respectively.

Sec. to sec. ref. This section is referred to in §§ 42-5210, 42-5216 and 42-5276.

42-5215. Limitation on proceedings affecting validity. — No action shall be commenced or maintained, or defense made affecting the validity or organization of the district, more than two (2) years from and after the county commission enters on its minutes the order directing the formation of the district. [I.C., § 42-5215, as added by 1995, ch. 290, § 1, p. 982.]

42-5216. Organizational meeting of board. — From and after the date the county commission files its order declaring the district to be formed by election, the organization of the district shall be complete and those ground water users specified in section 42-5214, Idaho Code, shall be included within the district. The officers and directors of the district shall be entitled to enter immediately upon the duties of their respective offices, upon qualifying according to law, and shall hold such offices respectively, until their successors are elected and qualified. The board of directors so elected shall meet within thirty (30) days after their election and elect a chairman, and appoint a secretary and treasurer, who shall perform the duties imposed upon such officers under this chapter. [I.C., § 42-5216, as added by 1995, ch. 290, § 1, p. 982; am. 1996, ch. 298, § 6, p. 977.]

Compiler's notes. Sections 5 and 7 of S.L. 1996, ch. 298 are compiled as §§ 42-5214 and 42-5218, respectively.

42-5217. Treasurer's official bonds. — The treasurer shall on his appointment execute and file with the secretary an official bond in such amount as may be fixed by the district board of directors, which shall not be less than five thousand dollars (\$5,000); and shall thereafter from time to time execute and file such further bonds as may be required by the board in amounts fixed by it, which amounts shall be of at least fifty percent (50%) of the maximum probable amount of money in the treasurer's hands at any one (1) time. All such official bonds shall be executed by a lawfully qualified surety company. [I.C., § 42-5217, as added by 1995, ch. 290, § 1, p. 982.]

42-5218. Election, term of office, nominations and qualifications. — (1) One (1) year following the organization of the district, an election shall be held in accordance with section 34-106(1), Idaho Code, at which shall be elected one (1) director for each division of the district by the electors of the district at large. Following the election, the term of office of the directors shall be selected by lot so that as nearly as may be, one-third

($\frac{1}{3}$) of the number shall hold office for the term of one (1) year, one-third ($\frac{1}{3}$) for the term of two (2) years, and the balance for the term of three (3) years. An election shall be held in the district in accordance with section 34-106(1), Idaho Code, for each year thereafter, at which directors shall be elected to succeed those whose terms expire, to hold office for a term of three (3) years, or until their successors are elected and qualified. Every director must be a ground water user and a member of the district in the division of the director whom he is to succeed in office. Written nominations for the office of director must be signed by at least six (6) members in districts having less than one hundred (100) members and by at least twelve (12) members in districts having more than one hundred (100) members, and filed with the secretary of the district not less than twenty-eight (28) days nor more than forty-two (42) days before the date of election; and the names of the persons so nominated shall be placed upon official ballot to be furnished by the district.

(2) The board of directors may provide that any elections conducted under this chapter may be conducted by mail as long as the ballots are mailed not later than fourteen (14) days prior to the election and received by the secretary of the district by 8:00 p.m. on the date of the election. [I.C., § 42-5218, as added by 1995, ch. 290, § 1, p. 982; am. 1996, ch. 298, § 7, p. 977.]

Compiler's notes. Sections 6 and 8 of S.L. 1996, ch. 298 are compiled as §§ 42-5216 and 42-5224, respectively. **Sec. to sec. ref.** This section is referred to in § 42-5273.

42-5219. When election not required. — In any election for directors if, after the expiration of the date for filing written nominations for the office of director, it appears that only one (1) qualified candidate has been nominated thereby for each position to be filled, it shall not be necessary to hold an election, and the board of directors shall, within five (5) days after expiration of the date for filing written nominations, declare such candidate elected as director. The procedure set forth in this section shall not apply to any other district election. [I.C., § 42-5219, as added by 1995, ch. 290, § 1, p. 982.]

42-5220. Notice of election. — The secretary of the district shall give notice of all elections in the district by posting the same in five (5) public places in each county in which a part of the district is situated and in the office of the board of directors at least four (4) weeks before the day of such election, or by publication of the notice once a week for four (4) successive weeks in a newspaper or newspapers published in each of said counties or in a newspaper of general circulation therein. Notices shall state the time of the election and the location of polling places within the district and the directors to be elected or other question to be voted upon, as the case may be. [I.C., § 42-5220, as added by 1995, ch. 290, § 1, p. 982.]

42-5221. Conduct of elections. — The election shall be conducted as nearly as practicable in accordance with the general laws of the state; provided that no particular form of ballot shall be required and the

provisions of the election laws as to the form and distribution of ballots shall not apply and each ballot must indicate the number of cubic feet per second associated with the ballot cast. The board of directors shall designate polling places in such number as it may deem necessary. At least ten (10) days before the holding of any election, the board shall appoint three (3) electors to serve as judges of election at each polling place. The judges shall perform the same duties as near as may be, as judges of election under the general laws of the state. Immediately after the election, the judges of election shall forward the official results to the secretary of the district. [I.C., § 42-5221, as added by 1995, ch. 290, § 1, p. 982.]

42-5222. Canvass of returns — Declaration of winners. — On the first Monday after each election, or at a time designated by the board of directors, the board shall meet at its usual place of meeting and proceed to canvass the returns. By order entered on its minutes, the board shall declare elected the person or persons having the highest number of votes for each office. [I.C., § 42-5222, as added by 1995, ch. 290, § 1, p. 982.]

42-5223. Board of directors — Officers — Meetings — Compensation — Vacancies. — (1) The board of directors annually shall elect a chairman from their number and shall appoint a secretary and a treasurer to hold office at the pleasure of the board. Upon appointment the treasurer shall execute and file with the secretary an official bond in such amount as may be fixed by the board of directors, and shall thereafter from time to time execute and file such further bonds as may be required by the board in amounts fixed by it, which amounts shall be at least fifty percent (50%) of the maximum probable amount of money in the treasurer's hands at any one (1) time. All such official bonds shall be executed by a lawfully qualified surety company.

(2) The board of directors shall designate an office of the district.

(3) The board of directors shall hold a regular monthly meeting in the district's office on the first Tuesday in every month or such date each month as it shall fix by resolution, and such special meetings as may be required for the proper transaction of business. Special meetings may be held on seventy-two (72) hours' notice of the chairman or a majority of the members. A majority shall constitute a quorum for the transaction of business and the concurrence of a majority of the members shall be necessary to constitute the action of the board. All meetings of the board shall be public and all records of the board shall be open to the inspection of any member water user, or representative thereof during business hours.

(4) The members of the board of directors shall fix the compensation board members shall receive for each day spent attending the meetings, or while engaged in official business under the order of the board, together with actual and necessary expenses. The term "actual and necessary expenses" shall include all traveling and lodging expenses necessarily incurred by any director when absent from his residence in the performance of the duties of his office. The board shall fix the compensation to be paid to the other officers of the district.

(5) In case of a vacancy in the office of director occurring otherwise than by the expiration of a term, the remaining members of the board of directors shall fill such vacancy by appointing a ground water user who is a member of the district or a representative thereof, possessing full voting qualifications under this chapter and the qualifications of the director whose office has become vacant to serve the remainder of the term. [I.C., § 42-5223, as added by 1995, ch. 290, § 1, p. 982.]

42-5224. Powers and duties of board of directors. — The board shall, in addition to any other powers and duties provided in this chapter, and provided that nothing in this chapter shall abrogate or impair the right of any person to take any action necessary to acquire, protect, challenge or defend any water right, have the following powers and duties:

(1) To acquire, and/or construct, operate, control or use by appropriation, grant, purchase, bequest, devise, contract or lease works or facilities, water rights, water permits or licenses, well-drilling permits, wells, pipelines, ditches and any other real and personal property (including easements and rights-of-way) or contract entitlement within or without the district necessary or convenient to fully exercise its powers;

(2) To sell, lease, encumber, alienate, or otherwise dispose of works or facilities, water, water rights, wells, pipelines, ditches, reservoirs, recharge facilities, and any other real and personal property owned by the district within or without its boundaries;

(3) To enter into contracts and agreements, cooperative and otherwise, including contracts with the United States of America and any of its agencies or instrumentalities, and tribes, and contracts with corporations, public or private, municipalities, or governmental subdivisions necessary or convenient to fully exercise its powers;

(4) To hire and retain agents, employees, engineers, hydrologists, geologists, and attorneys as shall be necessary and convenient to transact the district's business and to represent the district's interests;

(5) To levy assessments for the operation of the district and its programs;

(6) To represent district members, with respect to their individual water rights, in general water rights adjudications and other legal and administrative proceedings or before political bodies, provided that the board may levy assessments for these matters against only those members who have given written consent for the representation;

(7) To represent district members in proceedings or meetings of a water district established by the director of the department notwithstanding any provision to the contrary in chapter 6, title 42, Idaho Code. Provided however, that the board shall not be authorized to cast a vote in any proceeding or meeting of a water district established pursuant to chapter 6, title 42, Idaho Code, on behalf of any district member who has, prior to such proceeding or meeting, given written notice to the board and to the water district that such district member intends to vote on his own behalf, or on behalf of any district member who attends such meeting or proceeding and intends to vote on his own behalf. The board shall provide a verified list of the water rights that it represents at any water district proceeding or meeting to the chairman of the water district proceeding or meeting.

(8) To appropriate, develop, store, and transport water within the state;
(9) To acquire stock in canal companies, water companies, and water users' associations;

(10) To invest any surplus money in the district treasury pursuant to the public depository law as contained in chapter 1, title 57, Idaho Code;

(11) To develop, maintain, operate and implement mitigation plans designed to mitigate any material injury caused by ground water use within the district upon senior water uses within and/or without the district;

(12) To finance the repair or abandonment of wells in the ground water district which have experienced or are experiencing declines in water level or water pressures because of reasons including, but not limited to, flow, leakage, and waste from improper construction, maintenance, and operation of wells;

(13) To have and exercise the power of eminent domain in the manner provided by law for the condemnation of private property for easements, rights-of-way, and other rights of access to property necessary to the exercise of the mitigation powers herein granted, both within and without the district;

(14) To sue and be sued, and be a party to suits, actions and proceedings;

(15) To enter into joint powers agreements and/or memoranda of understanding with other districts, governmental or quasi-public entities;

(16) To develop and acquire water rights for, and operate, aquifer storage or recharge projects;

(17) To monitor, measure, study, and implement programs in the interests of the district's members regarding the protection of ground water diversions, depth of water in wells, aquifer water levels and characteristics;

(18) To adopt and amend bylaws not in conflict with the constitution and laws of the state for carrying on the business, objects and affairs of the board and of the district and to establish a fiscal year;

(19) To enter upon land to make surveys, locate district property, works, or facilities, and to otherwise conduct the affairs of the district;

(20) To make, record and report annually to the director sufficient measurements of diversions and water levels of district members to allow the district to be excluded from any water measurements district created pursuant to sections 42-705 through 42-715, Idaho Code.

(21) To manage and conduct the affairs of the district and to have and exercise all rights and powers necessary or incidental to or implied from the specific powers granted herein. Such specific powers shall not be considered as a limitation upon any power necessary or appropriate to carry out the purposes and intent of this act. [I.C., § 42-5224, as added by 1995, ch. 290, § 1, p. 982; am. 1996, ch. 298, § 8, p. 977; am. 2003, ch. 137, § 1, p. 400.]

Compiler's notes. The words enclosed in parentheses so appeared in the law as enacted.

The words "this act" refer to S.L. 1995, ch. 290, which is compiled as §§ 42-5201—42-5276.

Sections 7 and 9 of S.L. 1996, ch. 298 are compiled as §§ 42-5218 and 42-5241, respectively.

Section 2 of S.L. 2003, ch. 137 declared an emergency retroactively to January 1, 2003 and approved March 27, 2003.

42-5225. Authority to construct and operate ground water recharge or storage project. — Any ground water district organized under the laws of this state is authorized in section 42-4201A, Idaho Code, to file an application with the department to acquire water rights or to appropriate the unappropriated waters of the state for the purpose of storing waters in, or recharging, ground water basins within the district to aid in the efficient irrigation of district lands, to serve domestic, commercial, municipal or industrial uses within the district, or to carry out a mitigation plan. Upon approval of the application for permit by the director, the district shall proceed in the manner provided by law to construct and operate the ground water storage or recharge project. The construction and operation of the project shall be subject to such additional conditions and limitations as shall be imposed by the director pursuant to sections 42-203A, 42-222 and 42-4201A, Idaho Code. [I.C., § 42-5225, as added by 1995, ch. 290, § 1, p. 982.]

42-5226. Intersections with streets, railroads, watercourses. — The board of directors shall have power to construct the works necessary to implement an approved mitigation plan across any stream of water, watercourse, street, avenue, highway, railway, canal, ditch or flume which the works may intersect or cross, in such manner as to comply with the requirements of the stream channel alteration act, chapter 38, title 42, Idaho Code, and to afford security for life and property, provided that the board shall restore the same when so crossed or intersected, to its former state as near as may be, or in a sufficient manner not to have impaired unnecessarily its usefulness; and every company whose railroad shall be intersected or crossed pursuant to this section, shall unite with the board in forming the intersections and crossings and grant the privileges aforesaid; and if such railroad company and the board, or the owners and controllers of the property, thing or franchise to be crossed, cannot agree upon the amount to be paid therefor, or upon the points or the manner of said crossings or intersections, the same shall be ascertained and determined in all respects as herein provided in respect to the taking of land. [I.C., § 42-5226, as added by 1995, ch. 290, § 1, p. 982.]

42-5227. Officers must not be interested in contracts. — No director or any other officer named in this chapter shall in any manner be interested, directly or indirectly, in any contract awarded or to be awarded by the board, or in the profits to be derived therefrom, except as a member of the district; and for any violation of this provision such officers shall be deemed guilty of a misdemeanor, and such conviction shall work a forfeiture of his office, and he shall be punished by a fine not exceeding five hundred dollars (\$500), or by imprisonment in the county jail not to exceed six (6) months, or by both such fine and imprisonment. [I.C., § 42-5227, as added by 1995, ch. 290, § 1, p. 982.]

42-5228. Indemnification of officers, directors, employees and agents. — The indemnification provisions of section 43-204A, Idaho Code,

shall apply to ground water districts in the same manner as for irrigation districts. [I.C., § 42-5228, as added by 1995, ch. 290, § 1, p. 982.]

42-5229. Report to department of water resources. — At least as often as once a year after organization, the board of directors shall make a report to the department of the condition of the work of any mitigation plans developed by the district, as to capacity, stability and permanency, and whether or not any such mitigation plans are being successfully carried out, and whether or not in the opinion of the board the funds available will complete and maintain the mitigation plans. Upon the receipt of such report by the department, it may make such suggestions and recommendations to such board of directors as it deems advisable for the best interest of the district. [I.C., § 42-5229, as added by 1995, ch. 290, § 1, p. 982.]

42-5230. Statement of financial condition. — On or before the second Tuesday of February of each year the board of directors of each ground water district organized under this chapter shall publish in at least one (1) issue of a newspaper published in the county or counties in which such district is situated, a full, true and correct statement of the financial condition of the district, at the end of the last preceding fiscal year, giving all liabilities and assets of the district, in a form to be prescribed by the controller of the state of Idaho. [I.C., § 42-5230, as added by 1995, ch. 290, § 1, p. 982.]

42-5231. County commission to have access to books. — Any district board, or the secretary thereof, shall at any time allow any member of the county commission, when acting under resolution of the commissioners, to have access to all books, records and vouchers of the district which are in possession or control of the board of directors or secretary of the board. [I.C., § 42-5231, as added by 1995, ch. 290, § 1, p. 982.]

42-5232. Levy of assessments. — (1) The secretary of the board shall be the assessor of the district, and on or before August 1 of each year shall prepare an assessment book containing a full and accurate list of all lands within the district that are subject to assessment under this chapter.

(2) At a regular meeting of the board between August 1 and November 1 of each year, the board of directors shall determine the amount necessary to be raised for payment of the annual payment on any and all indebtedness of the district for the following year. Money received in payment of such assessments shall be deposited in a separate fund to be known as the debt retirement fund.

(3) The board shall, in addition, determine the assessments necessary to pay, without limitation, the expenses of developing, operating or maintaining any mitigation plan established by the district and the cost of contracts with any person for mitigation plans, or evaluation of proposed contracts. Money received in payment of such assessments shall be deposited in a separate fund to be known as the mitigation expense fund.

(4) The board shall, in addition, determine the assessments necessary to pay maintenance and operation of the district not related to mitigation

plans or purposes. These operation and maintenance duties include making the assessment book, giving notice of assessments and making collections thereof, and other duties, programs or projects of the district to the extent such duties, programs or projects are not attributable to mitigation plans or purposes. Money received in payment of such assessments shall be deposited in a separate fund of the district to be known as the operating expense fund.

(5) Any ground water user who becomes a member of a district for mitigation purposes shall be subject to no assessment beyond his proportional share of the costs, including administrative costs and other reasonable expenses, of any mitigation plan or actions or activities in furtherance of the district's mitigation plans or purposes.

(6) No assessment made pursuant to this chapter shall be a lien against any municipal property.

(7) Except as otherwise provided in this chapter, each member shall pay a proportionate share of the total of all amounts to be assessed for the purposes aforementioned, which share shall be based on the ratio which the quantity of water the water user is authorized to appropriate under the member's ground water right(s) bears to the total quantity of water authorized for appropriation under the ground water rights of all water users in the district, provided, that the board shall be entitled to levy assessments that adjust a member's proportionate share to take into consideration priority dates, consumptive use under the members' respective ground water rights, other attributes of the ground water rights appurtenant to the assessed lands, and/or the benefits the member derives from a mitigation plan or other activity of the district. [I.C., § 42-5232, as added by 1995, ch. 290, § 1, p. 982.]

42-5233. Power to incur indebtedness — Assessments to secure repayment — Warrants. — (1) In order to secure funds for the mitigation plan or plans for the district, the board of directors may, by resolution duly adopted and entered upon the minutes, incur indebtedness by contract with a money lending institution; provided however, that the term of such indebtedness shall not exceed ten (10) years. To secure the repayment of any indebtedness so incurred, the board shall levy assessments over the term of the indebtedness in amounts sufficient to repay the interest and principal as it falls due. Such assessments shall be levied in the manner and shall be subject to the limitations set forth in section 42-5232, Idaho Code, and may be levied only if the indebtedness has been approved at an election pursuant to sections 42-5234 through 42-5238, Idaho Code.

(2) Notwithstanding the provisions of subsection (1) of this section, the board of directors may, before the collection of the first assessment, incur indebtedness for the purpose of organization, or for any of the purposes of this chapter, and cause warrants of the district to issue therefor, provided that the total dollar amount of the warrants authorized to be issued shall not exceed one dollar (\$1.00) for each two-hundredths (.02) of a cubic foot per second of ground water authorized to be diverted and used upon lands or facilities located within the district. Following the collection of the first

assessment, the board of directors may at any time issue warrants of the district for the purpose of paying claims of indebtedness against the district, including salaries of officers and employees, not to exceed the district's anticipated revenue.

(3) The warrants herein authorized shall be in form and substance the same as county warrants or as nearly the same as may be practicable and shall be signed by the chairman and attested by the secretary of said board. All such warrants shall be presented by the holder thereof to the treasurer of the district for payment who shall endorse thereon the day of presentation for payment with the additional endorsement thereon, in case of nonpayment, that they are not paid for want of funds, and such warrants shall draw interest at a rate to be established by the board of directors from the date of their presentation to the treasurer for payment as aforesaid until such warrants are paid. No warrants shall be issued in payment of any indebtedness of such district for less than face or par value. It shall be the duty of the treasurer from time to time when sufficient funds are available for that purpose to advertise in a newspaper in the county in which the district is situated requiring the presentation to the treasurer for payment of as many of the outstanding warrants as are able to be paid. Ten (10) days after the first publication of said notice by the treasurer calling in any of said outstanding warrants, said warrants shall cease to bear interest, which shall be stated in the notice. Said notice shall be published two (2) weeks consecutively and said warrants shall be called in and paid in the order of their endorsement. [I.C., § 42-5233, as added by 1995, ch. 290, § 1, p. 982.]

42-5234. Election for indebtedness — Referendum petition. —

(1) The board may by resolution adopted by a two-thirds ($\frac{2}{3}$) majority of the board, determine that the interest of the district and the public interest and necessity demand the development and operation of a mitigation plan and shall set forth the amount of obligation or contract indebtedness proposed to be issued by the district under the provisions of this chapter for the development of such mitigation plan. The board shall submit the contract indebtedness in the proposed resolution to a vote of the qualified electors of the district as defined in section 42-5210, Idaho Code, at an election to be held only if within fifteen (15) days after the passage of such resolution a referendum petition signed by qualified electors of the district whose aggregate ground water rights equal not less than ten percent (10%), measured in cubic feet per second, of the aggregate ground water rights of all qualified electors of the district, shall be filed with the secretary of the district requesting that an election upon the issuance of the contract indebtedness be held and conducted under the provisions of this section. Any election required to be held pursuant to a referendum petition filed in accordance with this section for the purpose of submitting any proposition or propositions of incurring such obligation or indebtedness shall be held in accordance with section 34-106, Idaho Code. The resolution, in addition to such declaration of public interest or necessity, shall recite the objects and purposes for which the indebtedness is proposed to be incurred, the estimated cost of the mitigation plan, the amount of principal of the

indebtedness to be incurred therefor, and the sources of the revenues and assessments pledged to the payment of the indebtedness. The separate election upon the assessments, shall be held at the same time as and shall be combined with any such election required to be held upon the indebtedness question pursuant to a referendum petition.

(2) Any election for indebtedness required to be held hereunder shall be called by resolution, which resolution shall also fix the date upon which such election shall be held, the manner of holding the same and the method of voting for or against the incurring of the indebtedness. Such resolution shall also fix the compensation to be paid the officers of the election and shall designate the precincts and polling places and shall appoint for each polling place, from each precinct from the electors thereof, the officers of such election, which officers shall consist of three (3) judges, one (1) of whom shall act as clerk, who shall constitute a board of election for each polling place. The description of precincts may be made by reference to any order or orders of the county commission of the county or counties in which the district or any part thereof is situated, or by reference to any previous order, or resolution of the board or by detailed description of such precincts. Precincts established by the county commissions of the various counties may be consolidated for special elections held hereunder. In the event any such election shall be called to be held concurrently with any other election or shall be consolidated therewith, the resolution calling the election hereunder need not designate precincts or polling places or the names of officers of election, but shall contain reference to the act or order calling such other election and fixing the precincts and polling places and appointing election officers therefrom. The resolution calling the election shall prescribe an official notice of election, which notice shall be published once a week for two (2) consecutive weeks, the last publication of which shall be at least ten (10) days prior to the date set for said election, in a newspaper of general circulation printed and published within the district, and no other or further notice of such election or publication of the names of election officers or of the precincts or polling places need be given or made.

(3) The respective election boards shall conduct the election in their respective precincts in the manner prescribed by law for the holding of district elections to the extent the same shall apply and shall make their returns to the district secretary. At any regular or special meeting of the board held not earlier than five (5) days following the date of such election, the returns shall be canvassed and the results declared.

(4) If no referendum petition is filed, or if so filed, if it shall appear from the returns that the qualified electors of the district representing two-thirds ($\frac{2}{3}$) of the aggregate ground water rights of the district, such fraction computed according to cubic feet per second, have voted in favor of the proposition, the district thereupon shall be authorized to incur such indebtedness or obligations, or enter into such contracts, all for the purposes provided for in the proposition submitted in the resolution, and in the amount so provided. Submission of the proposition of incurring such obligation or other indebtedness at such an election shall not prevent or prohibit submission of the same or other propositions at subsequent election

or elections called for such purpose. [I.C., § 42-5234, as added by 1995, ch. 290, § 1, p. 982.]

Sec. to sec. ref. This section is referred to in § 42-5210.

42-5235. Judicial examination. — (1) Prior to the incurring of indebtedness, the board shall file a petition in the district court of the county in which the office of the board is located, pursuant to the provisions of sections 43-406 through 43-408, Idaho Code, as if the district were an irrigation district. Whenever any district which is required to file a petition hereunder has or proposes to enter into a contract or contracts with one (1) or more districts pursuant to law, and such other district or districts is authorized or required to bring a confirmation proceeding or proceedings pursuant to the provisions of section 43-406 or section 43-1808, Idaho Code, with respect to such contracts or the levy of assessments or the apportionment of costs, the boards of each of such other districts shall join in the filing of such petition, and the district court in which such petition is filed shall have jurisdiction to hear the petition and to grant the relief prayed for therein. Each such petition shall pray for a judicial examination and determination of any power conferred hereby or by any amendment hereto or of any assessment levied or of any apportionment of costs or of any act, proceeding or contract of the district or districts, whether or not said contracts shall have been executed, including, without limitation, proposed contracts for the reconstruction, rehabilitation, replacement and improvement of any well and other related structures and works and appurtenances, falling water contracts, contracts with other districts and contracts with other public and private persons, firms, corporations and associations. Such petition shall set forth the facts whereon the validity of such powers, assessments, apportionments, acts, proceedings or contracts is founded. Notice of the filing of said petition shall be given by the clerk of the court by mailing, and by publication in at least one (1) newspaper published and of general circulation within the boundaries of each district joining in the petition, or if no newspaper is so published within any district, then in a newspaper published in the same county in which any part of such district is located which is of general circulation in such district, pursuant to and in accordance with the requirements of section 43-407, Idaho Code, as if the district were an irrigation district under the seal thereof, stating in brief outline the contents of the petition and showing where a full copy of any contract or contracts, therein mentioned, may be examined.

(2) Any ground water user in any district joining in the petition or any other person interested in the contracts or proposed contracts may appear and answer the petition at any time prior to the date fixed for the hearing or within such further time as may be allowed by the court; and the petition shall be taken as confessed by all persons who fail so to appear. The said petition and notice shall be sufficient to give the court jurisdiction and, upon hearing, the court shall examine into and determine all matters and things affecting the question submitted, shall examine all of the proceedings of all of the districts as set forth in the petition, shall hear all objections either

filed in the proceeding or brought up from the hearings before any of the boards, shall correct all errors in the assessments and apportionments of costs, shall ratify, approve and confirm all apportionments of costs and assessments levied, shall make such findings with reference thereto and render a judgment and decree thereon approving and confirming all of the powers, assessments, apportionments, acts, proceedings and contracts of each of the districts as set forth in the petition as the case warrants. Costs may be divided or apportioned among the contesting parties in the discretion of the trial court. Review of the judgment of the court may be had as in other similar cases. The Idaho rules of civil procedure shall govern in matters of pleading and practice where not otherwise specified herein. The court shall disregard any error, irregularity or omission which does not affect the substantial rights of the parties. Except as provided herein, the provisions of sections 43-406 through 43-408, Idaho Code, shall apply to the proceeding herein authorized as though the ground water district were an irrigation district. [I.C., § 42-5235, as added by 1995, ch. 290, § 1, p. 982.]

42-5236. Judicial proceedings to test validity. — If any official required to participate in any act leading to the calling or holding of the required election or the execution of any required contract shall refuse to perform such act alleging as his reason illegality of the proposed election or the proposed contract, the board may institute judicial proceedings to compel such steps to be taken and legality of the election or the contract to be determined. All cases in which there may arise a question of the validity of any proceeding under this act shall be advanced as a matter of immediate public interest and concern, and heard at the earliest practicable moment. The courts shall be open at all times for the purposes of this act. [I.C., § 42-5236, as added by 1995, ch. 290, § 1, p. 982.]

Compiler's notes. The words "this act" refer to S.L. 1995, ch. 290, which is compiled as §§ 42-5201—42-5276.

42-5237. Tax exemption. — Interim notes, and the interest thereon, issued pursuant to the authority contained in this chapter shall be exempt from taxation under the Idaho income tax law. [I.C., § 42-5237, as added by 1995, ch. 290, § 1, p. 982.]

42-5238. Liberal construction. — Any restrictions, limitations or regulations relative to the execution of such contracts pursuant to the authority herein contained in any other act shall not apply to the execution of such contracts pursuant to the authority herein contained. Any act inconsistent herewith shall be deemed modified to conform with the provisions of this chapter for the purpose of this chapter only. This chapter being necessary to secure and preserve the public health, safety, convenience and welfare, and for the security of public and private property, it shall be liberally construed to effect the purposes of this chapter. [I.C., § 42-5238, as added by 1995, ch. 290, § 1, p. 982.]

Sec. to sec. ref. This section is referred to in § 42-5233.

42-5239. Lending institutions — Right to compel assessments — Alternative remedy. — If in any year the board of directors fails to levy assessments for the repayment of indebtedness in amounts sufficient to meet a payment or payments falling due, the lender may bring an action in the district court of any county in which the district is situated to compel the board to levy assessments in amounts sufficient to insure the payment thereof. In the event that the annual assessment to meet a payment or payments falling due will be unreasonably high, the district court may, in the alternative, enter an order requiring that moneys received by the district in payment of assessments for all purposes be first expended for the repayment of that portion of the indebtedness falling due. [I.C., § 42-5239, as added by 1995, ch. 290, § 1, p. 982.]

42-5240. Lien of assessment. — From and after January 1 of any year, all assessments, other than those levied against municipalities, shall be liens against the land of ground water users to which the water rights used to determine assessments are appurtenant. Such liens shall not be removed until the assessments are paid or the property is sold for the payment thereof. [I.C., § 42-5240, as added by 1995, ch. 290, § 1, p. 982.]

Compiler's notes. This section is referred to in § 42-5253.

42-5241. Payment of assessments — When delinquent — Interest and penalties. — District assessments shall be billed and collected in one (1) of the following ways:

(1) On or before the first day of December, the treasurer of the district shall mail an assessment bill to each water user and shall publish a notice for a period of not less than two (2) weeks in a newspaper published or having general circulation in each of the counties in which any part of the district is situated, which bill and notice shall set forth the date by which assessments must be paid and the times and places at which payment may be made. Assessments collected by the ground water district shall be due and payable on or before December 31 of each year, after which date each unpaid assessment shall be delinquent; shall bear interest at the rate of interest established for money due on judgments until paid; shall entitle the district to take any appropriate action to collect the assessment, including suit and the foreclosure of liens as provided in this chapter; and, in addition, shall be subject to a penalty in the amount of fifteen dollars (\$15.00) per delinquent assessment; or

(2) The board of directors of any ground water district organized under the laws of this state desiring to provide for the collection of district assessments by the county treasurer instead of the district treasurer may do so by adopting a resolution providing for collection by the county treasurer, and furnishing a copy of the resolution to the county auditor of each county in which any of the district lands are located; provided that the county

commissioners of the county or counties must first approve the ground water district resolution by a proper resolution of the board of county commissioner's adopted by a majority of the county commissioners and made and entered upon the minutes of the board or boards of county commissioners. The board of county commissioner's resolution may provide for collection fees and for any additional fee against the ground water district for the cost of transferring records and initiating the collection process. The board of county commissioners of any county, having determined that the collection of ground water district assessments is an undue burden upon the county and shall no longer be provided, shall notify the board of directors of the ground water district by December 1 in the year preceding the year for which the action shall first be effective by providing to the board of directors a certified copy of the majority decision of the board of county commissioners.

If the ground water district board determines to issue assessments through the respective counties, the treasurer of the ground water district first shall prepare a list containing the legal description, the assessor's parcel number, the name and last known address of the owner of record, and the amount of the assessment for each parcel. The sum assessed and charged against each parcel shall be entered by the ground water district as the operation and maintenance assessment of the (name of district) ground water district. On or before the third Tuesday of July of each year, the list shall be certified by the treasurer of the ground water district to the county auditor of the county in which the lands are located, and the county treasurer shall enter the same upon the tax rolls as provided by law for the entry of taxes, against the land of each of the persons named in the list, together with the amounts thereof; and the same shall be subject to the same interest and penalties in case of delinquency as in the case of property taxes and shall be collected in the same manner as taxes and subject to the same right of redemption, and the lands sold for the collection of delinquency shall be subject to the same right of redemption, as the sale of land for property taxes.

When a ground water district includes lands in more than one (1) county, the treasurer of the ground water district shall prepare separate lists for the county assessor for each county. When a parcel lies partly in one (1) county and partly in another county, only the portion in a county shall be included on the list for that county. If the legal description of any parcel on any such list differs from the legal description as shown by the assessor's records, the assessor shall notify the district treasurer of the discrepancy and the district treasurer shall submit to the county assessor an addendum changing the description to conform with the assessor's records; provided, that where the discrepancy between the descriptions occurs because a portion of the parcel lies outside the district, no change in description shall be required, and the district assessments shall be effective only as to the portions of any parcel that are within district boundaries.

Assessments shall be due and payable on the date specified in the county's tax notice; shall be collected and accounted for by the county treasurer in the same manner as property taxes and shall be paid over to the ground water

district treasurer together with any penalties or interest collected. The county shall enforce the collection of assessments in the same manner as it enforces the collection of taxes of the county, and failure to pay the assessment shall be subject to the same penalties. The collection of a ground water district's assessments by the county treasurer shall not make the district's obligations respecting any bond, contract, debt, or interest the obligation of the county. [I.C., § 42-5241, as added by 1995, ch. 290, § 1, p. 982; am. 1996, ch. 298, § 9, p. 977.]

Compiler's notes. Section 8 of S.L. 1996, ch. 298 is compiled as § 42-5224.

Section 10 of S.L. 1996, ch. 298 declared an emergency. Approved March 18, 1996.

42-5242. Entry of delinquent assessments — Filing of delinquency list. — (1) On or before the 15th day of January of each year the treasurer shall enter the amount of all delinquent assessments upon the assessment book, which entry shall be considered to be dated as of the first day of January. Such entry shall have the force and effect of a sale to the treasurer of the district as grantee in trust for the district of all property to which a lien has attached as a result of such unpaid assessments.

(2) The treasurer shall compile a list of such delinquency entries which shall contain the names of the persons or entities to whom the assessments were directed and the amount of such delinquent assessments together with the amount of the penalties to be added thereto. A certified copy of the delinquency list shall be filed with the county recorder of each county in which the properties affected by such delinquent assessments are located, and the treasurer shall then provide by certified mail a notice of delinquency to each ground water user having a delinquent assessment. [I.C., § 42-5242, as added by 1995, ch. 290, § 1, p. 982.]

42-5243. Redemption and sale of property subject to delinquent assessments. — The manner in which property subject to a lien for nonpayment of assessments may be redeemed, and if not redeemed, shall be sold as provided in sections 43-712, 43-715 through 43-721, 43-724 and 43-726, Idaho Code, to the extent that the provisions thereof are in keeping with the provisions of this chapter. [I.C., § 42-5243, as added by 1995, ch. 290, § 1, p. 982.]

42-5244. Prohibition against participation in mitigation plan when subject to delinquent assessment. — A ground water user who is delinquent in the payment of any assessment against his water use under this chapter is prohibited from being a participant in any mitigation plan until such delinquent assessment is paid in full. The district shall provide the director a report of such delinquent assessments at the first of each month for purposes of enforcement. The district shall inform the director immediately upon the payment of any such delinquent assessment. This section shall be enforced by the watermaster within water districts established under chapter 6 of this title, and by the director pursuant to sections 42-351 and 42-1701B, Idaho Code, in areas outside of such water district.

[I.C., § 42-5244, as added by 1995, ch. 290, § 1, p. 982; am. 1998, ch. 173, § 14, p. 595.]

Compiler's notes. Section 13 of S.L. 1998, ch. 173 is compiled as § 42-4010.

42-5245. Petition for annexation of land. — Any ground water user may file with the board a petition in writing praying that the land and/or facilities listed under the ground water user's ground water right(s) may be annexed into the district. The petition shall contain a legal description of the lands and any other information the district may require, and the petitioner shall state under oath that petitioner holds the title to said lands. If the ground water user is a nonirrigator, the petition shall state if the ground water user is seeking to join the district solely to participate in the district's mitigation plan or other mitigation activities. [I.C., § 42-5245, as added by 1995, ch. 290, § 1, p. 982.]

Sec. to sec. ref. Sections 42-5245 — 42-5249 are referred to in § 42-5214.

Sections 42-5245 — 42-5250 are referred to in § 42-5258.

42-5246. Notice of petition. — The board secretary shall cause a notice of the filing of such petition to be published in the manner of notices of elections. The notice shall state the filing of such petition, and the name of the petitioner, a description of the lands mentioned in the said petition, and it shall notify all persons interested in or that may be affected by such change of boundaries of the district, to appear at the office of said board, at a time named in said notice, and show cause in writing, if any they have, why the lands mentioned should not be annexed to said district. The petitioner shall advance to the secretary sufficient money to pay the estimated costs of all proceedings under this chapter. [I.C., § 42-5246, as added by 1995, ch. 290, § 1, p. 982.]

42-5247. Hearing on petition. — The board, at the time mentioned in said notice or at such other time to which the hearing may be adjourned, shall hear the petition and all the objections thereto. The failure of any person to appear and object shall be taken as an assent on his part to a change of the boundaries of the district as requested in the petition, or to such a change thereof as will include a part of the lands. [I.C., § 42-5247, as added by 1995, ch. 290, § 1, p. 982.]

42-5248. Assessments against annexed lands. — (1) The board of directors may require, as a condition to the granting of an annexation petition, that the petitioners shall severally pay to the district such respective sums, as nearly as the same can be estimated, as said petitioners, or their grantors, would have been required to pay such district, had such lands been included in such district at the time it was originally formed, together with a proportionate share of the expenses of the district accrued since formation.

(2) If the petition seeks only to participate in a district mitigation plan, the board may require a proportionate sum of the mitigation expenses

accrued since the district was originally formed to be paid as a condition to the granting of an annexation petition. [I.C., § 42-5248, as added by 1995, ch. 290, § 1, p. 982.]

42-5249. Order accepting or rejecting petition. — (1) If the board of directors deems a proposed annexation not to be in the best interests of the district to include the lands mentioned in the petition, the board shall reject the petition. But if they deem it for the best interest of the district, the board may order the lands mentioned in the petition or some part thereof be annexed to the district.

(2) The order shall describe the lands to be annexed to said district and the board may cause a survey thereof to be made if deemed necessary. Thereafter the annexed land shall be subject to such assessments from time to time as the board of directors shall deem right under the circumstances, and such assessments shall be deemed to be assessments for benefits to said lands by reason of their annexation to said district. The directors shall state on their minutes at their next regular meeting which division and election precinct in said district the said lands so annexed shall be attached, and, if necessary, the board shall make an order redividing the district into divisions and election precincts, in the same manner and to like effect, as near as may be, as provided for that purpose on the formation of a district. [I.C., § 42-5249, as added by 1995, ch. 290, § 1, p. 982.]

42-5250. Order to be recorded. — Upon a change of the boundaries of a district becoming effective, a copy of the order of the board of directors ordering such change, certified by the president and secretary of the board, shall be filed for record in the recorder's office of each county within which are situated any of the lands of the district, and thereupon the district shall be and remain a ground water district, as fully and to every intent and purpose as if the lands which are included in the district by the change of the boundaries had been included therein at the original organization of the district. [I.C., § 42-5250, as added by 1995, ch. 290, § 1, p. 982.]

42-5251. Petition for exclusion of lands — Lands may remain in the district for mitigation purposes. — Any district member may file with the district board a petition requesting that the member's lands be excluded from the district. The petition may request that the lands either be excluded for all purposes or be excluded for all purposes except mitigation. The petition shall be signed by each petitioner, but need not be acknowledged. All costs incurred by the district in carrying out the exclusion proceeding shall be assessed as provided in section 42-5253, Idaho Code. A person purchasing land under a written contract shall be deemed to be the owner of that land for purposes of this section. [I.C., § 42-5251, as added by 1995, ch. 290, § 1, p. 982.]

42-5252. Contents of petition — Representations, certification and liability — Waiver of benefits upon exclusion. — (1) A petition for exclusion shall set forth or include the following:

- (a) A description of the land and/or facilities of petitioner for which exclusion is requested, together with such evidence of ownership of the land and/or facilities as is satisfactory to the district board;
- (b) A representation that no mortgagee or other person holds a lien of record in the county where the land for which exclusion is requested is located, for which the lienholder's consent to the exclusion is required or that, if such consent is required, the consent has been granted by the lienholder;
- (c) If the member seeks exclusion for all purposes, an explicit written waiver and relinquishment, on a form provided by the board or otherwise, of all right to rely upon or be covered by any program, plan, activity or benefits of any kind provided by or through the district;
- (d) If the member seeks to be excluded from the district for all purposes except mitigation, an explicit written waiver and relinquishment stating that the member recognizes and agrees that:
 - (i) The member no longer will be entitled to vote or participate in the governance of the district, to nominate directors, or to serve as a director of the district except as specified in this chapter;
 - (ii) The member will remain subject to all assessments pertaining to the district's mitigation program(s) or plans;
 - (iii) The member will be entitled to receive no benefits of any kind from the district except those pertaining to mitigation purposes.
- (e) Regardless of whether the exclusion will be for all purposes or for all except mitigation purposes, an explicit written statement, on a form provided by the board or otherwise, that the member recognizes and agrees that he will remain liable to the district, and subject to assessment, for any financial indebtedness the member may have to the district for indebtedness incurred before exclusion occurs.

(2) The district board shall return to the petitioner any petition not accompanied by the information required in subsection (1) of this section, and no further action shall be required of the board with respect to such petition. The petitioner shall be liable for any expenses or damages to lienholders or to other landowners or to the district resulting directly or indirectly from wrongful exclusion of lands by reason of untrue or incorrect statements in the petition.

(3) The petition for exclusion shall be signed by the member and be acknowledged in front of a notary public in the same manner as for deeds of land. [I.C., § 42-5252, as added by 1995, ch. 290, § 1, p. 982.]

42-5253. Order of exclusion. — (1) Upon receipt of a properly completed petition for exclusion, the district's board of directors, by resolution shall make an order forthwith excluding the lands described in the petition either for all purposes or for only those purposes not related to mitigation. No hearing is required prior to granting a petition for exclusion.

(2) At a minimum, the order of exclusion shall specify that:

- (a) Lands excluded for all purposes shall not be a part of or be entitled to receive any benefits from the district;
- (b) Lands excluded only for purposes not related to mitigation, shall continue to be part of the district for mitigation purposes only and shall be assessed for these purposes as provided under this chapter;
- (c) Any excluded lands are subject to the requirements of section 42-5257, Idaho Code.
- (d) When the petition is filed on or before December 1 in any calendar year, any assessment, other than those specified in section 42-5257, Idaho Code, against the land for any calendar year subsequent to the year in which the petition was filed shall not be valid and no lien for any such attempted assessment shall attach under section 42-5240, Idaho Code. [I.C., § 42-5253, as added by 1995, ch. 290, § 1, p. 982.]

Sec. to sec. ref. This section is referred to in § 42-5251.

42-5254. Survey of land to be excluded. — The board of directors may cause any survey to be made it deems necessary for the purpose of determining the change in the district by reason of an exclusion or proposed exclusion. If the land described in the petition is described in accordance with the public survey or in accordance with a plat approved, filed and recorded as provided by law, the cost of survey shall be borne by the district, otherwise the cost shall be borne by petitioner. [I.C., § 42-5254, as added by 1995, ch. 290, § 1, p. 982.]

42-5255. Costs of excluding land. — The costs of excluding any land as provided in this chapter shall be borne by the petitioner or petitioners except as provided in section 42-5254, Idaho Code. The board may require a deposit of the estimated costs before granting the petition. If the actual costs of completing the exclusion of the lands from the district are less than the amount deposited by the petitioner, the balance shall be refunded to the petitioner within fourteen (14) days after the final action for the exclusion is completed. If the actual costs of the exclusion of the lands is more than the deposit, the difference shall be paid to the district by the petitioner within fourteen (14) days after receipt of a statement to that effect from the district, and the board's order of exclusion shall not be effective until the difference is paid. [I.C., § 42-5255, as added by 1995, ch. 290, § 1, p. 982.]

42-5256. Changes to be filed for record. — The decision and order of the board of directors or the district court, in case of appeal, excluding the petitioner's land and changing the boundaries of such ground water district shall be filed for record in the recorder's office of the county or counties within which are situated the lands of such ground water district. [I.C., § 42-5256, as added by 1995, ch. 290, § 1, p. 982.]

42-5257. Exclusion — Effect — Obligations outstanding — Enforcement — Payment — Certificate. — (1) Except as otherwise provided in this chapter, land and/or facilities excluded from any ground water

district shall not thereafter be entitled to any of the rights and benefits of the district and shall be deemed to have fully relinquished all such rights and benefits.

(2) Land and/or facilities fully excluded from a district and those excluded only from nonmitigation purposes shall be subject to assessment and be otherwise chargeable for the payment and discharge of all obligations outstanding at the time of the entry of the exclusion order as fully as though the land had not been excluded. Such obligations shall include, but are not limited to, their proportionate share of any of the district's existing indebtedness that was incurred for a project or activity that: (a) provided a benefit to such lands prior to the exclusion and for which benefit the excluded lands remain indebted; or (b) continues to benefit such lands even after the exclusion. Where either of these circumstances exists, excluded lands shall remain a part of the district for the purpose of discharging such existing contract indebtedness, and otherwise shall be obligated to pay all regular and special assessments to retire such debt as if they had not been excluded. The district's board of directors may allow any debt or obligation against any excluded land and/or facility to be paid in installments or in any other manner the board deems equitable.

(3) All provisions which could be used to compel the payment by excluded land of its portion of the outstanding obligations had the exclusion not occurred, may be used to compel the payment on the part of the land of the portion of the outstanding obligations of the district for which it is liable.

(4) When any member obtaining the exclusion of land from a ground water district has paid to the district all of the debts and obligations of the district assessable, chargeable or allocable to the land and/or facility excluded, the district may issue its certificate of full payment executed by the president and secretary of the district, and acknowledged so that the certificate may be recorded in the records of the county wherein the land is situate. [I.C., § 42-5257, as added by 1995, ch. 290, § 1, p. 982.]

Sec. to sec. ref. This section is referred to in § 42-5253.

42-5258. Reinstatement of lands. — Where lands have been excluded from a ground water district they may be reinstated to the district by following the procedures provided in sections 42-5245 through 42-5250, Idaho Code, except that the board of directors, in its discretion, may refuse for any reason to annex such lands to the district. [I.C., § 42-5258, as added by 1995, ch. 290, § 1, p. 982.]

42-5259. Participation by nonmember in district solely for mitigation purposes. — Upon written request from a ground water user who is not a member of a district, and regardless of whether such user is an irrigator, a district board of directors shall enter a contract with such nonmember pursuant to which the nonmember shall be allowed to participate fully in, and obtain all benefits of, any mitigation plan, purpose or activity the district currently has in force or is developing, provided that:

(1) The board finds that the plan is likely to be effective in mitigating the effects of such nonmember's ground water use, and that including the nonmember within the mitigation plan's coverage will not impair the plan's effectiveness as to district members;

(2) If the district's mitigation plan has been approved by the director, the board shall evaluate the contract request in accordance with any conditions of the district's mitigation plan which address equitable participation by ground water users who do not initially participate in such mitigation plan;

(3) Before the contract may be effective, the board may collect from the nonmember a payment adequate to compensate the district for the nonmember's proportional share of the costs the district already has incurred in developing and implementing the mitigation plan;

(4) The board may include in the contract a provision requiring the nonmember to pay a reasonable surcharge, either annually or on some other basis, to reimburse the district for such nonmember's proportional share of those past or future costs of operating the district attributable to formulating or implementing the mitigation plan or plans in which the nonmember is participating;

(5) The board may require the nonmember to provide security to assure the payment of all assessments and charges related to the contract;

(6) Nothing in this section shall be interpreted to limit the district's ability to enter into a contract with nonmembers pursuant to terms and conditions acceptable to both parties. [I.C., § 42-5259, as added by 1995, ch. 290, § 1, p. 982.]

42-5260. Petition to annex state land. — The state board of land commissioners may, by resolution duly passed at any meeting of such state board and recorded in its minutes, after due consideration in each specific case, authorize the governor of the state of Idaho, as chairman of the board of land commissioners, to sign a petition for the annexation of adjacent Idaho state lands to a district, or sign a petition to exclude such state lands from a district. The governor shall be deemed the owner of such state lands for the purpose of signing any petition herein authorized, with like effect as the owner of private lands. [I.C., § 42-5260, as added by 1995, ch. 290, § 1, p. 982.]

42-5261. Petition for dissolution of district. — Whenever a majority of the members entitled and qualified to vote in district elections so desire, they may petition the board to call a special election to submit to the qualified district electors a proposal to vote on the dissolution of the district. The petition shall set forth the reasons for such proposal. The petition for dissolution of the district shall state that all the district's outstanding legal and enforceable obligations of every nature whatsoever have been fully satisfied and paid or shall set forth facts showing reasonable grounds for the belief that the consent of the holders of all such district obligations can be obtained, or that the district is able to satisfy all those not consenting. [I.C., § 42-5261, as added by 1995, ch. 290, § 1, p. 982.]

42-5262. Call for election on dissolution petition. — It shall be the duty of the said board of directors, if it approves the dissolution petition, to

call an election in accordance with section 34-106, Idaho Code, for the purpose of submitting to the qualified electors of the district the proposal for dissolution of the district. [I.C., § 42-5262, as added by 1995, ch. 290, § 1, p. 982.]

42-5263. Notice of dissolution election. — Notice of such election must be given by posting notices in five (5) public places in each election precinct in said district at least four (4) weeks before the date of said election and by the publication thereof for the same length of time in some newspaper published in each county in which the district or any part thereof is located. Such notice must specify the time and place of holding such election. [I.C., § 42-5263, as added by 1995, ch. 290, § 1, p. 982.]

42-5264. Conduct of dissolution election. — An election on a dissolution petition shall be held in all respects as near as practicable in conformity with the provisions of sections 42-5211 through 42-5213, Idaho Code. Those district members who are qualified to vote pursuant to section 42-5210(1), Idaho Code, shall be entitled to vote in the dissolution election. Upon the ballots used at such elections shall be written or printed "For Dissolution—Yes" and "For Dissolution—No," depending upon the nature of the proposal to be voted upon. Each member qualified to vote in the election shall cast a number of votes in proportion to that user's cubic feet per second of ground water rights. [I.C., § 42-5264, as added by 1995, ch. 290, § 1, p. 982.]

42-5265. Canvass of returns on election for dissolution. — On the first Monday after any such election the board of directors of the district shall meet at its usual place of meeting to canvass the returns, and when they shall have declared the result the secretary shall make full entry in his record. [I.C., § 42-5265, as added by 1995, ch. 290, § 1, p. 982.]

42-5266. Petition for confirmation of dissolution by district court. — Immediately after such election, in case the proposal has carried by a vote of members representing a majority of the ground water rights in the district, measured by cubic feet per second, the board shall file in the district court of the county in which the district's office is situated a petition praying in effect that the proceedings for the dissolution of the district be examined, approved and confirmed by the court. The petition shall set forth a full description of the lands formerly embraced within the district which is affected by the proceedings for the dissolution of such district, shall set forth generally the proceedings taken with reference to the petition and the election specified in the preceding sections of this chapter, and shall set forth fully every item of legal and enforceable indebtedness of the district with the name and residence of the holder thereof so far as known to the district secretary. In case any items of indebtedness are in the hands of unknown owners, they shall be so listed. [I.C., § 42-5266, as added by 1995, ch. 290, § 1, p. 982.]

42-5267. Character of proceedings for confirmation. — Dissolution proceedings shall be in the nature of a suit to quiet title with respect to so much of the land and/or facilities within the district as is affected by the proposed dissolution. In such proceedings the board shall be the parties plaintiff and the holders of any obligations of the district, including obligations which are or might become liens against any of the lands, are parties defendant. The provisions of section 5-326, Idaho Code, so far as it can be made applicable, shall govern generally the force and effect of the decree; provided, that the petition may be in form against all persons having interest in or claim against the district, without naming them, and the summons, directed in the same way, and setting forth briefly the purposes of the petition, shall be by publication in the first instance or order of the court or a judge thereof and service on all parties interested, whether unknown owners, heirs, devisees, claimants or otherwise, shall be deemed complete at the time prescribed by the order for publication; and, unless answer be made by anyone interested in or making claim against said district default may be entered. [I.C., § 42-5267, as added by 1995, ch. 290, § 1, p. 982.]

42-5268. Decree of confirmation. — The court or judge shall set a day for the hearing of such petition and if it appears to the court from the proof that there is no such outstanding indebtedness of such district, or in case there is any such indebtedness outstanding that the holders thereof have filed no objections to the proceedings, or have filed their consent thereto, then the court shall enter its decree confirming the said proceedings, or may hear and determine and make decree as to any controversy. The election authorized by the preceding sections of this chapter shall have no force or effect to dissolve any district until confirmed by the decree of court as herein set forth. [I.C., § 42-5268, as added by 1995, ch. 290, § 1, p. 982.]

42-5269. Dissolution without election — Petition — Conditions. — (1) A ground water district may be dissolved without the holding of the election provided for in this chapter upon complaint or petition of parties holding and owning fifty percent (50%) or more, measured on the basis of cubic feet per second, of all the ground water rights within the district.

(2) It must be made to appear to the satisfaction of the court, by such complaint or petition, that any one (1) or more of the following conditions exist in or as to said district:

(a) The district has been abandoned, or for two (2) or more years last past has ceased to function, and there is little or no probability that it ever will or can function in the future;

(b) No useful purpose exists for the further continuance of the organization of the district; or

(c) There are insufficient members to pay for the costs of operating the district. [I.C., § 42-5269, as added by 1995, ch. 290, § 1, p. 982.]

42-5270. Dissolution without election — Parties. — In such petition the petitioners or complainants shall be named as plaintiffs and the ground water district, and its directors, if any there are, and all persons having

interest in or claim against the district, without naming them, shall be defendants. In the course of the proceedings of said case, and at any time before the final hearing thereof, any person interested may join in said case as a party plaintiff or as a party defendant, or any party interested may intervene in said case without order of the court. [I.C., § 42-5270, as added by 1995, ch. 290, § 1, p. 982.]

42-5271. Dissolution without election — Appointment of officer to marshal assets — Decree. — In the exercise of the jurisdiction given it by this act, the court shall have the power to appoint such referee, master, auditor, or receiver as may be considered necessary or proper to marshal the assets, and protect or preserve them, or ascertain the true condition of the district. After due hearing and consideration of the evidence submitted, the court shall enter a decree establishing the legal and equitable rights, interests and priorities of all parties and claimants, and may decree and direct the sale of all or any part of the properties of the district, whether real, personal or mixed, and direct the disbursement and application of the proceeds and the payment of the costs of the proceeding, and may dissolve the district, or may approve and confirm any settlement or agreement of settlement made between the parties interested in such district, if a settlement is agreed upon by them, or may direct the payment of the indebtedness of the district in the order of priority determined and established by the decree, through assessments made as in the case of the dissolution of villages, or may grant such other or further relief as may be equitable or proper on the premises. [I.C., § 42-5271, as added by 1995, ch. 290, § 1, p. 982.]

Compiler's notes. For words "this act" see
Compiler's notes, § 42-5224.

42-5272. Dissolution — Appeal. — Each party to any proceeding for dissolution of a district under this act shall have the right of appeal as in other civil cases. [I.C., § 42-5272, as added by 1995, ch. 290, § 1, p. 982.]

Compiler's notes. For words "this act" see
Compiler's notes, § 42-5224.

42-5273. Consolidation of two or more ground water districts. — Whenever the boards of directors of any two (2) or more ground water districts which together form a contiguous area determine that it is in the best interests of their respective districts that the districts be consolidated into a single ground water district and wish to proceed toward consolidation, the following procedures shall be followed:

(1) Each board shall petition its respective county commission in the counties identified by reference to section 42-5203, Idaho Code, for an order for an election to vote upon the question of such consolidation, which petition shall state in detail the terms upon which such consolidation is proposed to be made, and also shall transmit a copy of the petition to the department of water resources.

(2) Upon receiving the petitions, the department shall investigate questions affecting such proposed consolidation, and it shall make a report of the result of such investigations to each county commission with whom the petitions were filed not more than ninety (90) days after the department receives such petitions.

(3) After receiving the department's report, each county commission, if it deems it advisable, shall make an order fixing the time for an election in the districts to vote upon the question of proposed consolidation, which time shall be at the first available date in accordance with section 34-106, Idaho Code. Notice of the election shall be published as required for notice of election in section 42-5209, Idaho Code, and the boards of directors shall make all necessary arrangements for such election in their respective districts as provided in this title for other elections. The ballots shall be substantially as follows: "Consolidation—Yes." "Consolidation—No."

(4) The boards of directors shall canvass the returns of the election as provided in case of usual ground water district elections, and shall immediately thereafter transmit, by messenger or registered mail, certified abstracts of the result of said election in their respective districts to the clerk of the county commission. Within ten (10) days after such returns are received by the clerk, the county commission shall meet and canvass the same.

(5) If it appears that a majority of all the votes cast in each of said districts is "Consolidation—Yes." said board shall make an order, and enter the same of record in its minutes, establishing said consolidated district, giving its boundaries and designation, and in detail the terms under which the consolidation has been effected, and dividing said consolidated districts into three (3) divisions, and shall appoint some person qualified under this title, to act as director for each of said divisions of said district until the next general election for the election of officers, when a board of directors shall be elected as provided in section 42-5218, Idaho Code; provided however, that the organization of such district shall not take effect until the first Tuesday of the January following said order of its establishment. If the date provided by law for the election of directors shall come between the date of said order of the county commission and the first Tuesday of January, then in making such order the board shall designate the board of directors of one (1) of the consolidated districts as a board to take charge of such election, and in that case a director shall be elected for each such division of the consolidated district, and no appointment of directors shall be made by the county commission.

(6) If, however, upon such canvass by the county commission, it appears that a majority of the votes cast in any district thus proposed to be consolidated is "Consolidation—No," then a record of that fact shall be entered in the same minutes of the county commission, and all the proceedings had under the preceding sections of this chapter shall be void. [I.C., § 42-5273, as added by 1995, ch. 290, § 1, p. 982.]

42-5274. Procedure for consolidating one ground water district within another having substantially larger ground water diver-

sions. — In those cases where the cumulative total ground water diversions (excluding diversions under domestic and stockwater rights) in one (1) district are less than one-tenth ($\frac{1}{10}$) of such diversions in the larger district, and the boards of directors deem it for the best interests of the respective districts that the two (2) districts be consolidated into a single district, such boards may seek to consolidate according to the following procedure as an alternative to that described in section 42-5273, Idaho Code:

(1) The boards may propose a contract between them setting forth the terms and conditions of consolidating the district having the smaller ground water diversions into the other district, with the name and officers of the district having the larger ground water diversions still retained.

(2) Once both boards have approved the contract, it shall be submitted for approval by the members of the district having the smaller ground water diversions, together with the question of whether the two (2) districts shall be consolidated under the contract's terms, at a special election held for that purpose in such district. Notice of the election shall be published as required for notices of election for indebtedness. At the election should two-thirds ($\frac{2}{3}$) of the electors voting, vote in favor of the contract and the consolidation of the districts, the board of directors of the district having the smaller ground water diversions shall petition the board of directors of the district having the larger ground water diversions, which notice shall be published in a newspaper published within the county wherein the office of the board of directors of the district having the larger ground water diversions is situated, for such length of time and covering the same matters as required by a petition to annex land and/or facilities into a district.

(3) The law applicable to the annexation of land into a district after the petition is filed and notice given, shall apply to the consolidation, including an annexation of a smaller district into a larger district.

(4) After the board of directors of the district having the larger ground water diversions has approved the resolution or other decision including within its boundaries the district having the smaller ground water diversions, the board shall file a petition in the district court within the county wherein the principal office of its district is situated, asking for an approval and confirmation of the proceedings thereunder, and the same procedure shall be followed as provided in sections 43-406 through 43-408, Idaho Code, with reference to the confirmation of the proceedings within irrigation districts. In such petition the prayer shall be that the proceedings, together with the contract, may be examined and approved by the court; that after the confirmation of said proceedings the order of the board of directors admitting the smaller district into the district having the larger ground water diversions, containing a description of all the land properly certified by the secretary of the district, shall be filed for record in the office of the recorder of both counties with which the petition was filed. [I.C., § 42-5274, as added by 1995, ch. 290, § 1, p. 982.]

Compiler's notes. The words enclosed in parentheses so appeared in the law as enacted.

42-5275. Exercise of powers under this chapter by irrigation districts organized under title 43. — Any irrigation district organized and operating pursuant to title 43, Idaho Code, may exercise the authorities provided under this chapter to the extent doing so does not conflict with any provision of title 43, Idaho Code. [I.C., § 42-5275, as added by 1995, ch. 290, § 1, p. 982.]

42-5276. Inclusion of irrigation districts organized under title 43. — Where the water supply for lands is ground water provided by an irrigation district established under title 43, Idaho Code, and such lands are included in and subject to assessment by the irrigation district, such lands shall be included in a ground water district organized under the provisions of this chapter only if the board of the irrigation district serves notice in the same manner as that provided for nonirrigators in section 42-5214(2) and (3), Idaho Code. [I.C., § 42-5276, as added by 1995, ch. 290, § 1, p. 982.]

Compiler's notes. Section 2 of S.L. 1995, ch. 290 declared an emergency. Approved March 21, 1995.

TITLE 43

IRRIGATION DISTRICTS

CHAPTER.

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3. POWERS AND DUTIES OF BOARD OF DIRECTORS, §§ 43-301 — 43-343.
4. BONDS — ISSUANCE, CONFIRMATION AND SALE, §§ 43-401 — 43-414.
5. SECONDARY BONDS TO PAY INTEREST, §§ 43-501 — 43-504.
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7. LEVY AND COLLECTION OF ASSESSMENTS, §§ 43-701 — 43-732.
8. REPOSSESSION OF WATER RIGHTS UPON ISSUANCE OF TAX DEED, §§ 43-801 — 43-806.
9. CONSTRUCTION WORK AND ACQUIREMENT OF PROPERTY, §§ 43-901 — 43-908.
10. ANNEXATION OF LANDS TO DISTRICT, §§ 43-1001 — 43-1011.
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12. ANNEXATION AND EXCLUSION OF STATE LANDS, § 43-1201.
13. DISSOLUTION AND MODIFICATION OF DISTRICTS, §§ 43-1301 — 43-1313.
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22. RECONSTRUCTION, REHABILITATION, REPLACEMENT AND IMPROVEMENT OF DAMS. BY IRRIGATION DISTRICTS — FINANCIAL AND OTHER ARRANGEMENTS, §§ 43-2201 — 43-2207.
23. RECONSTRUCTION OF DAMS AND RELATED APPURTENANCES — HYDROELECTRIC. FACILITIES CONSTRUCTION, §§ 43-2301 — 43-2308.
24. ANNEXATION OF PROPERTY FOR THE PURPOSE OF RECEIVING DOMESTIC WATER, §§ 43-2401 — 43-2412.
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CHAPTER 1

ORGANIZATION OF DISTRICT

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- 43-102. Petition for organization.
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- 43-111. Qualifications of voters.
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- 43-117. Treasurer's official bonds.
- 43-118. Districts including lands under existing canals — Decree of confirmation — Rights of landowners — Powers of districts.
- 43-119. Rights and privileges of corporations and partnerships.

43-101. Who may propose organization. — Whenever fifty (50), or a majority, of the holders of title, or evidence of title, to lands susceptible of one or more modes of irrigation from the same or different sources and by

the same or different systems of works, desire to provide for the irrigation of the same, or when for other reasons they desire to organize the proposed territory into one district, they may propose the organization of an irrigation district under this title: provided, said formation into one (1) district meets with the approval of fifty (50), or a majority of the holders of title, or evidence of title, to lands in each of the communities affected: provided, further, said holders of title or evidence of title shall hold such title or evidence of title to at least one fourth ($\frac{1}{4}$) part of the total area of the land in the proposed district, exclusive of state and government land which will be assessable for the purposes of the district. The equalized county assessment roll next preceding the presentation of a petition for the organization of an irrigation district shall be sufficient evidence of title for the purpose of this title, but other evidence may be received, including receipts or other evidence of the rights of entrymen on lands under any law of the United States or of this state, and such entrymen shall be competent signers of such petition, and the lands on which they have made such entries shall, for the purposes of said petition, be considered as owned by them. [1903, p. 150, § 1; am. 1907, p. 484, § 1, subd. 1; reen. R.C. & C.L., § 2372; C.S., § 4313; am. 1921, ch. 237, § 1, p. 529; I.C.A., § 42-101.]

Cross ref. Change of name of irrigation districts, § 43-1506.

Construction work and acquirement of property, § 43-901.

Counties authorized to act as irrigation districts, § 42-2809.

Drainage districts, §§ 42-2901 — 42-2981.

Employment security law, covered employment under, § 72-1316.

Irrigation lateral districts, § 43-1505.

Local planning act, §§ 67-6501 — 67-6529.

Receivership, § 8-601 et seq.

Sec. to sec. ref. This title is referred to in §§ 34-1401, 42-706, 42-5203, 42-5275, 42-5276 and 63-36220.

Chapters 1-15 of this title are referred to in § 43-722.

This chapter is referred to in §§ 43-2502 and 59-1101.

This section is referred to in §§ 43-107 and 43-903.

Cited in: Nampa & Meridian Irrigation Dist. v. Barker, 38 Idaho 529, 223 P. 529 (1924); Oregon S.L.R.R. v. Minidoka Irrigation Dist., 48 Idaho 584, 283 P. 614 (1929); Bradshaw v. Milner Low Lift Irrigation Dist., 85 Idaho 528, 381 P.2d 440 (1963).

ANALYSIS

Constitutionality.

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Constitutionality.

This act is a reenactment of the district law of 1899, and is substantially the same as the Wright law of California and is constitutional. Nampa & M. Irrigation Dist. v. Brose, 11 Idaho 474, 83 P. 499 (1905).

Constitutionality of irrigation district law has been so frequently sustained it is no longer open to question. American Falls Reservoir Dist. v. Thrall, 39 Idaho 105, 39 Idaho 130, 228 P. 236 (1924).

Irrigating Lands Outside District.

Fact that canal works of districts supplied water to irrigated land outside of district did not in any way affect validity of organization of district. Settlers' Irrigation Dist. v. Settlers' Canal Co., 14 Idaho 504, 94 P. 829 (1908).

Irrigation Districts and Drainage Districts.

Court could not make drainage district out of irrigation district by mere judicial fiat. Nampa & Meridian Irrigation Dist. v. Petrie, 37 Idaho 45, 223 P. 531 (1923).

Legal Status of Irrigation District.

Irrigating district, though a quasi municipal corporation, is nevertheless liable for negligence of its officers. Noon v. Gem Irrigation Dist., 205 F. 402 (D. Idaho 1913).

Irrigation district is a public quasi corporation, organized, however, to conduct a business for the private benefit of owners of land within its limits and, it holds its property in a

proprietary rather than governmental capacity. *City of Nampa v. Nampa & Meridian Irrigation Dist.*, 19 Idaho 779, 115 P. 979 (1911), writ of error dismissed, 238 U.S. 643, 35 S. Ct. 602, 59 L. Ed. 1502 (1915).

Its quasi municipal character renders irrigation district subject to the constitutional requirements concerning electors. *Pioneer Irrigation Dist. v. Walker*, 20 Idaho 605, 119 P. 304 (1911).

Irrigation district is quasi municipal corporation organized for the specific purpose of providing ways and means of irrigating lands within district and maintaining irrigation system for that purpose. *Colburn v. Wilson*, 23 Idaho 337, 130 P. 381 (1913); *Tingwell v. King Hill Irrigation Dist.*, 66 Idaho 76, 155 P.2d 605 (1945).

Irrigation districts are public corporations although not strictly municipal in the sense of exercising governmental functions other than those connected with raising revenue to defray expenses of irrigation systems. *Indian Cove Irrigation Dist. v. Prideaux*, 25 Idaho 112, 136 P. 618, 191A Ann. Cas. 1218 (1913).

Irrigation district is a mutual cooperative corporation organized not for a profit, but it is not a public service corporation in its broad sense. *Nampa & Meridian Irrigation Dist. v. Briggs*, 27 Idaho 84, 147 P. 75 (1915).

Mutual Water Distribution Company.

An irrigation district which never conducted its business in accordance with the laws pertaining to irrigation districts but operated as a mutual company was an irrigation district in name only and court could not apply to it the law relating to irrigation districts. *Johnson v. Strong Arm Reservoir Irrigation Dist.*, 82 Idaho 478, 356 P.2d 67 (1960).

Proceedings in Rem.

Organization of irrigation districts and all proceedings in connection therewith are proceedings in connection therewith are proceedings in rem. *Knowles v. New Sweden Irrigation Dist.*, 16 Idaho 217, 101 P. 81 (1908); *Smith v. Progressive Irrigation Dist.*, 28 Idaho 812, 156 P. 1133 (1916); *In re King Hill Irrigation Dist.*, 37 Idaho 89, 221 P. 839 (1923).

Purpose of Organization.

Purpose of organization is not rental, sale, or distribution of water, but is improvement of land within district by means of irrigation. *Yaden v. Gem Irrigation Dist.*, 37 Idaho 300, 216 P. 250 (1923).

Rule of Interpretation.

Dominant purpose of irrigation district law to facilitate economical and permanent reclamation of arid lands should be effectuated by judicial construction, so far as consistent with the whole body of the law. *Nampa & Meridian Irrigation Dist. v. Petrie*, 28 Idaho 227, 153 P. 425 (1915).

Title Required for Signers.

Holders of title or evidence of title or entrymen on lands under any law of the United States or of this state, who had received receipts or other evidence of their rights as such entrymen, were competent and proper persons to sign a petition for organization of irrigation district, and such petitioners could be counted in computing the requisite number of signers. *Gem Irrigation Dist. v. Johnson*, 18 Idaho 386, 109 P. 845 (1910).

Unpatented Lands.

Irrigation district could include lands that were held under homestead and desert land laws of congress on which final proof had not been made, and could assess entryman's interest therein, the same as if the land were held under patent. *Indian Cove Irrigation Dist. v. Prideaux*, 25 Idaho 112, 136 P. 618, 1916A Ann. Cas. 1218 (1913).

Inclusion of unpatented lands within irrigation district and apportionment of benefits thereto did not interfere with disposal of such lands by the government. *Indian Cove Irrigation Dist. v. Prideaux*, 25 Idaho 112, 136 P. 618, 1916A Ann. Cas. 1218 (1913).

Use of Lands.

Statute authorizes board of county commissioners to include within the boundaries of irrigation district all lands which in their natural state will be benefited by irrigation and are susceptible of irrigation by one system, and this is true regardless of the question as to what particular use is being made of any particular tract or piece of land at time district is organized. *Oregon S.L.R.R. v. Pioneer Irrigation Dist.*, 16 Idaho 578, 102 P. 904 (1909).

Collateral References. 45 Am. Jur. 2d, Irrigation, §§ 58-61, 77-80.

94 C.J.S., Waters, § 769.

Scope and import of term "owner" in statutes relating to formation of irrigation districts. 2 A.L.R. 778; 95 A.L.R. 1085.

Constitutionality of statutes for formation or change of irrigation districts. 69 A.L.R. 266.

Definition of term "irrigation district." 69 A.L.R. 1225.

43-102. Petition for organization. — A petition shall be first presented to the board of county commissioners of the county in which the greatest proportion of the proposed district is situated, signed by the required number of holders of title or evidence of title to the required area

of such proposed district, evidenced as above provided, which petition shall set forth and describe, with the degree of certainty required by law in a tax roll, all the lands proposed to be included in said district, and shall state whether it is proposed to purchase irrigation works already in operation or to construct new works, or as the case may be, and shall pray that the same be organized into an irrigation district. The petition, together with all maps, cross sections and papers filed therewith, shall, at all proper hours, be open to public inspection at the office of the clerk of the board of county commissioners between the date of their said filing and the date of the final hearing thereon. [1903, p. 150, part of §§ 2, 3; am. 1907, p. 484, § 1, subd. 2, and last part of subd. 3; compiled R.C. & C.L., § 2373; C.S., § 4314; I.C.A., § 42-102.]

Cited in: Nampa & M. Irrigation Dist. v. Brose, 11 Idaho 474, 83 P. 499 (1905); Settlers' Irrigation Dist. v. Settlers' Canal Co., 14 Idaho 504, 94 P. 829 (1908).

ANALYSIS

Signature by attorney.
Sufficiency of petition.

Signature by Attorney.

Signature of attorney in fact, to petition for the organization of irrigation district, was as valid and binding on him who executed power

of attorney as if he had signed petition himself. Black Canyon Irrigation Dist. v. Marple, 19 Idaho 176, 112 P. 766 (1911).

Sufficiency of Petition.

This section requires petition for organization of irrigation district to describe the boundaries of such district, but does not require petition to contain a specific and accurate description of each tract or legal subdivision of land in district. Oregon S.L.R.R. v. Pioneer Irrigation Dist., 16 Idaho 578, 102 P. 904 (1909).

43-103. Maps and water supply data. — If it be proposed by said petition to construct new works for the irrigation of said lands, or to purchase works only partially completed and not yet in operation, the petitioners must accompany the petition with a map of the proposed district. Said map shall show the location of the proposed canal or other works by means of which it is intended to irrigate the proposed district, and all the canals situated within the boundaries of the proposed district: provided, that canals that only pass through said lands and which do not in fact irrigate any of the same need not be shown. If said water supply be from natural streams, the flow of said stream or streams shall be stated in terms of cubic feet per second. If the water supply for said district is to be gathered by storage reservoirs, said map shall show the location of said proposed reservoirs, and shall give their capacity in acre feet. Said map shall be drawn to a scale of two (2) inches to the mile. Cross sections of the proposed canal, and all canals existing within the boundaries of said proposed district and shown on said map, and all proposed dams and embankments, shall be given in sufficient number to show the contemplated mode of construction, and the capacity shall be given in cubic feet per second of the proposed and said existing canals. Such cross sections shall be drawn to a scale of ten (10) feet to the inch, and said map and cross sections, together with an estimate of the cost of such works, shall be certified to by a well known and competent irrigation engineer. [1903, p. 150, § 2a, as added by 1907, p. 484, § 1; reen. R.C., § 2374; am. 1915, ch. 89, § 1, part of subd. 2374, p. 207; reen. C.L., § 2374; C.S., § 4315; I.C.A., § 42-103.]

43-104. Bond. — The petitioners must also accompany the petition with a bond, to be approved by the said board of county commissioners, in double the amount of the probable cost to the county of organizing such district, conditioned that the bondsmen will pay all said costs, in case said organization be not effected. [1903, p. 150, § 2a, as added by 1907, p. 484, § 1; reen. R.C., § 2374; am. 1915, ch. 89, § 1, part of subd. 2374, p. 207; reen. C.L., § 2374a; C.S., § 4316; I.C.A., § 42-104.]

Sec. to sec. ref. This section is referred to in § 43-116.

Cited in: *Martiny v. Wells*, 91 Idaho 215, 419 P.2d 470 (1966).

43-105. Notice of presentation to commissioners. — Such petition may be filed with the clerk of the board of county commissioners at any time, and on such filing said clerk shall publish a general notice that (giving the first name on the petition) and others have filed a petition for the organization of an irrigation district. If it be proposed in said petition to construct a new canal system, such notice shall state that fact and give the numbers of the sections in which the lands are situated which it is proposed to include in said district, but if it is proposed to purchase a canal already in operation, the notice shall state that fact and give the name by which such canal system is generally known, and shall state that the lands covered by said canal system are the lands proposed to be included in such district. The notice shall further state the time at which such petition will be presented to the board of county commissioners, which time shall be during a regular meeting of said board or a special meeting called for that purpose, and such notice shall be published two (2) weeks before the day on which the same is to be presented, and if any portion of such proposed district be within another county or counties, then said notice shall be published in a newspaper published in each of said counties. [1903, p. 150, § 2a, as added by 1907, p. 484, § 1; reen. R.C., § 2374; am. 1915, ch. 89, § 1, part of subd. 2374, p. 207; reen. C.L., § 2374b; C.S., § 4317; I.C.A., § 42-105.]

Compiler's notes. The words enclosed in parentheses so appeared in the law as enacted.

Notice Need Not Describe Lands.

It was not necessary that the notice given of the presentation of petition, or notice of time

when the same would be heard, contain a description of the different tracts or legal subdivisions within the boundaries of the proposed district. *Oregon S.L.R.R. v. Pioneer Irrigation Dist.*, 16 Idaho 578, 102 P. 904 (1909).

43-106. Notice of hearing. — When such petition is presented, the said board shall set a time for a hearing upon the same, which time shall not be less than four (4) nor more than eight (8) weeks from the date of presentation. A notice of the time of such hearing shall be published by said board, at least three (3) weeks before the time of such hearing, in a newspaper published within each of the counties in which any part of said district is situated. [1903, p. 150, § 2a, as added by 1907, p. 484, § 1, reen. R.C., § 2374; am. 1915, ch. 89, § 1, part of subd. 2374, p. 207; reen. C.L., § 2374c; C.S., § 4318; I.C.A., § 42-106.]

Cited in: Oregon S.L.R.R. v. Pioneer Irrigation Dist., 16 Idaho 578, 102 P. 904 (1909); Black Canyon Irrigation Dist. v. Marple, 19 Idaho 176, 112 P. 766 (1911).

Confirmation Proceedings.

Confirmation proceedings were not defeated by failure to give notice of hearing

before board of county commissioners, since proceeding was in rem and objection could have been taken. American Falls Reservoir Dist. v. Thrall, 39 Idaho 105, 39 Idaho 130, 228 P. 236 (1924).

43-107. Examination by department of water resources — Report to county commissioners — Amendment of plan. — A copy of such petition and all maps and other papers filed with the same shall be filed in the office of the department of water resources at least four (4) weeks before the date set for such hearing. It shall be the duty of the department to examine such petition, maps and other papers, and, if it deem it necessary, to further examine the proposed district, the works proposed to be purchased, or the location of the works to be constructed, and it shall prepare a report upon the matter in such form as it deems advisable, and submit the same to the board of county commissioners at the meeting set for the hearing of said petition. Whenever the department of water resources shall report to the board of county commissioners against the organization of such district, said board of county commissioners shall refuse to further consider such petition unless it be requested in writing so to do by three fourths ($\frac{3}{4}$) of the landowners in said proposed district, such ownership to be determined as provided in section 43-101. At the time set for hearing the board may, on receiving an adverse report from the department, adjourn the proceedings for two (2) weeks for the purpose of enabling the petitioners to file a request for such further proceedings. In any case, the petitioners may amend such plan of irrigation at such hearing to meet the approval of the department, or as they may find advisable. It shall be the duty of the county commissioners to notify the department of water resources of the final action, either favorable or unfavorable, taken upon a petition for the formation of an irrigation district. [1903, p. 150, § 2a, as added by 1907, p. 484, § 1; reen. R.C., § 2374; am. 1915, ch. 89, § 1, part of subd. 2374, p. 207; compiled and reen. C.L., 2374d; C.S., § 4319; am. 1921, ch. 172, § 1, p. 367; I.C.A., § 42-107.]

Compiler's notes. The name of the department of water administration (formerly the department of reclamation) has been changed to the department of water resources

on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

Section 2 of S.L. 1921, ch. 172 repealed all conflicting laws.

43-108. Order of board. — When they shall have determined to proceed with the matter, said board may adjourn such hearing from time to time, not exceeding four (4) weeks in all, and on final hearing may make such changes in the proposed boundaries as they may find proper, and shall make an order on their records describing the lands which they shall have determined to include in said district, and stating that such lands will be organized into an irrigation district if the vote of the electors thereafter to be taken on the proposition shall be favorable to such organization: provided, that any person whose lands are susceptible of irrigation from the same

source may, in the discretion of the board, upon application by him, have such lands included in said district. [1903, p. 150, § 2a, as added by 1907, p. 484, § 1; reen. R.C., § 2374; am. 1915, ch. 89, § 1, part of subd. 2374, p. 207; compiled and reen. C.L., § 2374e; C.S., § 4320; I.C.A., § 42-108.]

Estoppel by Failure to Protest.

Where railroad corporation owned right of way and station grounds within the boundaries of proposed irrigation district, and made no objection or protest to organization of such

district, such protest was precluded by action of board including such right of way and station grounds within district. *Oregon S.L.R.R. v. Pioneer Irrigation Dist.*, 16 Idaho 578, 102 P. 904 (1909).

43-109. Divisions of district for election of directors. — Such board shall also make an order dividing the district into not less than three (3) nor more than seven (7) divisions of as nearly equal size as practicable, which shall be numbered first, second, third, etc., and one (1) director, who shall be an elector and resident in the division, shall be elected from each division of the district at large, except that in districts of three thousand (3,000) acres or less the directors may be elected from qualified electors, holding title or evidence of title to land in the district and residing in the county in which some portion of the district is located. The number of divisions into which said district shall be divided shall be specified in the petition for the organization of the district, and if not otherwise specified shall be three. [1903, p. 150, § 2a, as added by 1907, p. 484, § 1; reen. R.C., § 2374; am. 1915, ch. 89, § 1, last part of subd. 2374, p. 207; reen. C.L., § 2374f; C.S., § 4321; I.C.A., § 42-109; am. 1957, ch. 80, § 1, p. 130.]

Compiler's notes. Section 2 of S.L. 1957, ch. 80 declared an emergency. Approved February 27, 1957.

43-110. Notice of election. — Said board shall then give notice of an election to be held in such proposed district for the purpose of determining whether or not the same shall be organized under the provisions of this title. Such notice shall describe the lands in said district with the certainty required in an ordinary deed and shall state the name of the proposed district as designated by the board of commissioners, and shall state that a map showing the lands in said district is on file in the office of the board of county commissioners, which map, if not previously made as required herein, shall be made by the petitioners after the determination of said commissioners of the question of what lands shall be included in the proposed district, and if previously made, lands added to said district or deducted therefrom by the board may be indicated thereon. Said notice shall be published for four (4) weeks prior to such election, in a newspaper published within each of said counties as aforesaid. Such notice shall require the electors to cast ballots which shall contain the words "Irrigation district — yes," or "Irrigation district — no," or words equivalent thereto, and also the name of one (1) person from each such division for director of said district. [1903, p. 150, § 2b, as added by 1907, p. 484, § 1; reen. R.C., § 2375; am. 1915, ch. 49, § 1, first part of subd. 2375, p. 136; reen. C.L., § 2375; C.S., § 4322; I.C.A., § 42-110.]

Compiler's notes. An attempted amendment of this section, S.L. 1911, ch. 154, p. 461, was held unconstitutional. See *Pioneer Irrigation Dist. v. Walker*, 20 Idaho 605, 119 P.

304 (1911); *Bissett v. Pioneer Irrigation Dist.*, 21 Idaho 98, 120 P. 461 (1912).

Sec. to sec. ref. This section is referred to in § 43-1403.

43-111. Qualifications of voters. — No person shall be entitled to vote at any election held under the provisions of this title for the purpose of electing directors, for the purpose of determining whether indebtedness shall be created or bonds issued by the district, or for any other purpose, unless he shall possess all the qualifications required of electors under the general laws of the state, and own land within the district, or the proposed district, and be a resident of the county in which the district, or a portion thereof, is located for a period of thirty (30) or more days next preceding the election; provided that, in districts of fifteen thousand (15,000) acres or less, the bylaws may, by resolution of two-thirds ($\frac{2}{3}$) of the board and adoption by two-thirds ($\frac{2}{3}$) of the electors voting in a district election conducted in accordance with the general election laws of the state applicable to irrigation districts, set forth a provision allowing a district landowner to vote, if the landowner possesses all the qualifications required of electors under the general laws of the state and has resided within fifteen (15) miles of the district for a period of at least thirty (30) days prior to the election. [1903, p. 150, § 2b, as added by 1907, p. 484, § 1; reen. R.C., § 2375; am. 1915, ch. 49, § 1, last part of subd. 2375, p. 136; reen. C.L., 2375a; C.S., § 4323; I.C.A., § 42-111; am. 1933, ch. 27, § 1, p. 36; am. 1951, ch. 27, § 1, p. 39; am. 1982, ch. 254, § 11, p. 646; am. 1999, ch. 207, § 1, p. 554.]

Compiler's notes. An attempted amendment of this section, S.L. 1911, ch. 154, p. 461, was held unconstitutional. See *Pioneer Irrigation Dist. v. Walker*, 20 Idaho 605, 119 P. 304 (1911); *Bissett v. Pioneer Irrigation Dist.*, 21 Idaho 98, 120 P. 461 (1912).

Section 2 of S.L. 1951, ch. 27 is compiled herein as § 43-113.

Section 10 of S.L. 1982, ch. 254 is compiled as § 42-3118.

Section 2 of S.L. 1999, ch. 207, is compiled as § 43-201.

Cross ref. Qualifications of voters, Const., art. 6, § 2; §§ 34-401 — 34-438.

Sec. to sec. ref. This section is referred to in §§ 43-1808, 43-1914.

Cited in: *Johnson v. Lewiston Orchards Irrigation Dist.*, 99 Idaho 501, 584 P.2d 646 (1978).

Legal Status of District.

Irrigation districts are quasi municipal corporations and are governed by general elections laws of the state, and the qualifications prescribed by the constitution for voters at elections apply to election held in irrigation district. *Pioneer Irrigation Dist. v. Walker*, 20 Idaho 605, 119 P. 304 (1911).

Collateral References. Scope and import of term "owner" in statutes relating to formation of irrigation districts. 2 A.L.R. 778; 95 A.L.R. 1085.

43-112. Conduct of elections. — Such election shall be conducted as nearly as practicable in accordance with the general laws of the state: provided, no particular form of ballot shall be required, and that the provisions of the election laws as to the form and distribution of ballots shall not apply.

Said board of county commissioners shall establish one or more election precincts, not exceeding seven (7), as may be necessary, and define the boundaries thereof, which boundaries, when the district is divided into precincts, shall be the same as the division boundaries above-provided for and which said precincts may thereafter be changed by the board of

directors of such district as may be necessary: provided, that districts containing more than ten thousand (10,000) acres shall have not less than three (3), nor more than seven (7) voting precincts.

Said board shall also appoint three judges of election for each such election precinct, who shall perform the same duties as near as may be as judges of election, under the general laws of the state. [1903, p. 150, § 3; am. 1907, p. 484, § 1; R.C., § 2376; am. 1915, ch. 47, § 1, p. 134; reen. C.L., § 2376; C.S., § 4324; am. 1925, ch. 123, § 1, p. 169; I.C.A., § 42-112.]

Compiler's notes. An attempted amendment of this section, S.L. 1911, ch. 154, p. 461, was held unconstitutional. See *Pioneer Irrigation Dist. v. Walker*, 20 Idaho 605, 119 P. 304 (1911); *Bissett v. Pioneer Irrigation Dist.*,

21 Idaho 98, 120 P. 461 (1912).

Cross ref. General election laws, tit. 34.

Cited in: *Settlers' Irrigation Dist. v. Settlers' Canal Co.*, 14 Idaho 504, 94 P. 829 (1908).

43-113. Registration not required. — No registration shall be required in any irrigation district election, but in lieu thereof the judges of election shall require every elector to subscribe to an elector's oath as prerequisite to casting his vote, and such oath shall be the usual elector's oath with the following words added thereto, "and I own land within the _____ irrigation district, and am a resident of the county within which the district, or a portion thereof, is located." [1903, p. 150, § 3; am. 1907, p. 484, § 1; compiled R.C., § 2376; am. 1915, ch. 47, § 1, last part of subd. 2376, p. 134; reen. C.L., § 2376a; C.S., § 4325; I.C.A., § 42-113; am. 1933, ch. 109, § 1, p. 170; am. 1951, ch. 27, § 2, p. 39.]

Compiler's notes. An attempted amendment of this section, S.L. 1911, ch. 154, p. 461, was held unconstitutional. See *Pioneer Irrigation Dist. v. Walker*, 20 Idaho 605, 119 P. 304 (1911); *Bissett v. Pioneer Irrigation Dist.*, 21 Idaho 98, 120 P. 461 (1912).

Section 1 of S.L. 1951, ch. 27 is compiled herein as § 43-111.

Cross ref. Constitutionality, Art. 1, § 20, Constitution of Idaho.

Constitutionality.

Former statute was held unconstitutional insofar as it required that a person shall be "a holder of land within the boundaries" of irrigation district in order to entitle him to vote at election of district officers. *Bissett v. Pioneer Irrigation Dist.*, 21 Idaho 98, 120 P. 461 (1912).

43-114. Canvass of votes — Completion of organization. — Immediately after any election for voting upon the organization of an irrigation district, the judges of such election shall forward the official results of said election to the clerk of said board of county commissioners. The said board of county commissioners shall meet within ten (10) days after said returns are received, and shall proceed to canvass the votes cast thereat, and if upon such canvass it appears that two thirds ($\frac{2}{3}$) of the votes cast are "Irrigation district — yes," the said board shall, by order entered on its minutes, declare such territory duly organized as an irrigation district, under the name and style theretofore designated, and shall declare the persons receiving respectively the highest number of votes for such several offices to be duly elected to such offices. [1903, p. 150, part of 3a, as added by 1907, p. 484, § 1; reen. R.C., § 2377; am. 1915, ch. 143, § 2, p. 304; reen. C.S., § 2377; C.S., § 4326; I.C.A., § 42-114.]

Date of Order.

Fact that board of county commissioners did not declare district duly organized on the day that they canvassed the vote cast for

organization of district did not affect order declaring organization of district. *Progressive Irrigation Dist. v. Anderson*, 19 Idaho 504, 114 P. 16 (1911).

43-115. Limitation on proceedings affecting validity. — No action shall be commenced or maintained, or defense made affecting the validity of such organization after two (2) years from and after the making and entering of said order on its minutes by the board of county commissioners. [1903, p. 150, part of § 3, as added by 1907, p. 484, § 1; reen. R.C., § 2377; am. 1915, ch. 143, § 2, p. 304; compiled and reen. C.L., § 2377a; C.S., § 4327; I.C.A., § 42-115.]

ANALYSIS

Purpose of limitation.

Reconfirmation proceedings.

sive *Irrigation Dist. v. Anderson*, 19 Idaho 504, 114 P. 16 (1911).

Purpose of Limitation.

Limitation provided in this section was doubtless made to set at rest at an early date existence of district in view of its importance, both to inhabitants and bondholders. Progress-

Reconfirmation Proceedings.

Filing of petition for reconfirmation of proceedings for organization of irrigation district did not waive the statute of limitations. *Progressive Irrigation Dist. v. Anderson*, 19 Idaho 504, 114 P. 16 (1911).

43-116. Organization meeting of board. — Said board shall cause a copy of such order, duly certified, to be immediately filed for record in the office of the county recorder of each county in which any portion of such lands are situated.

If it shall appear, however, that more than one third ($\frac{1}{3}$) of said votes are "Irrigation district — no," then a record of that fact shall be duly entered upon the minutes of said board, and all proceedings in regard to the organization of said district shall be void, and the expenses properly incurred thereunder may be collected on the bond provided for in section 43-104.

From and after the date of such filing of said order of the board of county commissioners, the organization of such district shall be complete. The officers of the district shall be entitled to enter immediately upon the duties of their respective offices, upon qualifying according to law, and shall hold such offices respectively, until their successors are elected and qualified. The board of directors so elected shall meet within thirty (30) days after their election and elect a president, and appoint a secretary and treasurer, who shall perform the duties imposed upon such officers under this title. All officers of the district, except as above provided, must be residents thereof. [1903, p. 150, part of § 3a, as added by 1907, p. 484, § 1; reen. R.C., § 2377; am. 1915, ch. 143, § 2, p. 304; compiled and reen. C.L., § 2377b; C.S., § 4328; I.C.A., § 42-116.]

43-117. Treasurer's official bonds. — The treasurer shall on his appointment execute and file with the secretary an official bond in such amount as may be fixed by the board of directors of the district, which shall not be less than \$5000; and shall thereafter from time to time execute and file such further bonds as may be required by said board in amounts fixed by

it, which amounts shall be of at least fifty per cent (50%) of the maximum probable amount of money in the treasurer's hands at any one time. All such official bonds shall be executed by a lawfully qualified surety company. [1903, p. 150, part of § 3a, as added by 1907, p. 484, § 1; reen. R.C., § 2377; am. 1915, ch. 143, § 2, part of subd. 2377, p. 304; compiled and reen. C.L., § 2377c; C.S., § 4329; am. 1929, ch. 110, § 1, p. 178; I.C.A., § 42-117.]

Cross ref. Additional bond of treasurer of district contracting with federal government, § 43-1815.

43-118. Districts including lands under existing canals — Decree of confirmation — Rights of landowners — Powers of districts. — Where the petition or petitions for the organization of any irrigation district now or hereafter organized under the laws of the state of Idaho, includes lands lying under any existing irrigation canal or canals, and entitled to receive water therefrom for irrigation purposes, and such petition or petitions recite that it is proposed to construct or purchase or acquire an interest in any reservoir, or reservoirs constructed, or to be constructed by or in cooperation with the United States or under contract with the United States, the decree of the district court confirming the organization of such irrigation district shall recite such provision of said petition, or petitions, and the landowners of said district who by reason of stock ownership (in the canal company or companies owning or operating any of such existing canal), or otherwise, own or are entitled to the use of canal capacity or a proportionate interest in any such canal, shall be entitled to have delivered into such canal for the use and benefit of such landowners their proportionate share of the district's share of the stored water from such reservoir in the proportion that their lands are assessed for such reservoir, in such amounts, or at such rate of delivery as may be needed by the landowners not in excess of the amount which can be safely carried through such landowners' proportionate share of such canal, whenever such canal is not being utilized to its full capacity in carrying the natural flow or other water owned or controlled by the canal company operating said canal and the board of directors of such district shall have power to provide by contract for the carriage and distribution of the stored water from such reservoir to the landowners of the district through such existing canals, but such district shall be without power to purchase or condemn or otherwise acquire, or to operate or control any such canal, unless such petition for the organization of such district shall also recite the purpose to acquire such canal or canals. [1923, ch. 88, § 1, p. 100; I.C.A., § 42-118.]

Compiler's notes. The words enclosed in parentheses so appeared in the law as enacted.
Section 2 of S.L. 1923, ch. 88 declared an emergency.
Sec. to sec. ref. This section is referred to in § 57-111.

ANALYSIS
Constitutionality.
Pleading.
Constitutionality.
Statutory method of organizing irrigation districts and assessing lands therein accord-

ing to cost of system and benefits to lands is constitutional. *American Falls Reservoir Dist. v. Thrall*, 39 Idaho 105, 39 Idaho 130, 228 P. 236 (1924).

Pleading.

If reasons existed why this statute was not applicable to newly-created district or why lands could not be made liable for purchase of stored water, such reasons or facts should have been specifically set forth in answer, and averment by way of conclusion of law was

insufficient. *American Falls Reservoir Dist. v. Thrall*, 39 Idaho 105, 39 Idaho 130, 228 P. 236 (1924).

Collateral References. Liability of irrigation district for damages; for acts of its officers and employees; for negligent construction or operation of ditches; for failure to supply water; and for overflow or escape of water from district. 69 A.L.R. 1231; 108 A.L.R. 1174; 160 A.L.R. 1165; 169 A.L.R. 545.

43-119. Rights and privileges of corporations and partnerships.

— A corporation, the stock of which is owned entirely by natural persons related by blood or affinity, and a partnership, in which all the partners are natural persons related by blood or affinity, shall have the same rights and privileges in the conduct of irrigation district business as do natural persons, including, but not limited to, voting in elections and signing petitions. A corporation or partnership shall vote or otherwise act by and through its majority stockholder or majority partner, and for voting purposes the residence of such majority stockholder or partner shall establish the residence of the corporation or partnership. If the majority of the stock or partnership interest is owned by more than one (1) person, the corporation or partnership must furnish the irrigation district a written designation stating the name of the majority stockholder or partner who is authorized to vote and otherwise act for the corporation or partnership. If the majority or designated stockholder or partner is married, his or her spouse shall have the same rights and privileges in the conduct of irrigation district business as do the spouses of individual land owners in the district. A person, or the spouse of a person, voting for a corporation or partnership shall not be entitled to vote again as an individual. [I.C., § 43-119, as added by 1983, ch. 49, § 1, p. 120.]

CHAPTER 2

ELECTION OF DIRECTORS

SECTION.

- 43-201. Election, term of office, nominations and qualifications.
- 43-201A. When election not required.
- 43-202. Oath and bond.
- 43-203. Increasing or decreasing number of directors — Petition.
- 43-204. Increasing or decreasing number of directors — Hearing and election.
- 43-204A. Indemnification of officers, directors, employees and agents.
- 43-204B. Bylaw limiting director liability authorized.
- 43-205. Increasing or decreasing number of directors — Procedure following election.
- 43-206. Notice of election — Appointment of judges.

SECTION.

- 43-207. Conduct of election.
- 43-208. Canvass of returns.
- 43-209. Vacancies.
- 43-210. Voting and count of ballots.
- 43-211. Disposal of ballots.
- 43-212. Informalities disregarded — Postponement of canvass.
- 43-213. Statement of result.
- 43-214. Initiating recall proceedings — Statement — Contents — Verification — Definitions.
- 43-215. Petition — Where filed.
- 43-216. Ballot synopsis.
- 43-217. Determination by magistrate court — Correction of ballot synopsis.
- 43-218. Filing supporting signatures — Time limitations.

SECTION.

- 43-219. Petition — Form.
- 43-220. Petition — Size.
- 43-221. Number of signatures required.
- 43-222. Canvassing petition for sufficiency of signatures — Notice.
- 43-223. Verification and canvass of signatures — Procedure.
- 43-224. Fixing date for recall election — Notice.
- 43-225. Response to petition charges.

SECTION.

- 43-226. Destruction of insufficient recall petition.
- 43-227. Invalid names — Record of.
- 43-228. Conduct of election — Form of ballot.
- 43-229. Ascertaining the result — When recall effective.
- 43-230. Enforcement provisions — Mandamus — Appeals.
- 43-231. Violations by signers.
- 43-232. Violations — Corrupt practices.

43-201. Election, term of office, nominations and qualifications.

— Following the organization of any district, an election shall be held in accordance with section 34-106, Idaho Code, at which shall be elected one (1) director for each division of said district by the electors of the district at large. The term of office of the directors shall, immediately after the first election following such organization, be selected by lot so that as nearly as may be, one-third ($\frac{1}{3}$) of the number shall hold office for the term of one (1) year; one-third ($\frac{1}{3}$) for the term of two (2) years, and the balance for the term of three (3) years. And an election shall be held in the district in accordance with section 34-106, Idaho Code, for each year thereafter, at which directors shall be elected to succeed those whose terms expire, to hold office for a term of three (3) years, or until their successors are elected and qualified. Every director must be a qualified elector and a resident of the division of the director whom he is to succeed in office; provided that, in districts of fifteen thousand (15,000) acres or less, the bylaws may, by resolution of two-thirds ($\frac{2}{3}$) of the board and adoption by two-thirds ($\frac{2}{3}$) of the electors voting in a district election conducted in accordance with the general election laws of the state applicable to irrigation districts, set forth a provision allowing a district landowner to serve as the director from the division in which the landowner owns land, if the landowner possesses all the qualifications required of electors under the general laws of the state and has resided within fifteen (15) miles of the district for a period of at least thirty (30) days prior to the election; provided further than [that] any landowner who owns land in more than one (1) division may serve as the director only from the division nearest which he resides. Written nominations for the office of director if any are made, must be signed by at least six (6) electors in districts having less than one hundred (100) resident electors and by at least twelve (12) electors in districts having more than one hundred (100) resident electors, and filed with the secretary of the district not less than twenty (20) days nor more than forty (40) days before the date of election; and the names of the persons so nominated shall be placed upon official ballot to be furnished by the district. [1903, p. 150, part of § 4; R.C., § 2378; am. 1915, ch. 48, § 1, part of subd. 2378, p. 135; am. 1917, ch. 90, § 1, p. 313; reen. C.L., § 2378; C.S., § 4330; am. 1929, ch. 110, § 1, p. 178; I.C.A., § 42-201; am. 1957, ch. 147, § 1, p. 247; am. 1981, ch. 166, § 1, p. 292; am. 1995, ch. 125, § 1, p. 541; am. 1999, ch. 207, § 2, p. 554.]

Compiler's notes. The bracketed word "[that]" was inserted by the compiler.

Section 1 of S.L. 1999, ch. 207, is compiled as § 43-111.

Sec. to sec. ref. This section is referred to in § 43-1404.

Collateral References. 45 Am. Jur. 2d, Irrigation, §§ 58-61.

43-201A. When election not required. — In any election for directors if, after the expiration of the date for filing written nominations for the office of director, it appears that only one (1) qualified candidate has been nominated thereby for each position to be filled, it shall not be necessary to hold an election, and the board of directors shall within five (5) days after expiration of the date for filing written nominations declare such candidate elected as director. The secretary shall immediately make and deliver to such person a certificate of election signed by him and bearing the seal of the district. The procedure set forth in this section shall not apply to any other irrigation district election. [I.C., § 43-201A, as added by 1979, ch. 293, § 1, p. 771.]

43-202. Oath and bond. — Within ten (10) days after receiving the certificate of election hereinafter provided for, said officers shall take and subscribe the official oath and file the same in the office of the board of directors, and execute the bond hereinafter provided for. Each member of said board of directors shall execute an official bond in the sum of not less than \$500 nor more than \$5000, the amount to be determined and approved by the judge of the probate court of said county where such organization was effected and shall be recorded in the office of the county recorder thereof and filed with the secretary of said board. All official bonds provided for in this title shall be in the form prescribed by law for the official bond of county officers. [1903, p. 150, part of § 4; reen. R.C., § 2378; am. 1915, ch. 48, § 1, p. 135; am. 1917, ch. 90, § 1, part of subd. 2378, p. 313; reen. C.L., § 2378a; C.S., § 4331; I.C.A., § 42-202.]

Cross ref. Additional bond of directors, § 43-1814.

Form of official bonds, § 59-812.

43-203. Increasing or decreasing number of directors — Petition. — In any irrigation district, organized under the laws of the state of Idaho, having three (3), five (5) or seven (7) directors, whenever a petition amounting to fifty per cent (50%) of the votes cast at the last annual election within the district, shall be filed with the board of directors of such district asking for an election within the district, for the purpose of increasing or decreasing the number of directors of such district, such board of directors shall thereafter immediately call an election for the purpose of deciding the question: provided, that the petition shall recite that each signer thereof is a legal voter, or land holder within such district and the signatures thereupon are verified by the person or persons circulating the same: provided, that the petition shall specify the number of directors demanded, which shall be three (3), five (5) or seven (7): provided, that such petition shall represent not less than twenty-five per cent (25%) of the area of the lands within such district as shown by the records of the district. [1915, ch. 91, § 1, p. 210; reen. C.L.; § 2378b; C.S., § 4332; I.C.A., § 42-203.]

43-204. Increasing or decreasing number of directors — Hearing and election. — Upon the filing of a petition with the board of directors of any irrigation district as provided in section 43-203 the board of directors of such district shall set a date for hearing the said petition, not less than two (2) weeks and not more than sixty (60) days after the first regular monthly meeting following the filing of such petition, and if the petition does comply with the requirements of section 43-203 then the directors shall immediately thereafter order an election upon the question, and proceed according to the laws governing elections within irrigation districts for the submission of questions of creating indebtedness. [1915, ch. 91, § 2, p. 210; reen. C.L., § 2378c; C.S., § 4333; I.C.A., § 42-204.]

Cross ref. Bond elections, § 43-401.

43-204A. Indemnification of officers, directors, employees and agents. — (a) A district shall have power to indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative (other than an action by or in the right of the district) by reason of the fact that he is or was a director, officer, employee or agent of the district, or is or was serving at the request of the district as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise, against expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred by him in connection with such action, suit or proceeding if he acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the district, and, with respect to any criminal action or proceeding, had no reasonable cause to believe his conduct was unlawful. The termination of any action, suit or proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent, shall not, of itself, create a presumption that the person did not act in good faith and in a manner which he reasonably believed to be in or not opposed to the best interests of the district, and, with respect to any criminal action or proceeding, had reasonable cause to believe that his conduct was unlawful.

(b) A district shall have power to indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action or suit by or in the right of the district to procure a judgment in its favor by reason of the fact that he is or was a director, officer, employee or agent of the district, or is or was serving at the request of the district as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise against expenses (including attorneys' fees) actually and reasonably incurred by him in connection with the defense or settlement of such action or suit if he acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the district and except that no indemnification shall be made in respect of any claim, issue or matter as to which such person shall have been adjudged to be liable for negligence or misconduct in the performance of his duty to the district unless and only to the extent that the

court in which such action or suit was brought shall determine upon application that, despite the adjudication of liability but in view of all circumstances of the case, such person is fairly and reasonably entitled to indemnity for such expenses which such court shall deem proper.

(c) To the extent that a director, officer, employee or agent of a district has been successful on the merits or otherwise in defense of any action, suit or proceeding referred to in subsection (a) or (b) hereof, or in defense of any claim, issue or matter therein, he shall be indemnified against expenses (including attorneys' fees) actually and reasonably incurred by him in connection therewith.

(d) Any indemnification under subsection (a) or (b) of this section (unless ordered by a court) shall be made by the district only as authorized in the specific case upon a determination that indemnification of the director, officer, employee or agent is proper in the circumstances because he has met the applicable standard of conduct set forth in subsection (a) or (b). Such determination shall be made (1) by the board of directors by a majority vote of a quorum consisting of directors who were not parties to such action, suit or proceeding, or (2) if such a quorum is not attainable, or, even if obtainable a quorum of disinterested directors so directs, by independent legal counsel in a written opinion, or (3) by the qualified electors of the district.

(e) Expenses (including attorneys' fees) incurred in defending a civil or criminal action, suit or proceeding may be paid by the district in advance of the final disposition of such action, suit or proceeding upon receipt of an undertaking by or on behalf of the director, officer, employee or agent to repay such amount if it shall ultimately be determined that he is not entitled to be indemnified by the district as authorized in this section.

(f) The indemnification and advancement of expenses provided by, or granted pursuant to the other subsections of this section shall not be deemed exclusive of any other rights to which those seeking indemnification or advancement of expenses may be entitled under any bylaw, agreement, vote of qualified electors of the district or disinterested directors or otherwise, both as to action in his official capacity and as to action in another capacity while holding such office.

(g) A district shall have power to purchase and maintain insurance on behalf of any person who is or was a director, officer, employee or agent of the district, or is or was serving at the request of the district as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise against any liability asserted against him and incurred by him in any capacity or arising out of his status as such, whether or not the district would have the power to indemnify him against such liability under the provisions of this section.

(h) The indemnification and advancement of expenses provided by, or granted pursuant to, this section shall, unless otherwise provided when authorized or ratified, continue as to a person who has ceased to be a director, officer, employee or agent and shall inure to the benefit of the heirs, and personal representatives of such a person. [I.C., § 43-204A, as added by 1988, ch. 325, § 1, p. 985.]

Compiler's notes. The words enclosed in parentheses so appeared in the law as enacted. **Sec. to sec. ref.** This section is referred to in § 42-5228.

43-204B. Bylaw limiting director liability authorized. — The bylaws of the district may set forth a provision eliminating or limiting the personal liability of a director to the district or its qualified electors for monetary damages for breach of fiduciary duty as a director, provided that such provision shall not eliminate or limit the liability of a director:

(a) For any breach of the director's duty of loyalty to the district or its qualified electors.

(b) For acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law.

(c) For any transaction from which the director derived an improper personal benefit.

No such provision shall eliminate or limit the liability of a director for any act or omission occurring prior to the date when such provision becomes effective. [I.C., § 43-204B, as added by 1988, ch. 325, § 2, p. 985.]

43-205. Increasing or decreasing number of directors — Procedure following election. — Upon the canvass of the returns, as provided by section 43-208, of any election for determining the number of the directors for any irrigation district, and if there be any change voted, then the board shall immediately proceed to redivide the said district into directors' divisions of convenient boundaries and as nearly as possible of equal area, and appoint a qualified person from each division as a director whose term of office shall expire with the next regular election, and the first succeeding directors elected under the new arrangement shall determine their terms of office as contemplated by this chapter, and in case the number of directors shall have been decreased the old members of the board of directors shall continue in office until the expiration or sooner determination of their terms, successors being appointed or elected only in divisions where representation will terminate with the term of such director. [1915, ch. 91, § 3, p. 210; reen. C.L., § 2378d; C.S., § 4334; I.C.A., § 42-205.]

43-206. Notice of election — Appointment of judges. — The secretary of the district shall give notice of all elections in said district subsequent to the organization thereof, by posting the same in three (3) public places in each such precinct and in the office of said board, at least four (4) weeks before the day of such election, or by publication of the same once a week for two (2) successive weeks in a newspaper having general circulation within said district. If notice be given by publication in a weekly newspaper the same shall be published in two (2) successive issues thereof, or, if in a daily newspaper, at least six (6) days shall elapse between the first and last dates of publication, and, in either case, publication shall be completed not less than fifteen (15) days before such election. Notices shall state the time of said election and the polling place for each precinct; and the officer to be elected or other question to be voted upon, as the case may be. At least ten (10) days before the holding of any such election, the board of directors shall

appoint three (3) electors of each precinct to serve as judges of election for such precinct, and such judges shall constitute a board of election for such precinct.

A polling place for a precinct need not be located in the precinct, but shall be located within the district. Polling places for two (2) or more precincts may be combined at one (1) location, so long as the physical arrangements of the polling place are sufficient to guarantee all voters the right to cast a secret ballot. Any combined polling place thus created shall be no farther than ten (10) miles outside of the precinct which is losing its polling place. In cases of combined polling places, the board of directors shall name one (1) elector from each of the combined precincts, and they shall constitute the judges of election for that polling place. [1903, p. 150, § 5; am. 1907, p. 484, § 1, part of subd. 5; reen. R.C., § 2379; am. 1913, ch. 116, § 1, p. 453; reen. C.L., § 2379; C.S., § 4335; I.C.A., § 42-206; am. 1951, ch. 149, § 1, p. 342; am. 1965, ch. 29, § 1, p. 47; am. 1975, ch. 240, § 1, p. 649; am. 1976, ch. 146, § 1, p. 532.]

Compiler's notes. An attempted amendment of this section, S.L. 1911, ch. 154, p. 461, was held unconstitutional. See *Pioneer Irrigation Dist. v. Walker*, 20 Idaho 605, 119 P. 304 (1911); *Bissett v. Pioneer Irrigation Dist.*, 21 Idaho 98, 120 P. 461 (1912).

Section 2 of S.L. 1975, ch. 240 provided that

the act should take effect on and after July 1, 1975.

Cross ref. Notice by mail, § 60-109A.

Registration for irrigation district elections not required, § 43-113.

Sec. to sec. ref. This section is referred to in §§ 43-224 and 43-318.

43-207. Conduct of election. — Said judges shall elect a chairman, who may administer any oath required in the progress of an election, and may appoint additional judges if, during the progress of election, any judges cease to act. Said judges of election shall not appoint clerks of election unless they deem it necessary to have the assistance of clerks in order to accommodate the number of electors who desire to vote. Any member of the board of election, or any clerk thereof, may administer and certify oaths required to be administered during the progress of the election. Before opening the polls, each member of the board of election and each clerk, in case clerks are appointed, must take and subscribe an oath to faithfully perform the duties imposed upon them by law. Any elector of the precinct may administer and certify such oath. The time of opening and closing the polls, the manner of conducting the election, canvassing and announcing the result, the keeping of tally lists, and the making and certifying said result, and the disposition of the ballots after the election, shall be the same as near as may be, as provided for election under the general election laws of the state: provided, that the returns shall be delivered to the secretary of the district, and the election oaths shall be included with such returns; provided further, that by resolution of the board of directors duly entered on the minutes, at any regular meeting, and notice thereof given in the notices of election, any irrigation district may provide for the opening of the polls at 1 o'clock p.m. and closing at 7 p.m. [1903, p. 150, part of § 6; am. 1907, p. 484, § 1, part of subd. 6; reen. R.C., § 2380; am. 1915, ch. 87, § 1, part of subd. 2380, p. 205; compiled and reen. C.L., § 2380; C.S., § 4336; I.C.A., § 42-207; am. 1941, ch. 36, § 1, p. 83; am. 1945, ch. 7, § 1, p. 9.]

Compiler's notes. Proviso at end of the part of the 1915 amendment set forth herein concerning the disregarding of irregularities was omitted because it was repeated in § 43-212; remainder of section was embodied in §§ 43-208, 43-209.

Cross ref. General election laws, tit. 34.
Procedure following election, § 43-205.
Qualifications of voters, § 43-111.

43-208. Canvass of returns. — The board of directors must meet at its usual place of meeting on the first Monday after each election to canvass the returns, and they shall proceed in the same manner and with like effect, as near as may be, as the board of county commissioners in canvassing the returns of general elections, and when they shall have declared the result, the secretary shall make full entries in his records in like manner as is required of the county recorder in general elections. The board of directors must declare elected the person or persons having the highest number of votes for each office. The secretary must, immediately, make out and deliver to such person or persons a certificate of election signed by him and authenticated with the seal of the board. [1903, p. 150, part of § 6; am. 1907, p. 484, § 1, part of subd. 6; reen. R.C., § 2380; am. 1915, ch. 87, § 1, p. 205; reen. C.L., § 2380a; C.S., § 4337; I.C.A., § 42-208.]

Cross ref. Canvass of general election returns, §§ 34-1201 — 34-1217.

Sec. to sec. ref. This section is referred to in § 43-205.

Contest of Election.

District court has jurisdiction to hear and determine contest of election of a director of irrigation district. *Hertle v. Ball*, 9 Idaho 193, 72 P. 953 (1903).

43-209. Vacancies. — In case of a vacancy in the office of director, the remaining members of the board of directors shall fill such vacancy by appointing thereto a qualified elector residing within the division in which the vacancy occurred. An officer appointed to fill a vacancy as above provided shall take and subscribe the official oath and execute a bond as provided in the case of an elected director and shall hold his office until the next regular election of said district, at which election a director shall be elected for the remainder of the unexpired term. [1903, p. 150, part of § 6; am. 1907, p. 484, § 1, part of subd. 6; reen. R.C., § 2380; am. 1915, ch. 87, § 1, p. 205; reen. C.L., § 2380b; C.S., § 4338; I.C.A., § 42-209; am. 1953, ch. 130, p. 206.]

43-210. Voting and count of ballots. — Voting may commence as soon as the polls are open and may continue during all the time the polls remain open, and shall be conducted as nearly as practicable in accordance with the provisions of title 34 of this code relating to elections. As soon as the polls are closed the judges shall open the ballot box and shall commence counting the votes; and in no case shall the ballot box be removed from the room in which the election is held until all the ballots have been counted. The counting of ballots shall in all cases be public. The ballots shall be taken out, one by one by the chairman of the board of election or one (1) of the judges, who shall open them and read aloud the name of each person contained thereon, and the office for which every such person is voted for. Each clerk shall write down each office to be filled, and the name of each person voted for such office, and shall keep the number of votes by tallies as they are read by such

chairman or judge. The counting of the votes shall continue without adjournment until all the votes have been counted. [1903, p. 150, § 7; am. R.C. & C.L., § 2381; C.S., § 4339; I.C.A., § 42-210.]

43-211. Disposal of ballots. — As soon as all the votes are read off and counted, a certificate shall be drawn up on each of the papers containing the poll list and tallies, or attached thereto, stating the number of votes each one voted for has received, and designating the office to fill which he was voted for, which number shall be written in words and figures at full length. Each certificate shall be signed by all members of the board of election and by both clerks. One (1) of said certificates, with the poll list and tally paper to which it is attached, shall be retained by the chairman of the board of election, and preserved by him for at least six (6) months. The ballots shall be strung on a cord or thread by the said chairman, during the counting thereof, in the order in which they are entered upon the tally list by the clerks; and said ballots, together with the other of said certificates with the poll list and tally paper to which it is attached, shall be sealed by the said chairman in the presence of the other of said judges and clerks, and indorsed "Election returns of (naming precinct) precinct," and be directed to the secretary of the board of directors, and shall be immediately delivered by said chairman, or by other safe and responsible carrier designated by him, to said secretary, and the ballots shall be kept unopened for at least six (6) months, and if any person be of the opinion that the vote of any precinct has not been correctly counted he may appear on the day appointed for the board of directors to open and canvass the returns, and demand a recount of the precinct that is claimed to have been incorrectly counted. [1903, p. 150, § 8; reen. R.C. & C.L., § 2382; C.S., § 4340; I.C.A., § 42-211.]

Compiler's notes. The words enclosed in parentheses so appeared in the law as enacted.

sonable and appropriate method for conducting a recount of ballots. *Tiegs v. Patterson*, 81 Idaho 46, 336 P.2d 687 (1959).

Recount.

The board of directors may adopt any rea-

43-212. Informalities disregarded — Postponement of canvass. — No list, tally paper or certificate returned from any election shall be set aside or rejected for want of form if it can be satisfactorily understood. If, at the time of the meeting, the returns of each precinct in which polls have been opened have been received, the board of directors must then and there proceed to canvass the returns; but if all the returns have not been received, the canvass must be postponed from day to day until all the returns have been received, or until six (6) postponements have been had. The canvass must be made in public and by opening the returns and counting the vote of the district for each person voted for and declaring the result thereof. [1903, p. 150, § 9; am. R.C. & C.L., § 2383; C.S., § 4341; I.C.A., § 42-212.]

43-213. Statement of result. — The secretary of the board of directors must, as soon as the result is declared, enter on the records of such board a statement of such result, which statement must show:

1. The whole number of votes cast in the district and in each voting precinct thereof.

2. The names of the person or persons voted for.

3. The office to fill which each person was voted for.

4. The number of votes given in each precinct to such person or persons.

5. The number of votes given in the district for such person or persons.

The board of directors must declare elected the person or persons having the highest number of votes given for each office. [1903, p. 150, § 10; am. R.C. & C.L., § 2384; C.S., § 4342; I.C.A., § 42-213.]

43-214. Initiating recall proceedings — Statement — Contents — Verification — Definitions. — Whenever any legal voter of the irrigation district, either individually or on behalf of an organization, desires to demand the recall and discharge of a director of an irrigation district, under the provisions of article VI, section 6, of the constitution of the state of Idaho, he shall prepare a typewritten petition. The petition may recite that the director has wilfully neglected or failed to perform faithfully a duty imposed by law; or acted in an arbitrary and capricious manner; or has committed an unlawful act; or has wrongfully acted so as to interfere with, interrupt, or adversely affect the performance of his official duty; or has violated his oath of office. The petition may describe the act or acts complained of, if applicable, in concise language, give a detailed description including the approximate date, location and nature of each act complained of, be signed by the person making the charge, give his respective post office address and be verified, under oath, that he believes the charge or charges to be true and that he has knowledge of the alleged facts relating to the charges if any have been alleged in the recall petition. [I.C., § 43-214, as added by 1989, ch. 337, § 1, p. 849.]

43-215. Petition* — Where filed. — Any person making a charge shall file it with the secretary of the district, whose duty it is to receive and to promptly serve a copy of the charge upon the director whose recall is demanded. [I.C., § 43-215, as added by 1989, ch. 337, § 1, p. 849.]

43-216. Ballot synopsis. — (1) Within fifteen (15) days after receiving a petition, the secretary of the district shall formulate a ballot synopsis of not more than two hundred (200) words.

(2) The synopsis shall set forth the name of the person seeking to be recalled and if any charges have been filed in the petition, a concise statement of the elements of the charge. Upon completion of the ballot synopsis, the secretary shall certify and transmit the exact language of the ballot synopsis to the person filing the petition and the director subject to recall. The secretary shall additionally certify and transmit the charges, if any, and the ballot synopsis to the magistrate court of the county in which the director subject to recall resides and shall petition the magistrate court to approve the synopsis and to determine the sufficiency of the charges, if any. [I.C., § 43-216, as added by 1989, ch. 337, § 1, p. 849.]

43-217. Determination by magistrate court — Correction of ballot synopsis. — Within fifteen (15) days after receiving the petition, the

magistrate court shall have conducted a hearing on and shall have determined, without cost to any party the adequacy of the ballot synopsis. If any charges have been included in the petition and ballot synopsis, the magistrate court shall dismiss those charges that are frivolous and designed to harass the director. The clerk of the magistrate court shall notify the person subject to recall and the person demanding recall of the hearing date. Both persons may appear with counsel. The court may hear arguments as to the adequacy of the ballot synopsis and if any charges have been included in the petition and ballot synopsis, the sufficiency of the charges. The court shall not consider the truth of the charges if any have been included, but only their sufficiency. Any decision regarding the ballot synopsis by the magistrate court is final. The court shall certify and transmit the ballot synopsis to the director subject to recall, the person demanding the recall, and the secretary of the irrigation district. [I.C., § 43-217, as added by 1989, ch. 337, § 1, p. 849.]

43-218. Filing supporting signatures — Time limitations. —

(1) The sponsors of a recall demanded of any director of an irrigation district shall stop circulation and file all petitions with the appropriate irrigation district secretary not less than six (6) months before the next regular election in which any director is subject to reelection.

(2) The sponsors of a recall demanded of any director shall have a maximum of thirty (30) days in which to obtain and file supporting signatures after the approval of a ballot synopsis by the magistrate court. [I.C., § 43-218, as added by 1989, ch. 337, § 1, p. 849.]

43-219. Petition — Form. — Recall petitions shall be printed on single sheets of paper of good writing quality including, but not limited to, newsprint not less than eight and one-half (8 ½) inches in width and not less than fourteen (14) inches in length. No petition may be circulated or signed prior to the approval of a ballot synopsis by the magistrate court. Such petitions shall be substantially in the following form:

WARNING

Every person who signs this petition with any other than his true name, or who knowingly (1) signs more than one (1) of these petitions, (2) signs this petition when he is not a legal voter, or (3) makes herein any false statement, may be fined, or imprisoned, or both.

Petition for the recall of (here insert the name of the person whose recall is petitioned for) to the (here insert the name and title of the secretary of the irrigation district with whom the charge is filed).

We, the undersigned citizens and legal voters of (the irrigation district's official name), respectfully direct that a special election be called to determine whether or not (here insert the name of the person) be recalled and discharged from his office; and each of us for himself says: I have personally signed this petition; I am a legal voter of the state of Idaho in (the irrigation district's official name) and county written after my name, and my

director whose recall is demanded of the date when the petitions will be canvassed, which date shall be not less than five (5) nor more than ten (10) days from the date of its filing. [I.C., § 43-222, as added by 1989, ch. 337, § 1, p. 849.]

43-223. Verification and canvass of signatures — Procedure. —

(1) Upon the filing of a recall petition, the secretary of the irrigation district shall proceed to verify and canvass the names of legal voters on the petition.

(2) The verification and canvass of signatures on the petition may be observed by persons representing the advocates and opponents of the proposed recall so long as they make no record of the names, addresses, or other information on the petitions or related records during the verification process except upon the order of the magistrate court. The secretary of the irrigation district may limit the number of observers if in his opinion a greater number would cause undue delay or disruption of the verification process. Any such limitation shall apply equally to both sides, but in no case shall fewer than two (2) observers on each side be allowed. If the secretary of the irrigation district finds the same name signed to more than one (1) petition, he shall reject all but one (1) such valid signature. [I.C., § 43-223, as added by 1989, ch. 337, § 1, p. 849.]

43-224. Fixing date for recall election — Notice. — If, at the conclusion of the verification and canvass, it is found that a petition for recall bears the required number of signatures of certified legal voters, the secretary of the irrigation district shall promptly certify the petitions as sufficient and fix a date for the special election to determine whether or not the director charged shall be recalled and discharged from office. The special election shall be held not less than fourteen (14) days nor more than forty-five (45) days from the certification. Notice shall be given in the manner as required by law for all other irrigation district elections as provided in section 43-206, Idaho Code. [I.C., § 43-224, as added by 1989, ch. 337, § 1, p. 849.]

43-225. Response to petition charges. — When a date for a special election is set, the secretary of the irrigation district shall serve a notice of the date of the election to the director whose recall is demanded and the person demanding recall. Such notice may be made only in person or by certified mail, return receipt requested. After having been served a notice of the date of the election and the ballot synopsis, the director whose recall is demanded may submit to the secretary of the irrigation district a response, not to exceed two hundred (200) words in length, to the charge contained in the ballot synopsis. Such response shall be submitted by the seventh consecutive day after service of the notice. The secretary of the irrigation district shall promptly send a copy of the response to the person who filed the petition. [I.C., § 43-225, as added by 1989, ch. 337, § 1, p. 849.]

43-226. Destruction of insufficient recall petition. — If it is found that the recall petition does not contain the requisite number of signatures

of certified legal voters, the secretary of the irrigation district shall so notify the person filing the petition, and specify the number of additional signatures required to make the petition valid. The petition must be perfected within thirty (30) days of the date that the secretary finds the petition defective for lack of certified signatures. If the petition is not perfected within the thirty (30) day period, the secretary shall declare the petition null and void ab initio in its entirety. [I.C., § 43-226, as added by 1989, ch. 337, § 1, p. 849.]

43-227. Invalid names — Record of. — The secretary of the irrigation district shall keep a record of all names appearing thereon which are not certified to be legal residents of the district, and of all names appearing more than once thereon, and he may report the same to the prosecuting attorneys of the respective counties where such names appear to have been signed, to the end that prosecutions may be had for such violation of the provisions of this chapter. [I.C., § 43-227, as added by 1989, ch. 337, § 1, p. 849.]

43-228. Conduct of election — Form of ballot. — The special election to be called for the recall of directors of irrigation districts shall be conducted in the same manner as regular irrigation district elections are conducted. The secretary of the irrigation district shall provide for the holding of recall elections and the necessary places and officers, ballot boxes, ballots, poll books, voting machines, supplies, and returns as are required by law for holding regular irrigation district elections. The ballots at any recall election shall contain a full, true, and correct copy of the ballot synopsis of the charge, the director’s response to the charge if such has been filed, and shall be so arranged that any voter can, by making one cross (X), express his desire to have the director charged recalled from his office, or retained therein. The following form shall substantially comply with the provisions of this section:

RECALL BALLOT

(Here insert the ballot synopsis of the charge.)	(Here insert the irrigation director’s response to the charge.)
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FOR the recall of (here insert the name of the director of the irrigation district)
AGAINST the recall (here insert the name of the director of the irrigation district)

[I.C., § 43-228, as added by 1989, ch. 337, § 1, p. 849.]

43-229. Ascertaining the result — When recall effective. — The votes on a recall election shall be counted, canvassed, and the results certified in the manner provided by law for counting, canvassing, and certifying the results of an election for directors. If a majority of all votes cast at the recall election is for the recall of the director charged, he shall

thereupon be recalled and discharged from his office and there shall be declared a vacancy in the office. [I.C., § 43-229, as added by 1989, ch. 337, § 1, p. 849.]

43-230. Enforcement provisions — Mandamus — Appeals. — The magistrate court of the county in which the director subject to recall resides has original jurisdiction to compel the performance of any act required of any public officer or to prevent the performance by any such officer of any act in relation to the recall not in compliance with law. [I.C., § 43-230, as added by 1989, ch. 337, § 1, p. 849.]

43-231. Violations by signers. — Every person who signs a recall petition with any other than his true name is guilty of a felony. Every person who knowingly (1) signs more than one (1) petition for the same recall, (2) signs a recall petition when he is not a legal voter, or (3) makes a false statement as to his residence on any recall petition is guilty of a misdemeanor. [I.C., § 43-231, as added by 1989, ch. 337, § 1, p. 849.]

43-232. Violations — Corrupt practices. — (1) Every person is guilty of a misdemeanor, who:

- (a) Wilfully or knowingly circulates, publishes or exhibits any false statement or representation concerning the contents, purpose or effect of any recall petition for the purpose of obtaining any signature to any such petition, or for the purpose of persuading any person to sign any such recall petition;
- (b) Presents to any officer for filing any recall petition to which is attached, appended or subscribed any signature which the person so filing the petition knows to be false or fraudulent, or not the genuine signature of the person purporting to sign such petition, or whose name is attached, appended or subscribed thereto;
- (c) Circulates or causes to circulate any recall petition, knowing the same to contain false, forged or fictitious names;
- (d) Makes any false affidavit concerning any recall petition or the signatures appended thereto;
- (e) Offers, proposes or threatens for any pecuniary reward or consideration:
 - (i) To offer, propose, threaten or attempt to sell, hinder or delay any recall petition or any part thereof or any signatures thereon;
 - (ii) To offer, propose or threaten to desist from beginning, promoting or circulating any recall petition;
 - (iii) To offer, propose, attempt or threaten in any manner or form to use any recall petition or any power of promotion or opposition in any manner or form for extortion, blackmail or secret or private intimidation of any person or business interest.

(2) A public officer is guilty of a felony, who knowingly makes any false return, certification or affidavit concerning any recall petition, or the signatures appended thereto. [I.C., § 43-232, as added by 1989, ch. 337, § 1, p. 849.]

CHAPTER 3

POWERS AND DUTIES OF BOARD OF DIRECTORS

SECTION.

- 43-301. Election of officers.
- 43-302. Office of board.
- 43-303. Meetings of board.
- 43-304. General powers of board — By-laws — Right of entry — Acquisition of property.
- 43-305. Drainage of lands — Payment of cost — Apportionment of cost when payment deferred.
- 43-306. Levy authorized for purpose of draining lands within district.
- 43-307. Authority to exercise functions of drainage districts.
- 43-308. Authority to exercise functions of drainage districts — Petition and resolution.
- 43-309. Notice of hearing of petition.
- 43-310. Hearing — Objections — Findings.
- 43-311. Decree granting petition — Vesting of powers and authority in district.
- 43-312. Appeals.
- 43-313. Electric power plants — Construction and operation.
- 43-314. Electrical power plants — Sale of surplus power — Ratification of contract.
- 43-315. Assessment for extermination of rodents.
- 43-316. Legal title to property.
- 43-317. Conveyance of property — Actions.
- 43-318. Sale of personal or real property — Procedure — Sale of federal or state license or permit.
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- 43-325. County commissioners to have access to books.
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- 43-329. Elections to determine question as to construction of improvement — Resolution of directors.

SECTION.

- 43-330. Majority of votes as determinative — Construction of improvement — Cost — Apportionment — Assessment.
- 43-330A. Contracts with landowners for construction of improvements.
- 43-330B. Contract provisions.
- 43-330C. Compliance.
- 43-330D. Contract to be recorded.
- 43-330E. District to own distribution system.
- 43-330F. Operation and maintenance of pressurized distribution systems.
- 43-330G. Distribution systems for land in more than one irrigation district — Joint contract — Division of management — Assessments.
- 43-331. Directors may construct or maintain improvements, levy assessments.
- 43-332. Apportionment of water to tracts — Employment of person to distribute water — Assessment of cost — Lien on land.
- 43-333. Resolution for water distribution works or services — Hearing of objections — Construction, repair or maintenance of improvement — Apportionment of costs — Assessment.
- 43-334. Procedure for levy and collection of special assessment — Appeal.
- 43-335. Leasing of water rights by irrigation district within the district by district's where landowner can receive water through the district's irrigation system.
- 43-336. Notification of landowners regarding lease.
- 43-337. Requirements of election for landowners.
- 43-338. Leasing of water rights inside the district by an irrigation district where the landowner cannot receive water through the irrigation system.
- 43-339. No levy against lands where water rights are leased.
- 43-340. Use of moneys received for leased water rights.
- 43-341. Effect on water rights by leasing.
- 43-342. Landowner may not receive water from the district after agreeing to lease water rights.
- 43-343. Authority to construct and operate ground water recharge project.

43-301. Election of officers. — On the first Tuesday of January next following their election, the board of directors shall meet and organize as a board, elect a president from their number and appoint a secretary and treasurer, who shall each hold office during the pleasure of the board. At any regular or special meeting the board of directors may appoint an assistant secretary or an assistant treasurer, or both, and fix the duties, the length of term, and the amount of bond, of each of them. [1903, p. 150, part of § 12; am. 1907, p. 484, § 1, part of subd. 12; reen. R.C., § 2385; am. 1911, ch. 154, § 7, p. 461; am. 1915, ch. 86, § 1, p. 203; reen. C.L., § 2385; C.S., § 4343; I.C.A., § 42-301; am. 1933, ch. 33, § 1, p. 44.]

Cited in: *Kerner v. Johnson*, 99 Idaho 433, 583 P.2d 360 (1978).

are public moneys, subject to § 18-3203. In re Bank of Nampa, Ltd., 29 Idaho 166, 157 P. 1117 (1916).

Treasurer.

Irrigation district is a public corporation, its treasurer is a public officer, and moneys of such district, received by him as treasurer,

Collateral References. 45 Am. Jur. 2d, Irrigation, § 63.

43-302. Office of board. — On the organization of the first board of directors of any such district they shall designate some place within the district as the office of said board: provided, that the board of directors may establish the office of the district temporarily outside of the boundary of the district, but within the county in which the same or some portion thereof is situated, in cases where the business of the district may be more conveniently transacted thereby; and if such temporary location be approved by a majority of the electors of the district voting at any regular election at which such question may be submitted then such temporary location may be fixed as the location of the office of the district for such period of years as may be designated on their ballots by the majority of such electors at such election. [1903, p. 150, § 12; am. 1907, p. 484, § 1; reen. R.C., § 2385; am. 1911, ch. 154, § 7, p. 461; am. 1915, ch. 86, § 1, parts of subd. 2385, p. 203; reen. C.L., § 2385a; C.S., § 4344; I.C.A., § 42-302.]

Compiler's notes. The act of 1911, ch. 154, p. 461, was held unconstitutional in part by *Pioneer Irrigation Dist. v. Walker*, 20 Idaho 605, 119 P. 304 (1911); *Bissett v. Pioneer*

Irrigation Dist., 21 Idaho 98, 120 P. 461 (1912), but the amendment of this section does not appear to have been involved.

43-303. Meetings of board. — The board of directors shall hold a regular monthly meeting in their office on the first Tuesday in every month or such date each month as it shall fix by resolution and such special meetings as may be required for the proper transaction of business.

All special meetings shall be ordered by the president or a majority of the board, the order must be entered of record and the secretary must give each member not joining in the order five (5) days' notice of such special meetings. The order must specify the business to be transacted at such special meeting and none other than that specified shall be transacted: provided, that whenever all members of the board are present, however called, the same shall be deemed a legal meeting and any lawful business may be transacted.

All meetings of the board must be public, and a majority shall constitute a quorum for the transaction of business; but on all questions requiring a vote there shall be a concurrence of at least a majority of the members of the board. All records of the board shall be open to the inspection of any elector during business hours. [1903, p. 150, part of § 12; am. 1907, p. 484, § 1; reen. R.C., § 2385; am. 1911, ch. 154, § 7, p. 461; am. 1915, ch. 86, § 1, p. 203; compiled and reen. C.L., § 2385b; C.S., § 4345; I.C.A., § 42-303; am. 1965, ch. 38, § 1, p. 62.]

Cited in: Kerner v. Johnson, 99 Idaho 433, 583 P.2d 360 (1978).

43-304. General powers of board — By-laws — Right of entry — Acquisition of property. — Said board shall have the power to manage and conduct the business and affairs of the district, make and execute all necessary contracts, employ and appoint such agents, officers and employees as may be required and prescribe their duties, to establish equitable by-laws, rules and regulations for the distribution and use of water among the owners of such land, as may be necessary and just to secure the just and proper distribution of the same, which said by-laws, among other things, shall establish a fiscal year, and in case the by-laws do not provide for the establishment of a fiscal year, the fiscal year shall commence the first day of November and end the thirty-first day of October of each and every year. Said by-laws, rules and regulations must be printed in convenient form for distribution throughout the district.

The board and its agents and employees shall have the right to enter upon any land and to make surveys, and may locate the necessary irrigation works and the line of any canal or canals, and the necessary branches for the same on any lands which may be deemed best for such location.

Said board shall also have the right to acquire, either by purchase, condemnation or other legal means, all lands and water rights, and other property necessary for the construction, use and supply, maintenance, repair and improvement of said canal or canals and works, including canals and works constructed and being constructed by private owners, lands for reservoirs for the storage of needful waters, lands and water rights for ground water recharge projects initiated pursuant to chapter 42, title 42, Idaho Code, and all necessary appurtenances. In case of purchase, the bonds of the district hereinafter provided for may be used to their par value in payment. Said board may also construct the necessary dams, reservoirs, ground water recharge facilities and works for the collection of water for said district, and do any and every lawful act necessary to be done that sufficient water may be furnished to each landowner in said district for irrigation purposes. The use of all water required for the irrigation of the lands of any district formed under the provisions of this title, together with the rights of way for canals and ditches, sites for reservoirs, ground water recharge projects and all other property required in fully carrying out the provisions of this title, is hereby declared to be a public use, subject to the regulation and control of the state, in the manner prescribed by law.

The board of directors of an irrigation district organized under the laws of the state of Idaho may enter into contracts for a water supply to be delivered to the canals and works of the district, and do any and every lawful act necessary to be done that sufficient water may be furnished to the lands in the district for irrigation purposes. [1903, p. 150, § 12a, as added by 1907, p. 484, § 1, subd. 12a; reen. R.C., § 2386; am. 1911, ch. 71, § 1, p. 194; am. 1911, ch. 154, § 5, p. 461; am. 1915, ch. 143, § 4, p. 308; reen. C.L., § 2386; am. 1919, ch. 15, § 1, p. 78; C.S., § 4346; I.C.A., § 42-304; am. 1985, ch. 120, § 2, p. 292.]

Compiler's notes. The amendatory matter in the 1911 and 1915 amendments relating to operation of irrigation districts under the Carey Act was transferred to ch. 166 (ch. 17 of this title), and the material relating to cooperation with the federal reclamation service was transferred to ch. 167 (ch. 18 of this title).

Sections 1 and 3 of S.L. 1985, ch. 120 are compiled as §§ 42-4201A and 43-328, respectively.

Cited in: *Kerner v. Johnson*, 99 Idaho 433, 583 P.2d 360 (1978).

ANALYSIS

District liable in tort.

Drainage.

Easements.

Permissible agreement.

Personal liability.

Powers limited.

Ultra vires acts.

Void contracts.

District Liable in Tort.

Irrigation district was liable in damages for negligent construction and operation of its canal system, notwithstanding it was a quasi public corporation and possessed some governmental powers and exercised some governmental functions. *Stephenson v. Pioneer Irrigation Dist.*, 49 Idaho 189, 288 P. 421 (1930).

Drainage.

Under this section, irrigation district has power to issue bonds for the purpose of collecting drainage, waste, and seepage water and storing the same for irrigation of land within such district. *Bissett v. Pioneer Irrigation Dist.*, 21 Idaho 98, 120 P. 461 (1912).

Easements.

A third party may obtain a license from an easement holder (irrigation district) to use the easement without the notice to and consent from the servient estate owner so long as, and expressly provided that, the use of the easement is consistent with and does not unreasonably increase the burden to the servient estate. *Abbott v. Nampa Sch. Dist.* No. 131, 119 Idaho 544, 808 P.2d 1289 (1991).

Permissible Agreement.

Irrigation district could enter into agreement with school district to permit school district to place irrigation ditch on its property in an underground pipe and to construct a cement inlet collar and safety/trash screen within the boundaries of the districts easement located on plaintiffs' land and such agreement was not an impermissible delegation of the district powers. *Abbott v. Nampa Sch. Dist.* No. 131, 119 Idaho 544, 808 P.2d 1289 (1991).

Personal Liability.

A person, though president of board of directors, was not personally liable for maintenance and operation of canals and reservoirs of district nor for seepage occurring therefrom. *Verheyen v. Dewey*, 27 Idaho 1, 146 P. 1116 (1915); *Doran v. Dewey*, 27 Idaho 25, 146 P. 1124 (1915).

Powers Limited.

Powers of directors or other officers of irrigation district are limited, and any act done in excess of express or implied provisions of statute is ultra vires. *Yaden v. Gem Irrigation Dist.*, 37 Idaho 300, 216 P. 250 (1923).

Under this and cognate sections, the power of directors, or other officers, of an irrigation district is limited and any act done in excess of the express or implied provisions of the statutes by such directors, or other officers, is ultra vires. *Lewiston Orchards Irrigation Dist. v. Gilmore*, 53 Idaho 377, 23 P.2d 720 (1933).

Ultra Vires Acts.

Delivery of water by irrigation officers to exterior land was ultra vires, except in such cases where district acquired system burdened with such duty or in case of surplus water. *Yaden v. Gem Irrigation Dist.*, 37 Idaho 300, 216 P. 250 (1923).

A contract to construct and operate necessary works to provide increased water, which contract delegated the management of the system to a board of control, entered into between an irrigation district and the United States, was not ultra vires. *Board of Dirs. v. Jorgensen*, 64 Idaho 538, 136 P.2d 461 (1943).

Contract of district to make available to

property owners adjacent to outside of district "seepage and waste" waters was not ultra vires, since district did not agree to make available to property owners any water or water rights held in trust by district for benefit of district. *Jensen v. Boise-Kuna Irrigation Dist.*, 75 Idaho 133, 269 P.2d 755 (1954).

District could not be estopped to deny that waters contracted to be furnished outside property owners were dedicated waters since a contract to furnish dedicated waters to property owners outside district is ultra vires. *Jensen v. Boise-Kuna Irrigation Dist.*, 75 Idaho 133, 269 P.2d 755 (1954).

Void Contracts.

Contract entered into by board of directors of irrigation district giving to a stranger the management and control of reservoir, dam and main canal, and taking that management and control out of district was ultra vires and void. *Colburn v. Wilson*, 23 Idaho 337, 130 P. 381 (1913).

Agreement by directors in advance of assessment that it would be made in violation of terms of statute was a violation of law governing irrigation districts. In *re King Hill Irrigation Dist.*, 37 Idaho 89, 221 P. 839 (1923).

Officers of irrigation district are public officers and contract made with them in excess of powers, as provided by statute, is void so far as it departs from or exceeds terms of law. *Yaden v. Gem Irrigation Dist.*, 37 Idaho 300, 216 P. 250 (1923).

Collateral References. 94 C.J.S., Waters, §§ 895-902.

Effect of combination of public and private purposes in exercise of eminent domain for irrigation purposes. 53 A.L.R. 9.

Liability of irrigation district for negligent construction or operation of ditches or canals. 69 A.L.R. 1231; 160 A.L.R. 1165.

Duty of mutual association, nonprofit organization, or cooperative to distribute irrigation waters. 56 A.L.R.2d 418.

43-305. Drainage of lands — Payment of cost — Apportionment of cost when payment deferred. — Any irrigation district heretofore organized or hereafter to be organized, may, whenever it appears necessary, proper or beneficial to drain any of the lands within said district, whether for the benefit of the land actually requiring drainage or for the protection of other lands within said district, whether the irrigation works have been actually acquired or constructed or not, cause drainage canals and works to be constructed and to this end such district shall in all respects have the same power and authority as is now conferred or may hereafter be conferred respecting irrigation, and all the powers conferred upon irrigation districts under the laws of this state with respect to irrigation shall be construed to include drainage.

Any irrigation district now, or which may hereafter be organized under the laws of the state of Idaho, shall have the authority to construct drainage works for the purpose of draining any land or lands within such irrigation district, and such authority shall be exercised by the board of directors in its discretion. The cost of any such drainage works may be paid for out of the maintenance, operation charges, tolls, or assessments, or out of either or all of such funds which are not otherwise necessary for the purposes for which such funds were created; that not to exceed twenty per cent (20%) of the total amount of such maintenance, operation charges, tolls and assessments for any year shall be expended for drainage.

In all cases where the construction of drainage works requires the issuance of bonds or such works are constructed by the United States under a contract by which the payments therefor are deferred, the board of directors of such irrigation district shall apportion the cost of such drainage works to each tract of land in said district according to benefits. In determining the amount to be apportioned to each tract of benefits under this section, the board of directors may consider benefits to each tract drained; the damage done to the low land from seepage and saturation from

irrigation water from high land, and the necessity for carrying off waste water, and such high land may be considered as being benefited to the extent and in the amount that such lands are responsible for damage to low lands from seepage and saturation by irrigation water; the board may also consider any advantage to the lands of the district and each tract thereof, growing out of the construction of such drainage works. In lieu of issuing bonds or contracting with the United States for the construction of drainage works, the board of directors may consider such drainage works as a part of the irrigation system and may make levies to pay for the same upon the same basis as assessments for the construction of the irrigation works by which the lands of the district are irrigated. In all cases where the cost of drainage works shall be apportioned to all the tracts of lands of the district as herein provided, all the provisions of this title applicable to procedure and the confirmation of the apportionment by the court, including the right of appeal, shall be applicable to the apportionment of benefit[s] under this section. [1917, ch. 31, § 2, p. 74; compiled and reen. C.L., § 2386n; C.S., § 4347; am. 1925, ch. 139, § 1, p. 245; am. 1927, ch. 207, § 1, p. 290; am. 1929, ch. 112, § 1, p. 180; I.C.A., § 42-305.]

Compiler's notes. The bracketed letter "s" in the last sentence of the last paragraph was inserted by the compiler.

Cross ref. Confirmation of apportionment, §§ 43-406 — 43-408.

Right of joint interstate districts to drain lands, § 43-1407.

Cited in: Oregon S.L.R.R. v. Minidoka Irrigation Dist., 48 Idaho 584, 283 P. 614 (1929).

ANALYSIS

Pro rata assessment.

Quasi public corporation.

Seepage and waste waters.

Pro Rata Assessment.

An irrigation district assessed costs against the land involved in proportion to benefits previously adjudicated and determined. *Hale*

v. McCammon Ditch Co., 72 Idaho 478, 244 P.2d 151 (1951).

Quasi Public Corporation.

An irrigation district is a quasi public corporation, but no stock assessments are made, since no stock is issued. *Hale v. McCammon Ditch Co.*, 72 Idaho 478, 244 P.2d 151 (1951).

Seepage and Waste Waters.

Contract of district to make available to property owners adjacent to outside of district "seepage and waste" waters was not ultra vires, since district did not agree to make available to property owners any water or water rights held in trust by district for benefit of district. *Jensen v. Boise-Kuna Irrigation Dist.*, 75 Idaho 133, 269 P.2d 755 (1954).

DECISIONS UNDER PRIOR LAW

Irrigation district may provide for drainage and reclamation of lands within districts which have been flooded or water-logged by reason of overflow, percolation, or seepage from its irrigation works, and accomplishment of such purpose is one of the necessarily implied duties of district equally as incumbent on district as irrigation of its dry and

arid lands. *Pioneer Irrigation Dist. v. Stone*, 23 Idaho 344, 130 P. 382 (1913).

District was not liable for rise of water table under land, unless clearly shown that its works were so defective as to be proximate cause. *Verheyen v. Dewey*, 27 Idaho 1, 146 P. 1116 (1915); *Doran v. Dewey*, 27 Idaho 25, 146 P. 1124 (1915).

43-306. Levy authorized for purpose of draining lands within district. — Any irrigation district now organized, or which may hereafter be organized, under the laws of the state of Idaho, shall have authority to construct drainage works for the purpose of draining, or reclaiming, any land, or lands, within such irrigation district, which authority shall be

exercised by the board of directors in its discretion.

The board of directors before levy as hereinafter provided, shall determine by resolution spread on the minutes thereof if any of the lands within an irrigation district are in need of drainage, and should be drained to protect said land or other lands within said district from damage from seepage or other waters, subterranean or otherwise, then the board of directors of such district shall have the power and authority, at the time provided by law for levying assessments for the operation and maintenance of said irrigation district in addition to such assessments, also [to] levy an assessment against the lands of said irrigation district for drainage purposes, said levy not to exceed in any one (1) year forty per cent (40%) of the total amount levied for operation and maintenance purposes. Such assessment for drainage shall in all respects be levied and collected at the same time and in the same manner as assessments for operation and maintenance.

All funds collected for drainage purposes under the provisions hereof shall be kept in a separate fund to be known as "Drainage Fund" of said irrigation district, and the moneys in said "Drainage Fund" from time to time may be expended by the board of directors of said irrigation district. [I.C.A., § 42-305A, as added by 1945, ch. 17, § 1, p. 25; am. 1951, ch. 48, § 1, p. 65.]

Compiler's notes. The bracketed word "to" in the second paragraph was inserted by the compiler.

Section 2 of S.L. 1951, ch. 48 declared an emergency. Approved February 22, 1951.

Sec. to sec. ref. Sections 43-306 — 43-312

are referred to in § 43-1102.

Quasi Public Corporation.

An irrigation district is a quasi public corporation, but no stock assessments are made, since no stock is issued. *Hale v. McCammon Ditch Co.*, 72 Idaho 478, 244 P.2d 151 (1951).

43-307. Authority to exercise functions of drainage districts. — Any irrigation district heretofore or hereafter organized under the laws of this state desiring so to do, and having received the petition required by and complied with the provisions of section 43-308 as amended, and sections 43-309, 43-310, 43-311, 43-312, may exercise, and it is hereby given, all the functions, powers and authority of a drainage district and of its board of commissioners under the laws of this state relating to drainage districts. The functions, powers and authority granted by this act shall be exercised by such irrigation district through its board of directors and, so far as may be, in the manner provided in the drainage district laws of the state. [1931, ch. 163, § 1, p. 277; I.C.A., § 42-306; am. 1945, ch. 4, § 1, p. 5.]

Compiler's notes. The words "this act" refer to S.L. 1931, ch. 163 compiled herein as §§ 43-307, 43-308, and probably §§ 43-309 — 43-312 which were added by the 1945 amendment.

Cross ref. Drainage districts, § 42-2901 — 42-2981.

43-308. Authority to exercise functions of drainage districts —
Petition and resolution. — After receiving a petition signed by the holders of title or evidence of title to one fifth (1/5) of the lands within the district praying it shall do so, any irrigation district desiring to accept the provisions of this act shall so declare by resolution adopted by majority vote

of its directors and spread upon its minutes, and thereupon said district shall cause to be filed with the clerk of the district court of the county in which a greater portion of the lands of said irrigation district are located, its petition praying that the court shall set a day for hearing said petition and on and after said hearing make and enter its order and decree authorizing such irrigation district to perform all of the functions of a drainage district under the laws of the state of Idaho, and that there are lands within said district which need drainage: that there shall be attached to said petition so filed with the clerk of said court a true and correct copy of the petition of the said landowners in this section provided, together with a copy of said resolution of the board of directors of said district. [1931, ch. 163, § 2, p. 277; I.C.A., § 42-307; am. 1945, ch. 4, § 2, p. 5.]

Compiler's notes. The words "this act" refer to S.L. 1931, ch. 163 compiled herein as §§ 43-307, 43-308, and probably §§ 43-309 — 43-312 which were added by the 1945 amendment.

Cited in: Chandler v. Drainage Dist. No. 2, 68 Idaho 42, 187 P.2d 971 (1947).

43-309. Notice of hearing of petition. — After the filing of said petition the judge of said court shall fix the time for hearing said petition by order by him made, which order shall provide that said petition shall be published for at least three (3) successive weeks in some newspaper or newspapers printed and published in said county or counties in which the lands are situated, or in case no such paper is published in said county, then in some paper of general circulation therein; together with a notice of the time and place when said judge shall consider said petition. [I.C.A., § 42-307a, as added by 1945, ch. 4, § 3, p. 5.]

Cross ref. Notice by mail, § 60-109A.

Sec. to sec. ref. This section is referred to in § 43-307.

43-310. Hearing — Objections — Findings. — Upon the day fixed for the hearing of said petition, any person or corporation interest [interested] therein, may appear before said court and make objections in writing to the granting of said petition but said objections shall be limited to determining whether or not the granting of authority to said irrigation district to perform the duties and functions of a drainage district and as such perform such functions is a proper and advantageous method of accomplishing the reclamation and protection of swamped, bogged or water-logged lands and lands subject to overflow therein, and whether or not there is a reasonable probability that the object sought by granting such powers to said irrigation district may be accomplished, and whether or not the drainage of lands in said district will be conducive either to the public health, welfare or convenience or increase the public revenue; and at the hearing the court shall hear and consider such evidence only as may be presented for or against the petition or objections thereto. Thereupon the court shall make its findings upon the facts alleged in the petition and objections and any other facts necessary and proper for the determination of the propriety of

granting such powers to said irrigation district; and if such petition be granted the judge of said court shall make findings of fact setting forth the facts found by the said judge upon the hearing of said petition. [I.C.A., § 42-307b, as added by 1945, ch. 4, § 3, p. 5.]

Compiler's notes. The bracketed word "interested" was inserted by the compiler.

Sec. to sec. ref. This section is referred to in § 43-307.

43-311. Decree granting petition — Vesting of powers and authority in district. — Upon the filing of the findings of fact at the final hearing of said petition, as set forth in the last preceding section, said judge, if he finds that the granting of said petition and the drainage of the lands in said irrigation district will be conducive either to the public health, welfare or convenience, or will increase the public revenue, or will be of special benefit to the majority of the acreage of the lands in said irrigation district, shall enter the decree of said court granting said petition. Thereupon a certified copy of same shall be filed in the office of the secretary of state: and from and after the date of said filing of said decree, said irrigation district shall be vested with all of such functions, powers and authority of a drainage district and its board of commissioners under the laws of this state relating to drainage districts. The function, powers and authority granted by this act shall be exercised by such irrigation district through its board of directors and so far as may be in the manner provided by the drainage district laws of this state. [I.C.A., § 42-307c, as added by 1945, ch. 4, § 3, p. 5.]

Compiler's notes. For sections in which "this act" is compiled see compiler's note, § 43-308.

Sec. to sec. ref. This section is referred to in § 43-307.

43-312. Appeals. — Appeal may be taken by any interested person from said decree of the district court to the Supreme Court by serving a written notice of such appeal upon the secretary of said board of the irrigation district, within thirty (30) days after the rendition of said decree by said court. [I.C.A., § 42-307d, as added by 1945, ch. 4, § 3, p. 5.]

Sec. to sec. ref. This section is referred to in § 43-307.

43-313. Electric power plants — Construction and operation. — The board of directors of any irrigation district, organized under the laws of the state of Idaho, shall have the power to construct and operate, or to contract for the construction and operation, of electric power plants, power transmission lines, and all other works in connection therewith necessary or proper for generating and transmitting electric power, and for pumping water for irrigation and domestic use; and to contract to sell surplus power generated at such power plants. [1915, ch. 50, § 1, p. 137; reen. C.L., § 2386p; C.S., § 4348; am. 1923, ch. 27, § 1, p. 29; am. 1931, ch. 22, § 1, p. 49; I.C.A., § 42-308; am. 1973, ch. 183, § 1, p. 427.]

43-314. Electrical power plants — Sale of surplus power — Ratification of contract. — The question of the ratification of contracts for the sale of surplus power as provided in the preceding section shall be submitted in the same manner, and shall be governed by the same limitations and provisions as questions creating indebtedness: provided, that the form for the notices, and the form upon the prepared ballots, and the form for the returns, shall be so changed as to conform to the purposes of this and the preceding section. [1915, ch. 50, § 2, p. 138; reen. C.L., § 2386c; C.S., § 4349; I.C.A., § 42-309.]

Sec. to sec. ref. This section is referred to in § 43-2308.

43-315. Assessment for extermination of rodents. — The board of directors of an irrigation district may levy an assessment upon the lands within the district, not to exceed ten (10) cents per acre for the purpose of raising funds to be used for the extermination of gophers and other rodents. Said assessment shall be levied at the same time and in the same manner and with a like effect, as assessments levied for maintaining and operating the property of the district. Said assessments shall constitute a lien upon the property assessed and shall be collected, in like manner as assessments for maintenance and operation.

The funds realized from such assessment shall be used for the extermination of gophers and other rodents within the irrigation district, in such manner and by such means as the said board of directors may direct. [1927, ch. 42, § 1, p. 57; I.C.A., § 42-310.]

43-316. Legal title to property. — The legal title to all property acquired under the provisions of this title shall immediately and by operation of law vest in such irrigation district, and shall be held by such district in trust for, and is hereby dedicated and set apart to, the uses and purposes set forth in this title. Said board is hereby authorized and empowered to hold, use, acquire, manage, occupy and possess said property as herein provided. [1903, p. 150, § 13; reen. R.C., § 2387; am. 1915, ch. 143, § 3, p. 304; reen. C.L., § 2387; C.S., § 4350; I.C.A., § 42-311.]

Compiler's notes. Amendatory matter of 1915 transferred to § 43-1814 herein, relating to cooperation with federal reclamation service.

Cited in: Colburn v. Wilson, 23 Idaho 337, 130 P. 381 (1913); Yaden v. Gem Irrigation Dist., 37 Idaho 300, 216 P. 250 (1923); Lewiston Orchards Irrigation Dist. v. Gilmore, 53 Idaho 377, 23 P.2d 720 (1933).

ANALYSIS

Dedicated waters.
In general.

Dedicated Waters.

District cannot be estopped to deny that waters contracted to be furnished outside

property owners were dedicated waters since a contract to furnish dedicated waters to property owners outside district is ultra vires. Jensen v. Boise-Kuna Irrigation Dist., 75 Idaho 133, 269 P.2d 755 (1954).

Contract of district to make available to property owners adjacent to outside of district "seepage and waste" waters was not ultra vires, since district did not agree to make available to property owners any water or water rights held in trust by district for benefit of district. Jensen v. Boise-Kuna Irrigation Dist., 75 Idaho 133, 269 P.2d 755 (1954).

In General.

The irrigation district law regards the irrigation district as a unit, and as a legal entity,

holding title to its property and water rights in trust for the uses and purposes set forth in that law. *Bradshaw v. Milner Low Lift Irrigation Dist.*, 85 Idaho 528, 381 P.2d 440 (1963).

43-317. Conveyance of property — Actions. — The said board is hereby authorized and empowered to take conveyance or other assurances for all property acquired by it under the uses and provisions of this title, in the name of such irrigation district, to and for the purposes herein expressed; and to institute and maintain any and all actions and proceedings, suits at law and in equity, necessary or proper in order to fully carry out the provisions of this title, or to enforce, maintain, protect or preserve any and all rights, privileges and immunities created by this title, or acquired in pursuance thereof. In all courts, actions, suits or proceedings the said board may sue, appear and defend, in person or by attorneys, and in the name of such irrigation district. [1903, p. 150, § 14; reen. R.C. & C.L., § 2388; C.S., § 4351; I.C.A., § 42-312.]

Title Vesting in District.

The legal title to all property acquired by an irrigation district by operation of law vests immediately in the district and is held in

trust and dedicated to and set apart to the use and purposes provided by law. *Lewiston Orchards Irrigation Dist. v. Gilmore*, 53 Idaho 377, 23 P.2d 720 (1933).

43-318. Sale of personal or real property — Procedure — Sale of federal or state license or permit. — (1) Personal or real property of an irrigation district including a federal or state license or permit may be sold or transferred by its board of directors whenever the board finds and by resolution declares that the district no longer has use therefor. This procedure shall not be applicable to sales of real property acquired in compliance with the provisions of chapter 7, title 43, Idaho Code, because of the failure to pay irrigation district assessments.

1. If, in the opinion of the board, such property does not exceed two thousand dollars (\$2,000) in value, it may sell the same without independent appraisal, notice or competitive bids.
2. Personal or real property, but not including a federal or state license or permit, exceeding two thousand dollars (\$2,000) in estimated value shall first be appraised by three (3) disinterested freeholders of the district, who shall be selected by the board. It may then be sold at public or private sale to the highest bidder for cash at not less than its appraised value, after due notice.
3. Notice of sale shall describe the property, the appraised value thereof (by separate items, if so appraised), and the time, place and condition of sale.
4. If the appraised value exceeds two thousand dollars (\$2,000), notice of sale shall be posted in three (3) public places in each of the election precincts in the district (one of which shall be the office of the board) at least ten (10) days before the date of sale. The board, in its discretion, may order that, in addition to such posting of notice, the notice shall be published in a daily or weekly newspaper, published or having a general circulation in the district, for the number of times, not to exceed three (3), and on the dates that the board shall specify in its order.

5. If, at the time set for closing the bids, no bidder offers the appraised price, or more, the board may sell the property for such price, and upon such terms, as the board by resolution declares to be reasonable, without further appraisal, notice or competitive bids.

(2) Whenever the board, by resolution, shall determine that the interest of the district in any federal or state license or permit is no longer required, it may, without independent appraisal or competitive bid, sell or transfer such federal license or permit upon such terms as may be fixed by the board; provided, that such resolution sets forth the license or permit to be sold or transferred and terms and conditions for sale or transfer, and provided further, that said resolution shall be published in a newspaper having general circulation in the district at least once a week for four (4) consecutive weeks preceding the date of sale; provided, however, that if within fifteen (15) days after the first publication of the resolution a referendum petition signed by qualified electors of the district equal in number to not less than ten percent (10%) of the electors of the district, based upon the aggregate vote cast at the general election of the directors of the district next preceding the filing of such petition, and at which election votes were cast in the election of directors, shall be filed with the secretary of the district requesting that an election be held upon the sale or transfer of such license or permit. Any election required to be held pursuant to a referendum petition filed in accordance with the provisions of this section, may be held separately or may be held concurrently with any other election authorized by law, pursuant to notice as provided in section 43-206, Idaho Code.

Any such election required to be held hereunder shall be called by resolution, which resolution shall also fix the date upon which such election shall be held, which shall be not more than forty-five (45) days following the receipt of petition requesting the election, the manner of holding the same and the method of voting for or against the sale or transfer. Such resolution shall also fix the compensation to be paid the officers of the election and shall designate the precincts and polling places and shall appoint for each polling place, from each precinct from the electors thereof, the officers of such election who shall constitute a board of election for each polling place, which officers shall consist of three (3) judges, one (1) of whom shall act as clerk. The description of precincts may be made by reference to any order or orders of the board of county commissioners of the county or counties in which the district or any part thereof is situated, or by reference to any previous order or resolution of the board or by detailed description of such precincts. Precincts established by the boards of the various counties may be consolidated for special elections held hereunder. In the event any such election shall be called to be held concurrently with any other election or shall be consolidated therewith, the resolution calling the election hereunder need not designate precincts or polling places or the names of officers of election, but shall contain reference to the act or order calling such other election and fixing the precincts and polling places and appointing election officers therefrom. The resolution calling the election shall prescribe an official notice of election, which notice shall be published once a week for two (2) consecutive weeks, the last publication of which shall be at least ten (10)

days prior to the date set for said election, in a newspaper of general circulation printed and published within the district, and no other or further notice of such election or publication of the names of election officers or of the precincts or polling places need be given or made. At such election the ballots shall contain the words "Sale — Yes" or "Sale — No."

The respective election boards shall conduct the election in their respective precincts in the manner prescribed by law for the holding of district elections to the extent the same shall apply and shall make their returns to the secretary of the district.

In the event that no referendum petition is filed, or if so filed, and if it shall appear from the election returns that a majority of the qualified electors of the district who shall have voted on the proposition submitted hereunder at such election voted in favor of such proposition, the directors of the district shall, by resolution, authorize the sale or transfer under the terms prescribed and effective as of the end of the notice period hereinafter provided, and shall cause notice thereof to be published one (1) time in a newspaper of general circulation within the district. For a period of thirty (30) days from the date of such publication, any person in interest may file suit in any court of competent jurisdiction to test the regularity, formality or legality of the proceedings authorizing the sale or transfer and the provisions of the contract of sale or transfer. After the expiration of such thirty (30) day period, no one shall have any right of action to contest the validity of the sale or transfer, or of the contract, or of the proceedings, or of any resolution of the board of directors regarding such sale or transfer, and said sale or transfer shall be conclusively presumed to be legal and no court shall thereafter have authority to inquire into such matter. [1921, ch. 242, § 1, p. 533; I.C.A., § 42-313; am. 1949, ch. 206, § 1, p. 432; am. 1967, ch. 76, § 1, p. 175; am. 1974, ch. 84, § 1, p. 1175; am. 1982, ch. 196, § 1, p. 522.]

Compiler's notes. The words enclosed in parentheses so appeared in the law as enacted.

Section 2 of S.L. 1982, ch. 196 read: "The provisions of this act are hereby declared to be severable and if any provision of this act or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect

the validity of remaining portions of this act."

Section 2 of S.L. 1949, ch. 206 declared an emergency. Approved March 14, 1949.

Section 3 of S.L. 1982, ch. 196 declared an emergency. Approved March 29, 1982.

Section 2 of S.L. 1974, ch. 84 provided that this act take effect on and after July 1, 1974.

Sec. to sec. ref. This section is referred to in § 43-2541.

43-318A. Trade-in or exchange of district property. — Whenever the board of directors of an irrigation district finds and by resolution declares that the district no longer has use for any personal property of the district, or finds and declares that such property is no longer economical to use, the district may, in lieu of the sale of said property as provided in section 43-318, Idaho Code, dispose of the property by exchanging the same in part payment for new or replacement property.

If the acquisition of the new or replacement property is required to be let to bid under the provisions of section 43-901, Idaho Code, the district shall include in its request for bids, a full description of the property to be exchanged as part payment, and shall permit any interested bidder to examine the same, and any contract let as a result of said bid shall be

awarded on the basis of net cost to the district after allowance for the property to be exchanged in part payment.

Exchange of property will be permitted only when, in the opinion of the board of directors of the district, the sale of the property under the provisions of section 43-318, Idaho Code, will yield a lesser monetary return to the district than the exchange thereof as herein provided. [I.C., § 43-318A, as added by 1988, ch. 160, § 1, p. 290.]

43-319. Compensation of directors and officers. — The members of the board of directors shall fix the compensation board members shall receive for each day spent attending the meetings, or while engaged in official business under the order of the board and actual and necessary expenses. The term “actual and necessary expenses,” shall be deemed to include all traveling expenses and hotel expenses necessarily incurred by any director when absent from his residence in the performance of the duties of his office. The board shall fix the compensation to be paid to the other officers named in this title, to be paid out of the treasury of the district: provided, that such board shall, upon the petition of fifty (50) or a majority of the freeholders within such district, submit to the electors, at any general election, a schedule of salaries and fees to be paid hereunder. Such petition must be presented to the board twenty (20) days prior to a general election, and the result of the election shall be determined and declared in all respects as other elections are determined and declared under this title. [1903, p. 150, § 38; reen. R.C. & C.L., § 2389; C.S., § 4352; am. 1921, ch. 166, § 1, p. 361; am. 1923, ch. 73, § 1, p. 81; I.C.A., § 42-314; am. 1951, ch. 11, § 1, p. 20; am. 1969, ch. 32, § 1, p. 57; am. 1982, ch. 234, § 1, p. 617; am. 1989, ch. 338, § 1, p. 856.]

Compiler's notes. Section 2 of S.L. 1923, ch. 73 declared an emergency. Approved March 5, 1923.

43-320. Officers must not be interested in contracts. — No director or any other officer named in this title shall in any manner be interested, directly or indirectly, in any contract awarded or to be awarded by the board, or in the profits to be derived therefrom; and for any violation of this provision such officers shall be deemed guilty of a misdemeanor, and such conviction shall work a forfeiture of his office, and he shall be punished by a fine not exceeding \$500, or by imprisonment in the county jail not to exceed six (6) months, or by both such fine and imprisonment. [1903, p. 150, § 39; reen. R.C. & C.L., § 2390; C.S., § 4353; I.C.A., § 42-315.]

43-321. Special assessments — Elections — Collection of assessments — Delinquent list. — The board of directors may, at any time when in their judgment it may be advisable, call a special election and submit to the qualified electors of the district the question whether or not a special assessment shall be levied for the purpose of raising money to be applied to any of the purposes provided in this title, and shall, at the same time, fix a date upon which such assessment shall become delinquent, which date shall

be not less than sixty (60) days nor more than ninety (90) days from the date of said meeting of said board. Such election must be called upon the notice prescribed, and the same shall be held, and the result thereof determined and declared, in all respects in conformity with the provisions of section 43-401. The notice must specify the amount of money proposed to be raised, and the purpose for which it is intended to be used. At such elections the ballots shall contain the words "Assessment _____ yes" or "Assessment _____ no." If two thirds ($\frac{2}{3}$) or more of the votes cast are "Assessment _____ yes," the board shall immediately levy an assessment sufficient to raise the amount voted.

The assessment so levied shall be computed and entered on the assessment roll by the secretary of the board, and within ten (10) days after such assessment, the secretary must deliver the assessment book to the treasurer of the district who shall, within ten (10) days after receipt of such book, publish a notice in a newspaper published in each county in which any portion of the district may lie, that said assessments are due and payable and will become delinquent at six o'clock p.m. of the day fixed by the board of directors, naming such day and date, and also the times and places at which the payment of the assessment may be made; which notice shall be published for a period of two (2) weeks.

The treasurer must attend at the times and places specified in the notice to receive assessments which must be paid in lawful money of the United States. Within fifteen (15) days after the delinquent date as fixed by the board of directors, said treasurer shall begin the preparation of the delinquent list, which delinquent list shall contain a description of all the tracts of land upon which such special assessments are delinquent, and the amount of such assessment against each of the said tracts, and the name of the owner as shown on the assessment book. And on or before thirty (30) days thereafter, the treasurer shall complete said delinquent list, shall properly certify the same, and prepare a duplicate thereof; and deliver the delinquent list to the secretary of the district. At the same time the treasurer must commence to publish the delinquent list and publication shall continue three (3) weeks and must contain the names of the owners, a description of the property delinquent at that time, the amount of assessments and penalties and the costs due, opposite each name and description. After said publication shall have been made for the first time the treasurer shall collect twenty-five (25) cents in addition to the assessment and penalties on each description of lands published. The treasurer must append and publish with the delinquent list a notice that unless the assessments delinquent, together with penalties and costs, are paid, the real property upon which said assessments are made will be sold at public auction on the first Tuesday in September following date of notice. The publication must be made in some newspaper published in the district, if it can be so published, and if it cannot be so published, then in some newspaper published in the county in which the office of the board of directors is situated; and if it cannot be so published, then by posting in not less than three (3) places in said district, one (1) of which shall be at the door of the office of said board of directors.

The place of such sale shall be at the office of said board of directors. The treasurer, as soon as he has made the publication required, must file with the secretary proof of such publication by affidavit, or like proof of posting in case such notice was posted as herein required. Such sales and all proceedings thereafter shall be in accordance with the provisions of sections 4392 to 4401, both inclusive, or Idaho Compiled Statutes, where not in conflict herewith.

When collected such assessments shall be paid into the district treasury for the purposes provided in the notice of such special election. [1903, p. 150, § 40; reen. R.C. & C.L., § 2391; C.S., § 4354; am. 1921, ch. 234, § 1, p. 524; I.C.A., § 42-316.]

Compiler's notes. Sections 4392-4401 of Compiled Statutes referred to in this section, except for § 4399 (§ 43-721 herein), were originally printed in this code as notes under § 43-723. However, because said § 43-723 provides that the enumerated sections of Compiled Statutes shall not apply to assessments levied in 1925 and subsequent years, but shall be continued in force with respect to assessments levied prior to 1925, the sections are probably obsolete. See also § 43-722.

Sec. to sec. ref. This section is referred to in § 43-409.

Cited in: *City of Nampa v. Nampa & Meridian Irrigation Dist.*, 19 Idaho 779, 115 P. 979 (1911), writ of error dismissed, 238 U.S. 643, 35 S. Ct. 602, 59 L. Ed. 1502 (1915).

Apportionment of Special Assessments.

Special assessment is to be listed in assessment books in same proportions as assessment of benefits for cost of works. *Holland v. Avondale Irrigation Dist.*, 30 Idaho 479, 166 P. 259 (1917).

Collateral References. Inclusion of amount to cover delinquencies in assessment for public improvement as contrary to constitutional guaranties. 40 A.L.R. 1352; 42 A.L.R. 1185.

Right of governmental unit, or officers thereof, other than irrigation district, to compensation for collecting assessments levied by, or owed to, an irrigation district. 114 A.L.R. 1098.

43-322. Power to incur debts — Warrants. — The board of directors, or other officers of the district, shall have no power to incur any debt or liability whatever, either by issuing bonds or otherwise, in excess of the express provisions of this section; and any debt or liability incurred in excess of such express provisions shall be and remain absolutely void: provided, that for the purpose of organization, or for any of the purposes of this title, the board of directors may, before the collection of the first assessment, incur indebtedness and cause warrants of the district to issue therefor according to the following limitations: Districts embracing fifty thousand (50,000) acres, or more, of irrigable land, not in excess of fifteen thousand dollars (\$15,000) of warrants; districts embracing forty thousand (40,000) acres, or more, and less than fifty thousand (50,000) acres of irrigable land, up to twelve thousand dollars (\$12,000) of warrants; districts embracing thirty thousand (30,000) acres, or more, and less than forty thousand (40,000) acres of irrigable land, up to nine thousand dollars (\$9,000) of warrants; districts embracing twenty thousand (20,000) acres, or more, and less than thirty thousand (30,000) acres of irrigable land, up to six thousand dollars (\$6,000) of warrants; districts embracing ten thousand (10,000) acres, or more, and less than twenty thousand (20,000) acres of irrigable land, up to four thousand dollars (\$4,000) of warrants; districts embracing more than two thousand (2,000) acres, or more, and less than ten thousand (10,000) acres of irrigable land up to three thousand dollars (\$3,000) of warrants, and districts embracing less than two thousand (2,000) acres of irrigable land up

to two thousand dollars (\$2,000) of warrants.

Provided, further, that for the purpose of defraying the expenses in the care, operation, repair and improvement of such portion of the irrigation works of the district as are completed and in use, including salaries of officers and employees, the board of directors of an irrigation district may at any time issue warrants of such district in payment of claims of indebtedness against the district, not to exceed the district's anticipated revenue.

The warrants herein authorized shall be in form and substance the same as county warrants or as near the same as may be practicable and shall be signed by the chairman and attested by the secretary of said board. All such warrants shall be presented by the holder thereof to the treasurer of the district for payment who shall indorse thereon the day of presentation for payment with the additional indorsement thereon, in case of nonpayment, that they are not paid for want of funds, and such warrants shall draw interest at a rate to be established by the board of directors from the date of their presentation to the treasurer for payment as aforesaid until such warrants are paid. No warrants shall be issued in payment of any indebtedness of such district for less than face or par value. It shall be the duty of the treasurer from time to time when he has sufficient funds in his hands for that purpose to advertise in some newspaper in the county in which the district is situated requiring the presentation to him for payment of as many of the outstanding warrants as he may be able to pay. Ten (10) days after the first publication of said notice by the treasurer calling in any of said outstanding warrants, said warrants shall cease to bear interest, which shall be stated in the notice. Said notice shall be published two (2) weeks consecutively and said warrants shall be called in and paid in the order of their indorsement.

Provided, further, after an irrigation district has organized and has no warrants outstanding, the district may maintain its operation on a cash basis and pay by check the expenses of operation and maintenance, repair, improvement, obligations on contractual or bonded indebtedness, and all other general necessary expenses incurred by the district.

The board of directors, or other officers of the district, may incur debt by contracting indebtedness with a money-lending institution, subject to the election requirements contained in section 43-401, Idaho Code, but the term of such indebtedness shall not exceed twenty (20) years. [1903, § 41, p. 150; reen. R.C. & C.L., § 2392; C.S., § 4355; am. 1923, ch. 61, § 1, p. 69; am. 1925, ch. 134, § 1, p. 236; I.C.A., § 42-317; am. 1967, ch. 211, § 1, p. 641; am. 1976, ch. 251, § 2, p. 857; am. 1980, ch. 61, § 9, p. 118.]

Compiler's notes. Section 1 of S.L. 1976, ch. 251, is compiled herein as § 43-401.

Section 8 of S.L. 1980, ch. 61, compiled as § 40-1649, has been repealed and § 10 of S.L. 1980, ch. 61 is compiled as § 50-1763.

Section 2 of S.L. 1925, ch. 134 declared an emergency. Approved March 5, 1925.

Section 3 of S.L. 1976, ch. 251 declared an emergency. Approved March 30, 1976.

Section 14 of S.L. 1980, ch. 61 declared an emergency. Approved March 11, 1980.

Cross ref. County warrants, §§ 31-2301 — 31-2305.

Nonpayment of warrants for want of funds, indorsement, interest rate, §§ 31-2124, 31-2125.

Cited in: Colburn v. Wilson, 23 Idaho 337, 130 P. 381 (1913).

ANALYSIS

Bond issuance.

Seepage and waste waters contract.

Ultra vires acts.

Bond Issuance.

Since the legislature specifically provided that restrictions contained in statutes such as this section were not to apply to a district exercising the powers granted it by §§ 43-2201 — 43-2207 or that such restrictions were to be considered as modified to the extent they were inconsistent with the provisions of such sections, a resolution for bond issue adopted under §§ 43-2201 — 43-2207 did not violate this section. *Kerner v. Johnson*, 99 Idaho 433, 583 P.2d 360 (1978).

Seepage and Waste Waters Contract.

Contract of district to furnish "seepage and waste" waters to property owners outside of

district did not violate this section on the ground that warrants for such a purpose were not authorized where no showing was made that expense imposed on district would be greater than anticipated revenues. *Jensen v. Boise-Kuna Irrigation Dist.*, 75 Idaho 133, 269 P.2d 755 (1954).

Ultra Vires Acts.

Power of directors or other officers of irrigation district is limited, and any act done in excess of the express provisions of statute by such directors or officers is ultra vires. *Yaden v. Gem Irrigation Dist.*, 37 Idaho 300, 216 P. 250 (1923); *Lewiston Orchards Irrigation Dist. v. Gilmore*, 53 Idaho 377, 23 P.2d 720 (1933).

43-323. Report to department of water resources. — (1) At least as often as once a year after organization, the board of directors shall make a report to the department of water resources of the condition of the work of construction, as to capacity, stability and permanency, and whether or not the plan of irrigation formulated under the provisions of this title is being successfully carried out, and whether or not in the opinion of the board the funds available will complete the proposed works. Upon the receipt of such report by the department, it shall make such suggestions and recommendations to such board of directors as it may deem advisable for the best interest of the district.

(2) A change in the generally described place of use for a water right held by an irrigation district may be made without applying for a change under the provisions of section 42-222, Idaho Code, provided the district files with the department of water resources a map portraying the changes to the generally described place of use within which the district's water rights shall be exercised. For this filing requirement, it shall be sufficient to provide a drawing on a seven-and-one-half-minute (7-½) quadrangle map having a scale of one to twenty-four thousand (1:24,000) which shows the changes to the outer limits of the boundaries of the irrigation district to include each quarter-quarter section within which irrigation occurs. This map showing changes to the generally described place of use shall be filed with the department no later than April 1 of the year following the changes. Notwithstanding the filing of such map, only the legal description of an irrigation district's boundaries recorded in compliance with title 43, Idaho Code, shall constitute conclusive proof of the district's boundaries for purposes other than defining the generally described place of use for a water right held by the district. [1903, p. 150, § 37; reen. R.C. & C.L., § 2393; C.S., § 4356; I.C.A., § 42-318; am. 1998, ch. 332, § 3, p. 1065.]

Compiler's notes. The name of the department of water administration (formerly the department of reclamation) has been changed to the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

Section 2 of S.L. 1998, ch. 332 is compiled as § 42-219.

Section 5 of S.L. 1998, ch. 332 declared an emergency. Approved March 25, 1998.

Sec. to sec. ref. This section is referred to in § 42-219.

43-324. Statement of financial condition. — On or before the second Tuesday of February of each year the board of directors of each irrigation district organized under this title shall publish in at least one (1) issue of some newspaper published in the county or counties in which such district is situated, a full, true and correct statement of the financial condition of said district, at the end of the last preceding fiscal year, giving all liabilities and assets of the said district, in a form to be prescribed by the bureau of public accounts of the state of Idaho. [1903, p. 150, § 57; reen. R.C. & C.L., § 2394; C.S., § 4357; am. 1927, ch. 115, § 1, p. 160; am. 1931, ch. 126, § 1, p. 222; I.C.A., § 42-319; am. 1941, ch. 170, § 1, p. 341; am. 1998, ch. 332, § 4, p. 1065.]

Compiler's notes. Section 5 of S.L. 1998, ch. 332 declared an emergency. Approved March 25, 1998.

43-325. County commissioners to have access to books. — Any board of directors of any such irrigation district, or the secretary thereof, shall at any time allow any member of the board of county commissioners, when acting under the order of such board, to have access to all books, records and vouchers of the district which are in possession or control of said board of directors or said secretary of said board. [1903, p. 150, § 58; reen. R.C. & C.L., § 2395; C.S., § 4358; I.C.A., § 42-320.]

43-326. Power to maintain parks. — The board of directors of any irrigation district shall have the power to maintain public parks and recreation grounds for the benefit of the people of the district and may set aside for this purpose, land belonging to the district, including land acquired by the district from sale for delinquent water assessments. The district shall have the power to purchase land, or to acquire land by lease, within the district for public parks and recreation ground. In the maintenance of said grounds, the board of directors may construct buildings and provide facilities for recreation purposes and may receive gifts and donations of either real or personal property for the purposes hereinbefore enumerated. [I.C.A., § 42-322, as added by 1935, ch. 11, § 1, p. 26; am. 1959, ch. 7, § 1, p. 21.]

Compiler's notes. Section 2 of S.L. 1959, ch. 7 declared an emergency. Approved February 9, 1959.

43-327. Delinquent assessments — Shutting off of water. — The board of directors of any irrigation district shall have the power to refuse to deliver water for the use on any lands upon which any assessments, tolls or charges levied, assessed or charged against said lands or the owner, lessee, occupant or contract purchaser thereof, under any section of this title, whether for irrigation or domestic water service, are unpaid for more than ninety (90) days after delinquency until such assessments, tolls or charges, together with any lawful penalties and additional charges are paid.

Provided, that, in irrigation districts having a contract with the United States under the provisions of this title, for the construction, or operation, or maintenance of a domestic water system or for the repayment to the United States of a loan for any such purpose, the board of directors of such district may, by resolution, from time to time, fix a date or dates after which any or all lawful tolls and/or charges of the district, including without limitation domestic water tolls and charges, and excepting only assessments provided for in this title against real property within the district, shall be deemed delinquent. Such district shall have the right, in addition to and supplemental to all other legal rights now in effect, or hereafter acquired for the collection of any such sums, to cease delivery of domestic and irrigation water to all lands in connection with which such tolls or charges have been incurred and, at the district's option, also to all other lands within the district belonging to the person or persons, firm, corporation or other legal entity incurring any such tolls or charges. Such delivery may be ceased at any time after the tenth day following the date any such sums become delinquent, and until all such sums together with any lawful penalties, additional charges and/or interest at the legal rate are paid. [I.C.A., § 42-323, as added by 1939, ch. 269, § 1, p. 668; am. 1959, ch. 14, § 1, p. 34; am. 1965, ch. 25, § 1, p. 38.]

Compiler's notes. The following note appeared in the published acts (S.L. 1939, ch. 269, § 1, p. 668): "This bill became a law on March 15, 1939, not having been signed by the governor, or filed, together with his objections, in the office of the secretary of state

within ten days after the adjournment of the legislature."

Section 2 of S.L. 1959, ch. 14 declared an emergency. Approved February 12, 1959.

Section 2 of S.L. 1965, ch. 25 declared an emergency. Approved February 17, 1965.

43-328. Petition to construct improvements for irrigation — Assent of petitioners to assessment of cost of improvement. — The holders of title, or evidence of title, representing a majority of the acreage of any body of land within any irrigation district, may file with the board of directors of the district a petition in writing, praying for the construction of any improvement necessary or expedient for the efficient irrigation of the lands, including facilities for the recharge of ground water basins. The petition shall in a general way describe the proposed improvement and shall describe the tracts, or body of land, owned by the petitioners, and shall contain a description of the exterior boundaries of the land for which the proposed improvement is to be constructed, and describing therein any lands that are to be excepted from the benefit or use of the proposed improvement. The petition shall also contain an agreement on the part of the petitioners that the cost of construction of the improvement shall constitute a lien upon the lands within the exterior boundaries of the land described in the petition, except the lands that are therein excepted from the benefit or use of the proposed improvement, and that the lands shall be assessed for and pay the cost of the improvement. The petitions shall be deemed to give assent of the petitioners to construction of the improvement and shall authorize the assessment of the cost of such improvement upon and against the lands described in the petition and not specifically therein excepted. The petition shall be acknowledged in the same manner that

conveyances of land are required to be acknowledged. [I.C., § 43-328, as added by 1973, ch. 64, § 1, p. 105; am. 1985, ch. 120, § 3, p. 292.]

Compiler's notes. Sections 2 and 4 of S.L. 1985, ch. 120 are compiled as §§ 43-304 and 43-343, respectively.

Sec. to sec. ref. Sections 43-328 — 43-330 are referred to in § 43-701B.
This section is referred to in § 43-343.

43-329. Elections to determine question as to construction of improvement — Resolution of directors. — (1) The board of directors, if they deem it for the best interest of the district that the proposed improvement be constructed, may by resolution call an election to be held within the boundaries of the land described in the petition for the purpose of submitting the question as to whether or not the proposed improvement shall be constructed. The board shall in the resolution fix the time and place of holding the election, and specify the polling place, and shall also appoint three (3) judges who shall constitute a board of election. The resolution shall also contain the ballot title to be used at the election, which title shall contain such information as in the judgment of the board will advise the owners of the land to be charged with the cost of the proposed improvement as to the general nature of the improvement and the estimated cost.

(2) The board at the time of calling the election within the land described in the petition shall also by resolution call an election to be held within the district at large for the purpose of submitting the question as to whether or not the proposed improvement shall be constructed. This resolution shall contain provisions identical with those provided for in subsection (1) of this section. The election in the district at large shall be held on the same day that the election within the territory described in the petition is held. The election shall be conducted, as nearly as practicable, in accordance with the general election laws of the state applicable to irrigation districts. [I.C., § 43-329, as added by 1973, ch. 64, § 2, p. 105.]

Sec. to sec. ref. This section is referred to in §§ 43-343, 43-1102, 43-1120 and 43-1121.

43-330. Majority of votes as determinative — Construction of improvement — Cost — Apportionment — Assessment. — If a majority of the votes cast by the electors within the boundaries of the land described in the petition are "Improvement — Yes," and if a majority of the votes cast by the electors in the district at large are "Improvement — Yes," then, but not otherwise, the board shall construct the improvement. The cost of construction shall be apportioned by the board to the lands within the boundaries described in the petition, so that each acre of irrigable land therein shall be assessed and required to pay the same amount. In all other respects the assessment and its levy and collection shall be, as nearly as practicable, in accordance with the assessment, levy and collection of other assessments and taxes levied upon lands within the district. [I.C., § 43-330, as added by 1973, ch. 64, § 3, p. 105.]

Sec. to sec. ref. This section is referred to in § 43-343.

43-330A. Contracts with landowners for construction of improvements. — When a parcel of land lying within an irrigation district has been subdivided and the owner or owners of the entire parcel propose to develop that parcel or any of the tracts therein for residential, commercial, industrial or municipal use, the board of directors of the district may enter into a contract with the owner or owners of the entire parcel, or of any tract therein, for the construction of a pressurized system for the proper distribution of irrigation water to the parcel or to the designated tracts within the parcel. [I.C., § 43-330A, as added by 1993, ch. 261, § 1, p. 892; am. 1998, ch. 195, § 1, p. 705.]

Compiler's notes. Section 2 of S.L. 1998, in §§ 43-330D, 43-330E, 43-330F, 43-330G, ch. 195 is compiled as § 43-331. 43-1120.

Sec. to sec. ref. This section is referred to

43-330B. Contract provisions. — Any contract entered into under the authority of section 43-330A, Idaho Code, shall include the following provisions:

(1) An apportionment of the cost of the construction of the distribution system against the parcel or against the tract or tracts which are included in the contract;

(2) The cost of construction of the distribution system shall constitute a lien against the parcel, tract or tracts included in the contract, to secure payment of any portion of the cost of construction that is not paid upon completion of construction by the owner or owners, or by a third party on their behalf, and securing payment of interest on any deferred installments of the construction costs;

(3) A schedule of annual installment payments, with accrued interest, for the portion, if any, of the construction costs that are not paid upon completion of construction;

(4) The annual installment payment against the parcel or against the tract or tracts included in the contract shall be included in the annual assessments levied by the district against the parcel, tract or tracts and any such assessment and its levy and collection shall be, as nearly as practicable, in accordance with the assessment, levy and collection of other assessments levied upon lands in the district;

(5) The deferred annual installment payments of principal and accrued interest may be prepaid in whole or in part at any time without penalty, but any prepayment of principal shall not be less than one-half ($\frac{1}{2}$) the amount of the annual installment payment of principal next coming due, but the prepayment privilege authorized in this subsection shall not be applicable where the construction costs have been financed through a local improvement district;

(6) If the district has constructed or proposes to construct a pumping station and pipeline to serve the parcel, tract or tracts included in the contract and other lands, the cost of the pumping station and pipeline shall be apportioned by the board to all lands which are planned to be served by the pumping station, so that each acre of irrigable land to be served by the pumping station shall be assessed and required to pay the same amount;

(7) A grant of an easement to the district for the installation, operation, maintenance, repair and replacement of the portion of the distribution system located on the parcel, tract or tracts included in the contract. The easement shall be of sufficient width to allow construction, installation, operation, maintenance, repair and replacement by the use of ordinary mechanized equipment designed to perform those functions. [I.C., § 43-330B, as added by 1993, ch. 261, § 1, p. 892.]

43-330C. Compliance. — If the contract provides for construction of any portion of the distribution system by the owner or owners, chapter 9, title 43, Idaho Code, shall not be applicable to that portion of the construction. If any portion of the distribution system is to be constructed by the district, the district shall comply with the provisions of chapter 9, title 43, Idaho Code, insofar as applicable to the construction to be performed by the district or by a contractor under a separate contract with the district, unless the owner or owners furnish a written waiver of such compliance. [I.C., § 43-330C, as added by 1993, ch. 261, § 1, p. 892.]

43-330D. Contract to be recorded. — Any contract entered into by an irrigation district under the authority of section 43-330A, Idaho Code, shall be recorded in the office of the county recorder of each county in which any portion of the land covered by the contract is located, and the owner or owners named in the contract shall remain personally liable, jointly and severally, for the cost of construction until the contract has been properly recorded. [I.C., § 43-330D, as added by 1993, ch. 261, § 1, p. 892.]

43-330E. District to own distribution system. — Any pressurized distribution system constructed under the authority of section 43-330A, Idaho Code, shall be the property of, and shall be owned by, the district. [I.C., § 43-330E, as added by 1993, ch. 261, § 1, p. 892.]

43-330F. Operation and maintenance of pressurized distribution systems. — Any pressurized distribution system constructed under the authority of section 43-330A, Idaho Code, shall be operated, maintained, repaired and replaced by the district, and the district may levy and collect an assessment against each tract of land served by the distribution system to defray the cost and expense of such operation, maintenance, repair or replacement. The board shall apportion to each tract of land included in the contract a portion of the cost of operation, maintenance, repair and replacement of the distribution system, on the same basis as the cost of construction of the distribution system is apportioned. [I.C., § 43-330F, as added by 1993, ch. 261, § 1, p. 892.]

43-330G. Distribution systems for land in more than one irrigation district — Joint contract — Division of management — Assessments. — Where the interests of two (2) or more irrigation districts and the interests of the contracting landowners will be served thereby, lands in two (2) or more irrigation districts may be included in a contract entered into by

the districts and the landowners under the authority of section 43-330A, Idaho Code, and the contract shall specify how the ownership, management, operation, maintenance, repair and replacement of the distribution system shall be divided between or among the districts, and shall provide that all assessments for construction costs and for costs of operation, maintenance, repair and replacement against any tract of land included in the contract shall be levied and collected by the district in which that tract is located. [I.C., § 43-330G, as added by 1993, ch. 261, § 1, p. 892.]

Compiler's notes. Section 2 of S.L. 1993, ch. 261 declared an emergency. Approved March 29, 1993.

43-331. Directors may construct or maintain improvements, levy assessments. — (1) This section applies: (a) When a parcel of land lying within an irrigation district is subdivided and the owner has made no provisions which in the opinion of the board of directors is adequate for the proper distribution of water thereto; or (b) when improvements for the distribution or delivery of water to any tract of land are not owned by the district and the owner or person in control of the improvement fails to maintain, repair or replace the improvement as required for the proper and efficient distribution or delivery of water to any tract; or (c) when fifty percent (50%) or more of the owners of the tracts in any such subdivided parcel request that the board provide for the proper distribution of water thereto or request that the board maintain, repair or replace the improvement as required for the proper and efficient distribution or delivery of water to any tract.

(2) Whenever the interest or convenience of such tracts requires the construction, repair or maintenance of any ditch, flume, dike, aqueduct or other improvement, the board may construct, repair or maintain such improvement, and levy and collect an assessment upon all tracts specially benefited thereby, to defray the whole or any portion of the cost and expense thereof. The board may determine what lands are specially benefited by such construction, repair or maintenance, and the amount to which each tract is benefited. [I.C., § 43-331, as added by 1973, ch. 64, § 4, p. 105; am. 1978, ch. 251, § 1, p. 550; am. 1998, ch. 195, § 2, p. 705.]

Compiler's notes. Section 1 of S.L. 1998, ch. 195 is compiled as § 43-330A.

Sec. to sec. ref. This section is referred to in §§ 43-333, 43-334.

43-332. Apportionment of water to tracts — Employment of person to distribute water — Assessment of cost — Lien on land. — Whenever a parcel of land lying within an irrigation district is subdivided and plats of such subdivision are filed as provided by law, and the owners fail to properly apportion the water to their various tracts in the subdivision, or upon request made by fifty percent (50%) or more of the owners of the tracts in the subdivision the board of directors may employ some competent person to distribute and apportion water for such tracts. The reasonable cost of such services shall be apportioned each year by the board to such tracts. The cost of such services shall be assessed by the board as a special charge

to the tracts in the same manner as other assessments are made by the board. The assessment so levied and apportioned shall be a lien upon the tracts, and shall be collected in the same manner as all other assessments are levied and collected by the board. [I.C., § 43-332, as added by 1973, ch. 64, § 5, p. 105; am. 1978, ch. 250, § 1, p. 549; am. 1998, ch. 195, § 3, p. 705.]

Sec. to sec. ref. This section is referred to in § 43-334.

43-333. Resolution for water distribution works or services — Hearing of objections — Construction, repair or maintenance of improvement — Apportionment of costs — Assessment. — (1) Whenever the board of directors shall deem it expedient or necessary to construct, repair or maintain ditches, flumes, dikes, aqueducts or other improvements as provided in section 43-331, Idaho Code, or to employ the services of some competent person to distribute and apportion water for any subdivision, as provided in section 43-332, Idaho Code, it shall declare such necessity by resolution.

(2) A resolution shall be posted in three (3) public places in the subdivision for five (5) days. Within ten (10) days from the date when the resolution is posted, the owner of any property within the tract may file with the secretary a written remonstrance against the proposed improvement or employment. The board hearing such remonstrances may, in its discretion, overrule any remonstrance and by a resolution order construction, repair or maintenance of the improvements. The board may either enter into a contract to complete the improvement or, in its discretion, complete the improvement under its own supervision. After the work on the improvement is completed the board shall, by resolution, apportion the costs and shall declare an assessment upon each tract benefited, which assessments shall be final and conclusive. [I.C., § 43-333, as added by 1973, ch. 64, § 6, p. 105.]

Sec. to sec. ref. This section is referred to in §§ 43-1102, 43-1120 and 43-1121.

43-334. Procedure for levy and collection of special assessment — Appeal. — Whenever the board of directors levies a special assessment against the various tracts of land as provided in section 43-331 and section 43-332, Idaho Code, it shall be extended against the tracts of land in the same manner as other assessments are levied and extended upon the assessment rolls of the irrigation district or county. The assessments shall be collected in the same manner as other assessments are collected. An appeal may be taken from the action of the board to the district court of the county in which the land is situated. The appeal shall be taken, perfected and prosecuted in the same manner and within the same period of time as an appeal from the board of county commissioners. [I.C., § 43-334, as added by 1973, ch. 64, § 7, p. 105.]

Compiler's notes. Section 8 of S.L. 1973, ch. 64, declared an emergency. Approved March 2, 1973.

43-335. Leasing of water rights by irrigation district within the district by district's where landowner can receive water through the district's irrigation system. — Any irrigation district which has within its boundaries residential, commercial or industrial lands, or any combination of those lands, and which holds water rights for those lands, shall have the right to lease, to any municipality, municipal provider, public utility, domestic water users organization which furnishes water service to those lands, or to any other entity for the distribution of water to those lands for uses other than culinary purposes, those water rights which are held for any residential, commercial or industrial lands for which the owner has elected not to receive his proportionate share of the irrigation district's water through the irrigation system of the district; provided, however, that no water right under which water is delivered through a community ditch shall be leased without the written consent of the ditch users who do not elect not to receive water from the district. For purposes of this chapter, the terms "municipality" and ["municipal provider"] shall be defined as provided in section 42-202B, Idaho Code; "culinary purposes" shall mean the use of water for direct human consumption, cooking, sanitary purposes, and other such uses. Nothing in this chapter shall be construed as amending or affecting the laws of Idaho pertaining to the control and regulation of public utilities, municipal providers or water corporations. [I.C., § 43-335, as added by 1983, ch. 68, § 1, p. 150; am. 1997, ch. 401, § 1, p. 1277.]

Compiler's notes. The bracketed quotation marks in the second sentence were inserted by the compiler.

Section 2 of S.L. 1997, ch. 401 is compiled as § 43-337.

Sec. to sec. ref. Sections 43-335 — 43-342 are referred to in § 42-223.

This section is referred to in §§ 43-337, 43-339, 43-340 and 43-342, 43-1120.

43-336. Notification of landowners regarding lease. — Whenever the board of directors of an irrigation district resolves to lease all or any portion of any water right or water rights as authorized by section 43-335, Idaho Code, the district shall notify its landowners, by such method as the board shall order, that (1) the district intends to lease the water right or water rights identified by priority date, quantity and source in the notice, (2) owners of residential, commercial or industrial lands for which the district holds water rights may elect not to receive water from the district for their lands, and (3) consent of other ditch owners who will continue receiving water is required for leasing water rights delivered through community ditches. [I.C., § 43-336, as added by 1983, ch. 68, § 2, p. 150.]

43-337. Requirements of election for landowners. — The election under section 43-335, Idaho Code, not to receive water shall be made in writing and shall state:

- (a) The name and address of the landowner;
- (b) The legal description of the land as to which the election is made;

(c) The date of the notification from the district pursuant to which the election is made;

(d) That the owner elects not to receive water from the irrigation system of the district under the water right held for the land described in the notification of election;

(e) That this landowner's election not to receive water from the district shall remain in effect so long as the lease under section 43-335, Idaho Code, has not been terminated.

The written notification of election shall be signed by the landowner and shall be delivered to the district at its office. Signature by each surviving spouse shall be required for a valid election as to land which is community property. [I.C., § 43-337, as added by 1983, ch. 68, § 3, p. 150; am. 1997, ch. 401, § 2, p. 1277.]

Compiler's notes. Section 1 of S.L. 1997, ch. 401 is compiled as § 43-335.

43-338. Leasing of water rights inside the district by an irrigation district where the landowner cannot receive water through the irrigation system. — An irrigation district shall have the right to lease, to any municipality, municipal provider, public utility or domestic water users organization which furnishes water service to lands lying within the district, or to any other entity providing water service for uses other than culinary purposes those water rights which the landowner does not receive through the irrigation system of the district because the landowner has no ditch, pipeline or other transmission facility for carrying water from the district's system to his land. [I.C., § 43-338, as added by 1983, ch. 68, § 4, p. 150; am. 1997, ch. 401, § 3, p. 1277.]

Sec. to sec. ref. This section is referred to in §§ 43-340, 43-1120.

43-339. No levy against lands where water rights are leased. — After the effective date of a lease by which a water right or any portion thereof is leased by an irrigation district under the authority granted by section 43-335 or 43-338, Idaho Code, the district shall not levy tolls or assessments for any purpose against the lands for which that water right is held by the district, so long as the lease remains in effect, and any toll or assessment levied in violation of this section shall be void and of no effect whatsoever. [I.C., § 43-339, as added by 1983, ch. 68, § 5, p. 150.]

43-340. Use of moneys received for leased water rights. — All payments of rent received by an irrigation district under a lease of water rights authorized by section 43-335 or 43-338, Idaho Code, shall belong to the district, and it shall not be obligated to reimburse electing landowners for any such rental payments, and such payments shall be deemed to have been received by the district in lieu of tolls or assessments which otherwise would have been levied against the lands for which landowners have elected not to receive water or against the lands to which water cannot be delivered. [I.C., § 43-340, as added by 1983, ch. 68, § 6, p. 150.]

43-341. Effect on water rights by leasing. — Use of water under a lease authorized by this act shall not constitute abandonment, or be grounds for forfeiture, of the water right, and shall not be deemed a change in the place of use or in the nature of the use of the water. Any change in the point or points of diversion of water shall require approval of the director of the department of water resources as provided in section 42-222, Idaho Code, but the director shall not be required to determine whether a water right has been abandoned or forfeited, in whole or in part, before approving any change in the point of diversion. [I.C., § 43-341, as added by 1983, ch. 68, § 7, p. 150.]

Compiler's notes. The words "this act" refer to S.L. 1983, ch. 68, which is compiled as §§ 43-335 — 43-342.

43-342. Landowner may not receive water from the district after agreeing to lease water rights. — After the effective date of any lease by an irrigation district under the authority granted by section 43-335, Idaho Code, no landowner who has elected not to receive water from the district and who owns land from which the water right has been leased and who has actual knowledge of the lease, shall use water from the community ditch, if any, by which water is carried from the district's system to his land. Any landowner violating this section shall be liable for all costs reasonably incurred by the district in enforcing the provisions of this section. [I.C., § 43-342, as added by 1983, ch. 68, § 8, p. 150.]

43-343. Authority to construct and operate ground water recharge project. — Any irrigation district heretofore or hereafter organized under the laws of this state, having received and affirmatively acted upon a petition to construct a ground water recharge improvement project in the manner provided by sections 43-328, 43-329 and 43-330, Idaho Code, is authorized by section 42-4201A, Idaho Code, to file an application with the department of water resources to appropriate the unappropriated waters of the state for the purpose of recharging ground water basins within the district to aid in the efficient irrigation of district lands. Upon approval of the application for permit by the director of the department of water resources, the district shall proceed in the manner provided by the irrigation district laws of the state to construct and operate the recharge project. The construction and operation of the project shall be subject to such additional conditions and limitations as shall be imposed by the director of the department of water resources pursuant to sections 42-203 [42-203A] and 42-4201A, Idaho Code. [I.C., § 43-343, as added by 1985, ch. 120, § 4, p. 292.]

Compiler's notes. The bracketed reference "42-203A" was inserted by the compiler since § 42-203 was amended and redesignated as § 42-203A by S.L. 1985, ch. 17, § 1.

Section 3 of S.L. 1985, ch. 120 is compiled as § 43-328.

CHAPTER 4

BONDS — ISSUANCE, CONFIRMATION AND SALE

- SECTION.
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- SECTION.
43-406. Confirmation of proceedings.
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43-408. Confirmation of proceedings — Hearing and order.
43-409. Sale of bonds — Assessments in lieu of bonds canceled.
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43-413. Safety fund for payment of bonds and contract obligations.
43-414. Interim notes.

43-401. Plan of construction — Issuance of bonds — Indebtedness — Election. — As soon as practicable after the organization of any such district the board of directors shall, by a resolution entered on its records, formulate a general plan of its proposed operations, in which it shall state what constructed works or other property it proposes to purchase and the cost of purchasing the same; and further what construction work it proposes to do and how it proposes to raise the funds for carrying out said plan. For the purpose of ascertaining the cost of any such construction work, said board shall cause such surveys, examinations and plans to be made as shall demonstrate the practicability of such plan, and furnish the proper basis for an estimate of the cost of carrying out the same. All such surveys, examinations, maps, plans and estimates, shall be made under the direction of a competent irrigation engineer and certified by him. Said board shall then submit a copy of the same to the department of water resources, and within ninety (90) days thereafter the department shall file a report upon the same with said board, which report shall contain such matters as, in the judgment of the department may be desirable.

Upon receiving said report said board of directors shall proceed to determine the amount of money necessary to be raised, and shall immediately thereafter call a special election, at which shall be submitted to the electors of said district possessing the qualifications hereinafter prescribed the question whether or not the bonds of said district, or the right to enter into an obligation with the United States in the manner hereinafter in this title provided, or whether a contractual arrangement with a money-lending institution in the amount as determined, shall be authorized.

Notice of such election must be given by posting notices in three (3) public places in each election precinct in said district at least four (4) weeks before the date of said election, and the publication thereof for the same length of time in some newspaper published in the district, and in case no paper is published in the district, then in a paper published in each county in which the district or any part thereof is located. Such notice must specify the time of holding the election, the qualifications of voters, the amount of bonds proposed to be issued, and, in case such maps and estimates have been

made, it shall further state that copies thereof, and in all cases it shall state that said report of the department of water resources, are on file and open to public inspection by the people of the district, at the office of said board and at the office of the department of water resources.

No person who is not a resident holder of title or evidence of title to lands located and subject to assessment within such district, or the wife or husband of such holder of title or evidence of title, shall be entitled to vote at such election. Otherwise said election must be held and the results thereof determined and declared in all respects as nearly as practicable in conformity with the provisions of this title governing the election of officers: provided, that no informalities in conducting such an election shall invalidate the same if the election shall have been otherwise fairly conducted. At such election the ballots shall contain the words "bonds—yes" or "bonds—no," or other words equivalent thereto. If two-thirds (2/3) of the votes cast are "bonds—yes" the board of directors shall cause bonds in said amount to be issued; if more than one-third (1/3) of the votes cast at any bond election are "bonds—no" the result of such election shall be so declared and entered of record.

And whenever thereafter said board in its judgment deems it for the best interest of the district that the question of the issuance of bonds in said amount, or any other amount, shall be submitted to the electors, it shall so declare of record in its minutes, and may thereupon submit such questions to said electors in the same manner and with like effect as at such previous election. [1903, p. 150, § 15; am. 1907, p. 484, § 1, subd. 15; reen. R.C., § 2396; am. 1915, ch. 143, § 5, p. 304; compiled and reen. C.L., § 2396; C.S., § 4359; am. 1929, ch. 177, § 1, p. 311; I.C.A., § 42-401; am. 1959, ch. 223, § 1, p. 488; am. 1976, ch. 251, § 1, p. 857; am. 2001, ch. 183, § 19, p. 613.]

Compiler's notes. Amendatory proviso of 1915 act referring to voting on contracts with federal government transferred to C.L. 167:8 (§ 43-1808 herein).

The name of the department of water administration (formerly the department of reclamation) has been changed to the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

Section 2 of S.L. 1976, ch. 251 is compiled herein as § 43-322.

Sections 18 and 20 of S.L. 2001, ch. 183 are compiled as §§ 42-2011 and 49-202, respectively.

Section 3 of S.L. 1976, ch. 251 declared an emergency. Approved March 30, 1976.

Cross ref. Election for contracting with United States, §§ 43-1808, 43-1809.

Election for special assessments, § 43-321. Qualifications of voters at bond election, § 43-111.

Sec. to sec. ref. This chapter is referred to in §§ 43-502, 43-503, 43-504, 43-701, 43-1830 and 43-2201.

This section is referred to in §§ 43-321, 43-322, 43-404A, 43-1808, 43-1809 and 43-2521.

Cited in: Emmett Irrigation Dist. v. Thompson, 253 F. 316 (9th Cir. 1918); City of Nampa v. Nampa & Meridian Irrigation Dist., 19 Idaho 779, 115 P. 979 (1911), writ of error dismissed, 238 U.S. 643, 35 S. Ct. 602, 59 L. Ed. 1502 (1915).

ANALYSIS

Additional bond issue.
Confirmation of bond issue.
Confirmation of proceedings.
Discretion of board.
Exclusion of land from plan.
Irrigation of outside lands.
Legislative grant of power.
Order of proceedings.
Qualifications of voters.

Additional Bond Issue.

Where irrigation district had been regularly organized and had surveys, maps, plans, and estimates made in accordance with this section, and bond issue had been made but money raised was not sufficient for completion of projected works, it was unnecessary to make a new survey and additional maps and plans as a prerequisite to ordering and hold-

ing another election authorizing further bond issue. *Pioneer Irrigation Dist. v. Campbell*, 10 Idaho 159, 77 P. 328 (1904).

Confirmation of Bond Issue.

Proceedings for confirmation of bond issue by irrigation district may be instituted before issuance of bonds in order to procure a judicial determination of their validity, and to facilitate their sale. *Nampa & M. Irrigation Dist. v. Brose*, 11 Idaho 474, 83 P. 499 (1905).

Confirmation of Proceedings.

Proceedings must be confirmed by decree of district court of county wherein district has its principal place of business. *American Falls Reservoir Dist. v. Thrall*, 39 Idaho 105, 39 Idaho 130, 228 P. 236 (1924).

Discretion of Board.

Authorization of bonds by popular vote conferred upon board continuing authority to issue bonds, or withdraw them from issue in whole or in part as they deemed in the best interest of district. *Turner v. Roseberry Irrigation Dist.*, 33 Idaho 746, 198 P. 465 (1921).

Exclusion of Land from Plan.

Owners of land properly included in irrigation district could waive their rights to obtain water from the general district plan, and could obtain water from other sources, by means of a different plan, where it was clearly shown that no one residing in district was in any manner injured or prejudiced thereby, but in such case no part of bond issue could be apportioned to excluded land. *Nampa & M. Irrigation Dist. v. Brose*, 11 Idaho 474, 83 P. 499 (1905).

Irrigation of Outside Lands.

Legality of proposed issue of bonds for construction or purchase of canal system was not affected by fact that canal system of district may water lands outside of said district. *Settlers' Irrigation Dist. v. Settlers' Canal Co.*, 14 Idaho 504, 94 P. 829 (1908).

Legislative Grant of Power.

Power to issue bonds depends upon grant of authority from legislature. *Turner v. Roseberry Irrigation Dist.*, 33 Idaho 746, 198 P. 465 (1921).

Legislature in granting authority to issue bonds may impose such conditions as it may choose, and unless such conditions are complied with, issue is unauthorized and bonds invalid. *Turner v. Roseberry Irrigation Dist.*, 33 Idaho 746, 198 P. 465 (1921).

Order of Proceedings.

Where board of directors of irrigation district had authority to enter into contract to purchase irrigation plant and to issue bonds, fact that contract was entered into before receiving their engineer's report did not invalidate bonds. *Indian Cove Irrigation Dist. v. Prideaux*, 25 Idaho 112, 136 P. 618, 1916A Ann. Cas. 1218 (1913).

Qualifications of Voters.

No special qualifications are prescribed for voting at elections held for purpose of voting a bonded indebtedness. *Bissett v. Pioneer Irrigation Dist.*, 21 Idaho 98, 120 P. 461 (1912).

Collateral References. 45 Am. Jur. 2d, Irrigation, § 68.

94 C. J. S., Waters, §§ 853-856.

43-401A. Rehabilitation of irrigation structures. — The board of directors may contract for the reconstruction, rehabilitation or replacement of dams, structures or works belonging to the district or to the United States, necessary to the storage, diversion or delivery of water appurtenant to land within the district. The board shall determine the necessity and cost of such proposed improvements, and determine what amount of money needs to be raised and call a special election, at which shall be submitted to electors of the district possessing the qualifications prescribed in section 43-401, Idaho Code, the question of whether or not the bonds of said district in the amount as determined, shall be authorized. Such election shall be held in the manner provided in section 43-401, Idaho Code, except that no report need be obtained from the department of water resources and the notice of election need not recite anything concerning a report from the department of water resources. If the issuance of bonds is approved at the election, the board may thereafter proceed in conformity with chapter 4, title 43, Idaho Code, in the issuance, confirmation and sale of said bonds. The provisions of chapters 5, 6, 7, 8 and 9, title 43, Idaho Code, shall apply to the said bonds and the work proposed to be done with the funds derived from the sale thereof. [I.C., § 43-401A, as added by 1973, ch. 181, § 1, p. 423.]

Compiler's notes. The name of the department of water administration has been changed to the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

Section 2 of S.L. 1973, ch. 181 is compiled herein as § 43-404A.

Sec. to sec. ref. This section is referred to in §§ 43-404A, 43-701A.

Cited in: Kerner v. Johnson, 99 Idaho 433, 583 P.2d 360 (1978).

43-402. Form of bonds. — The bonds authorized by any vote shall be designated as a series and the series shall be numbered consecutively as authorized. The portion of the bonds of a series sold at any time shall be designated as an issue, and each issue shall be numbered in its order. The bonds of each issue shall be numbered consecutively, commencing with those earliest falling due. All bonds shall be negotiable in form and payable in money of the United States.

Interest coupons shall be attached thereto, and all bonds and coupons shall be dated on January 1, or July 1 next following the date of their authorization and they shall bear interest, payable semiannually on the first days of January and July of each year. The principal and interest shall be payable at the place designated therein. Said bonds shall be each of the denomination of not less than \$100 nor more than \$5000, and shall be signed by the president and secretary, and the seal of the board of directors shall be affixed thereto. Coupons attached to each bond shall be signed by the secretary. Said bonds shall express on their face that they were issued by the authority of this title, naming it, and shall also state the number of the issue of which such bonds are a part. The secretary and treasurer shall each keep a record of the bonds sold, their number, the date of sale, the price received, and the name of the purchaser. In case the money raised by the sale of all the bonds be insufficient for the completion of the plans and works adopted, and additional bonds be not voted, it shall be the duty of the board of directors to provide for the completion of said plan by a levy of assessment therefor, in the manner hereinafter provided.

Bonds may be issued with maturities under any one (1) of the following plans:

Plan No. 1, Eleven-Twenty (11-20) Year Bonds. At the expiration of eleven (11) years from each issue, five per cent (5%) of the whole number of bonds of such issue; at the expiration of twelve (12) years, six per cent (6%); at the expiration of thirteen (13) years, seven per cent (7%); at the expiration of fourteen (14) years, eight per cent (8%); at the expiration of fifteen (15) years, nine per cent (9%); at the expiration of sixteen (16) years, ten per cent (10%); at the expiration of seventeen (17) years, eleven per cent (11%); at the expiration of eighteen (18) years, thirteen per cent (13%); at the expiration of nineteen (19) years, fifteen per cent (15%); at the expiration of twenty (20) years, sixteen per cent (16%); provided, that such percentages may be changed sufficiently so that every bond shall be in an amount of \$100 or a multiple thereof, and the above provisions shall not be construed to require any single bond to fall due in partial payments.

Plan No 2, Amortization Plan. Bonds may be issued on the amortization plan covering a period of forty (40) years or less, at the discretion of the

board of directors, with the principal payable in annual or semiannual instalments, so arranged as to maturities that the combined principal and interest payments during the entire period shall be approximately the same each year during the life of the issue.

Plan No. 3, Five-Thirty (5-30) Year Bonds. Bonds may be issued payable in annual instalments over a period of thirty (30) years or less. The board of directors may fix a date, not more than five (5) years from the date of each issue, for the earliest maturity of each issue. Beginning with the date of the earliest maturity of each issue, the principal shall be payable in annual amounts designated by the board of directors over the remaining life of the bonds not to exceed thirty (30) years from the date of issue. [1903, p. 150, § 15a, as added by 1907, p. 484, § 1, subd. 15a; reen. R.C., § 2397; am. 1915, ch. 143, § 6, p. 304; reen. C.L., § 2397; C.S., § 4360; am. 1925, ch. 64, § 1, p. 94; am. 1929, ch. 104, § 1, p. 170; I.C.A., § 42-402; am. 1966 (2nd E.S.), ch. 8, § 1, p. 20; 1970, ch. 133, § 9, p. 309.]

Compiler's notes. Sections 8 and 10 of S.L. 1970, ch. 133 are compiled herein as §§ 42-3708, 43-602 respectively.

Cross ref. Agreement to provide safety fund, § 43-413.

ANALYSIS

- Authority to sign bonds.
- Authorization by electors.
- Construction.
- Date bonds must bear.
- Maturity date.
- Validity of bonds.

Authority to Sign Bonds.

Bonds are properly signed by officers of district in office at time of their issuance. Emmett Irrigation Dist. v. Thompson, 253 F. 316 (9th Cir. 1918); Turner v. Roseberry Irrigation Dist., 33 Idaho 746, 198 P. 465 (1921).

Authorization by Electors.

Only one authorization is provided, and that is by a two thirds' vote of electors of district. Turner v. Roseberry Irrigation Dist., 33 Idaho 746, 198 P. 465 (1921).

Construction.

Provision that portion of bonds of a series sold at any time shall be designated as an

issue and bonds of each issue shall be payable at expiration of eleven years negatives idea that such bonds begin to mature from January 1 or July 1 next following their authorization. Turner v. Roseberry Irrigation Dist., 33 Idaho 746, 198 P. 465 (1921).

Date Bonds Must Bear.

All bonds of series, regardless of when they may be issued, must bear date of January 1 or July 1 next following date of their authorization. Turner v. Roseberry Irrigation Dist., 33 Idaho 746, 198 P. 465 (1921).

Maturity Date.

Irrigation district was without authority to issue bonds maturing less than eleven years from issue thereof. Turner v. Roseberry Irrigation Dist., 33 Idaho 746, 198 P. 465 (1921).

Validity of Bonds.

Bonds held not invalidated by provision that certain percentage of issue should be payable at specified dates being followed by recital of numbers of bond maturing on each date, bonds numbered in recital not corresponding in amount with those specified in the first provision. Emmett Irrigation Dist. v. Seymour, 270 F. 473 (9th Cir. 1921).

43-403. Form of bonds — Statements enhancing security of bonds. — In case the works of any irrigation district shall have been constructed by the reclamation service of the United States of America, or in case the general plan and estimates of the works have been examined by the reclamation service of the United States of America and declared feasible and practicable by such reclamation service and the works and the lands within such district good security for the payment of the interest and principal of the bonds of such district, such fact shall be stated in said bonds, and in case the sale of such bonds has been approved by the courts, as

provided by section 43-406, such confirmation and approval may be stated on said bonds by the clerk of the district court, under the seal of said court. [1915, ch. 137, § 1, p. 295; reen. C.L., § 2397a; C.S., § 4361; I.C.A., § 42-403.]

Cross ref. Confirmation of proceedings, § 43-406.

Cited in: Haga v. Nampa & Meridian Irrigation Dist., 38 Idaho 333, 221 P. 147 (1923).

43-404. Apportionment of benefits. — Whenever the electors shall have authorized an issue of bonds as hereinbefore provided, the board of directors shall examine each tract or legal subdivision of land in said district, and shall determine the benefits which will accrue to each of such tracts or subdivisions from the construction or purchase of such irrigation works; and the cost of such works shall be apportioned or distributed over such tracts or subdivisions of land in proportion to such benefits; and the amount so apportioned or distributed to each of said tracts or subdivisions shall be and remain the basis for fixing the annual assessments levied against such tracts or subdivisions in carrying out the purpose of this chapter.

Such board of directors shall make, or cause to be made, a list of such apportionments or distribution, which list shall contain a complete description of each subdivision or tract of land of such district, with the amount and rate per acre of such apportionment or distribution of cost, and the name of the owner thereof; or they may prepare a map on a convenient scale showing each of said subdivisions or tracts with the rate per acre of such apportionment entered thereon; provided, that where all lands on any map or section of a map are assessed at the same rate, a general statement to that effect shall be sufficient.

Said list or map shall be made in duplicate and one (1) copy of each shall be filed in the office of the department of water resources and one (1) copy shall remain in the office of said board of directors for public inspection.

Whenever thereafter any assessment is made either in lieu of bonds, or any annual assessment for raising the interest on bonds, or any portion of the principal, it shall be spread upon the lands in the same proportion as the assessment of benefits, and the whole amount of the assessment of benefits shall equal the amount of bonds or other obligations authorized at the election last above-mentioned. [1903, p. 150, § 15c, as added by 1907, p. 484, § 1, subd. 15c; reen. R.C., § 2399; am. 1911, ch. 71, § 3, p. 194; am. 1911, ch. 154, § 8, p. 461; reen. C.L., § 2399; C.S., § 4362; I.C.A., § 42-404.]

Compiler's notes. The name of the department of water administration (formerly the department of reclamation) has been changed to the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

Sec. to sec. ref. This section is referred to in §§ 43-414, 43-1703, 43-1708, 43-2201.

Cited in: Progressive Irrigation Dist. v. Anderson, 19 Idaho 504, 114 P. 16 (1911); City of Nampa v. Nampa & Meridian Irrigation Dist., 19 Idaho 779, 115 P. 979 (1911), writ of

error dismissed, 238 U.S. 643, 35 S. Ct. 602, 59 L. Ed. 1502 (1915); Indian Cove Irrigation Dist. v. Prideaux, 25 Idaho 112, 136 P. 618, 1916A Ann. Cas. 1218 (1913); Nampa & Meridian Irrigation Dist. v. Petrie, 28 Idaho 227, 153 P. 425 (1915); In re King Hill Irrigation Dist., 37 Idaho 89, 221 P. 839 (1923); Brown v. Shupe, 40 Idaho 252, 233 P. 59 (1924) (on rehearing at p. 262); Lundy v. Pioneer Irrigation Dist., 52 Idaho 683, 19 P.2d 624 (1933); Barker v. Wagner, 96 Idaho 214, 526 P.2d 174 (1974).

ANALYSIS

Benefits received.
Benefits to railroad right-of-way.
Confirmation of proceedings.
Contribution.
Cost of drainage system.
Flat rate.
Increase in value.
Permanent assessment.
Proceeding in rem.

Benefits Received.

An irrigation district has authority to levy and collect assessments against the lands within the district according to benefits received. *Knowles v. New Sweden Irrigation Dist.*, 16 Idaho 235, 101 P. 81 (1908).

Assessment cannot be based upon speculative future benefits, but must be based upon present benefit, immediately accruing or demonstrably certain to accrue from construction of work. *Nampa & Meridian Irrigation Dist. v. Petrie*, 37 Idaho 45, 223 P. 531 (1923); *American Falls Reservoir Dist. v. Thrall*, 39 Idaho 105, 39 Idaho 130, 228 P. 236 (1924).

The owners of lands newly annexed to an irrigation district had to bear the cost of acquiring water for such lands, of enlarging, equipping, and extending the irrigation system for the irrigation thereof and the difference in the cost of maintenance and operation due to the higher elevation of the new lands, or any other factor necessarily increasing the cost of the irrigation, such burdens being assumed by the owners of the new lands in their petition for annexation. *Bradshaw v. Milner Low Lift Irrigation Dist.*, 85 Idaho 528, 381 P.2d 440 (1963).

Benefits to Railroad Right-of-Way.

Mere fact that railroad company was using its lands for right-of-way and depot purposes was not a reason why such lands could not be benefited by system of irrigation works controlled by district if such lands in their natural state would be benefited from the system. *Oregon S.L.R.R. v. Pioneer Irrigation Dist.*, 16 Idaho 578, 102 P. 904 (1909).

Confirmation of Proceedings.

Proceedings under this section must be confirmed by decree of district court in county

wherein district has principal place of business. *American Falls Reservoir Dist. v. Thrall*, 39 Idaho 105, 39 Idaho 130, 228 P. 236 (1924).

Contribution.

Irrigation district law contains no provision for assessing land on ground of contribution. *Nampa & Meridian Irrigation Dist. v. Petrie*, 37 Idaho 45, 223 P. 531 (1923).

Cost of Drainage System.

Irrigation district had no more right to assess cost of drainage system regardless of benefits than it had to assess costs of irrigation system in same way. *Nampa & Meridian Irrigation Dist. v. Petrie*, 37 Idaho 45, 223 P. 531 (1923).

Flat Rate.

Assessment of all lands of district on basis of flat rate could be made only for maintenance and operating charges and even then benefits could not be entirely ignored. *Nampa & Meridian Irrigation Dist. v. Petrie*, 37 Idaho 45, 223 P. 531 (1923).

Increase in Value.

As a general rule, benefit contemplated by statute results in increase in value of land, but there may be cases when there is actual benefit, although not possible to prove actual increase in value. *Nampa & Meridian Irrigation Dist. v. Petrie*, 37 Idaho 45, 223 P. 531 (1923).

Permanent Assessment.

Apportionment for benefits, after having been fixed by board and confirmed by court, stands as the permanent assessment and equalization of the value of each separate tract or subdivision, and the basis upon which all subsequent levies, for any purpose, must be made. *American Falls Reservoir Dist. v. Thrall*, 39 Idaho 105, 39 Idaho 130, 228 P. 236 (1924).

Proceeding in Rem.

Entire proceeding for determination of benefits is a proceeding in rem against land, and all that the statute requires is that board shall designate the benefit to the particular legal subdivisions or tracts within the proposed district. *Oregon S.L.R.R. v. Pioneer Irrigation Dist.*, 16 Idaho 578, 102 P. 904 (1909).

43-404A. Contracts of payment for rehabilitation. — If the reconstruction, rehabilitation or replacement of dams, structures or works determined necessary in accordance with section 43-401A, Idaho Code, involves a dam, structure or works which also provide water storage, diversion or delivery of water to water users or water user organizations for the use of said water on lands not within the boundaries of the district proposing the improvements, the district (hereinafter referred to as constructing district) may contract with such water users or water user

organizations for payment by them, over a period of time not to exceed the period of any bonded indebtedness incurred by the constructing district to finance construction of the improvements, of a proportionate share of the cost of such improvements, including design, construction, land acquisition and other related costs, to include interest on the unpaid balance of said proportionate share of such water users or water user organization at a rate equal to the average rate of interest payable by the constructing district on any bonded indebtedness incurred by it in financing the improvements.

If the water user organization contracting for payment of a proportionate share of the costs of the improvements is an irrigation district (hereinafter referred to as contracting district) organized pursuant to title 43, Idaho Code, the board of directors of such district shall negotiate a proposed contract with the constructing district. Thereafter, the question of entering into the proposed contract shall be submitted to the electors of such contracting district in a manner substantially in conformance with the provisions of section 43-401, Idaho Code. If at least two thirds ($\frac{2}{3}$) of the electors approve the execution of the contract, the board shall confirm the proceeding as provided in connection with a bond issue, and following confirmation, the board shall execute the contract and thereafter an annual assessment to provide revenue for payment of the obligation and interest thereon shall be levied and collected on lands within the contracting district in the manner provided for assessment for payment of bonds and interest thereon. The provisions of section 43-404, Idaho Code, shall be applicable to apportionment of benefits accruing under the terms of said contract.

If the water user organization contracting for payment of a proportionate share of the costs of improvements is an operating company entitled to a lien for maintenance charges under chapter 22, title 42, Idaho Code, it shall annually assess and collect the costs of meeting its obligations under the contract as a toll, assessment or charge under chapter 22, title 42, Idaho Code.

If the water user organization contracting for payment of a proportionate share of the costs of the improvements is a lateral ditch water user association organized and operating under chapter 13, title 42, Idaho Code, the annual cost of meeting the association's obligation under the contract shall be included in the assessment made under section 42-1303, Idaho Code, and chapter 13, title 42, Idaho Code, shall apply to the collection and disbursement of said assessment. [I.C., § 43-404A, as added by 1973, ch. 181, § 2, p. 423.]

Compiler's notes. The words in parentheses so appeared in the law as enacted.

Section 1 of S.L. 1973, ch. 181, is compiled herein as § 43-401A.

Application.

Since the legislature specifically provided in § 43-2207 that the restrictions in other statutes do not apply to a district exercising

the authority granted by §§ 43-2201 — 43-2207 to irrigation districts, both the contracting and the constructing districts need only comply with the requirements of said sections with respect to confirmation proceedings and not with this section. *Kerner v. Johnson*, 99 Idaho 433, 583 P.2d 360 (1978).

43-405. Apportionment of benefits — Notice and hearing — Appeal. — After the board shall have examined the lands in said district, and

before proceeding to make the assessment of benefits and the list and apportionment as provided in the last preceding section, the secretary shall give notice to the owners of said lands that the board will meet at its office on a day to be stated in said notice for the purpose of making such assessment and list and apportionment, and will at such meeting provide a hearing for all parties interested in such proceedings. The secretary shall give such notice by publication in a newspaper published in the county where said office is located in three (3) successive issues if published in a daily newspaper, or by publication in one (1) issue if published in a weekly newspaper, the first of which publications shall be at least fifteen (15) days before the date fixed for said hearing. Additionally, the secretary shall, not less than fifteen (15) days before the date fixed for said hearing, mail notice of the hearing to each owner of such land, if known, or his agent if known, addressed to such person at his post-office address if known, or if unknown, to the post office serving the area wherein his land lies.

At such meeting the board shall proceed to hear all parties interested who may appear, and they shall continue in session from day to day until the assessment is completed. They shall hear all evidence offered, including any maps or surveys which any owners of lands may produce, and they may classify the lands in such way that the assessment when completed shall be just and equitable. Any person interested who shall fail to appear before the board shall not be permitted thereafter to contest said assessment or any part thereof except upon a special application to the court in the proceedings for confirmation of said assessment, showing reasonable excuse for failing to appear before said board of directors. In case any landowner makes objection to said assessment or any part thereof before said board, and said objection is overruled by the said board, and the landowner does not consent to the assessment as finally determined, such objection shall, without further proceedings, be regarded as appealed to the district court and to be heard at the said proceedings to confirm as aforesaid. [1903, p. 150, § 15d, as added by 1907, p. 484, § 1, subd. 15d; reen. R.C. & C.L., § 2400; C.S., § 4363; I.C.A., § 42-405; am. 1974, ch. 2, § 1, p. 14.]

Compiler's notes. Section 2 of S.L. 1974, ch. 2, is compiled as § 43-407.

Cross ref. Notice by mail, § 60-109A.

Cited in: *Progressive Irrigation Dist. v. Anderson*, 19 Idaho 504, 114 P. 16 (1911); *Nampa & Meridian Irrigation Dist. v. Petrie*, 28 Idaho 227, 153 P. 425 (1915); *In re King Hill Irrigation Dist.*, 37 Idaho 89, 221 P. 839 (1923).

ANALYSIS

Collateral proceeding.
Estoppel.

Collateral Proceeding.

Board of directors of irrigation district had jurisdiction to determine whether land in-

cluded therein would be benefited by organization of district, and fact that board assessed certain property therein when it should not have done so, or assessed it in excess of the actual benefits received, could not be questioned in a collateral proceeding. *Knowles v. New Sweden Irrigation Dist.*, 16 Idaho 235, 101 P. 81 (1908).

Estoppel.

Where landowner who had knowledge of defects in assessments against his land acquiesced in the expenditure of moneys derived from sale of irrigation district bonds, he was estopped to object to such assessment. *Page v. Oneida Irrigation Dist.*, 26 Idaho 108, 141 P. 238 (1914).

43-406. Confirmation of proceedings. — The board of directors of the irrigation district shall file in the district court of the county in which their office is situated a petition, praying in effect that the proceedings aforesaid may be examined, approved and confirmed by the court. The petition shall state generally that the irrigation district was duly organized and the first board of directors elected, that due and lawful proceedings were taken to issue bonds in an amount to be stated, and that said assessment, list and apportionment were duly made and a copy of said assessment, list and apportionment shall be attached to said petition, and that such bonds or a certain amount of such bonds have been legally sold or exchanged, as the case may be, but the petition need not state other facts showing such proceedings: provided, that after the organization of the district is complete, a petition may be filed for the confirmation of the proceedings so far, or after the authorization of any issue of bonds such petition may be so filed or after the sale or exchange of any issue or any portion of an issue of bonds such petition may be so filed, and where the procedure is by separate petitions for the confirmation of different portions of said proceedings, subsequent proceedings may be in the name of reopening of the same case, but shall not be considered as authorizing any rehearing of the matter theretofore heard and decided. [1903, p. 150, § 16; am. 1907, p. 484, § 1, subd. 16; reen. R.C., § 2401; am. 1915, ch. 170, § 1, p. 391; reen. C.L., § 2401; C.S., § 4364; I.C.A., § 42-406.]

Sec. to sec. ref. This section is referred to in §§ 42-5116, 43-403, 43-1401, 43-2204 and 43-2308.

Sections 43-406 — 43-408 are referred to in §§ 42-5116, 42-5235, 42-5274 and 43-2204.

Cited in: Pioneer Irrigation Dist. v. Campbell, 10 Idaho 159, 77 P. 328 (1904); Nampa & M. Irrigation Dist. v. Brose, 11 Idaho 474, 83 P. 499 (1905); Black Canyon Irrigation Dist. v. Marple, 19 Idaho 176, 112 P. 766 (1911); Black Canyon Irrigation Dist. v. Fallon, 21 Idaho 537, 122 P. 850 (1912); Pioneer Irrigation Dist. v. Stone, 23 Idaho 344, 130 P. 382 (1913); Little Willow Irrigation Dist. v. Haynes, 24 Idaho 317, 133 P. 905 (1913); In re King Hill Irrigation Dist., 37 Idaho 89, 221 P. 839 (1923).

ANALYSIS

Confirmation proceedings.
Constitutionality.
Effect of decree.
Independent action.
Purpose of proceedings.
Reconfirmation proceedings.
Sufficiency of petition.

Confirmation Proceedings.

District could institute proceeding for confirmation after organization of district was completed, or after authorization of bonds, and again after subsequent proceedings, or could wait and ask for confirmation of all

proceedings at one time. *Progressive Irrigation Dist. v. Anderson*, 19 Idaho 504, 114 P. 16 (1911).

Until directors had brought action to confirm the apportionment of benefits irrigation district could not levy or enforce valid assessment to pay interest or provide sinking fund for bonds against land and sell land for a delinquent assessment. *Haga v. Nampa & Meridian Irrigation Dist.*, 38 Idaho 333, 221 P. 147 (1923).

Confirmation proceedings are in nature of proceeding in rem, object being to determine status of district and its power to issue bonds. *American Falls Reservoir Dist. v. Thrall*, 39 Idaho 105, 39 Idaho 130, 228 P. 236 (1924).

Constitutionality.

This and §§ 43-407, 43-408 are not in conflict with Const., Art. 3, § 19, prohibiting local and special laws. *Emmett Irrigation Dist. v. Shane*, 19 Idaho 332, 113 P. 444 (1911).

Method of organization of district and assessment of lands is constitutional within provisions against taking property without just compensation and due process of law. *American Falls Reservoir Dist. v. Thrall*, 39 Idaho 105, 39 Idaho 130, 228 P. 236 (1924).

Effect of Decree.

Decree of confirmation of provisions under this section was conclusive as to all matters embraced in proceedings where no appeal had been taken therefrom, unless such decree was

assailed by direct attack, or statutory proceedings had not been taken in manner prescribed by law. *American Falls Reservoir Dist. v. Thrall*, 39 Idaho 105, 39 Idaho 130, 228 P. 236 (1924).

Independent Action.

Where district officers did not move for confirmation within two years, anyone interested could, by proper action, have question as to legality of organization of such district determined by district court. *Progressive Irrigation Dist. v. Anderson*, 19 Idaho 504, 114 P. 16 (1911).

Purpose of Proceedings.

The procedure in this and §§ 43-407, 43-408 is summary for purpose of making organization simple and facilitating issuance of bonds. *Emmett Irrigation Dist. v. Shane*, 19 Idaho 332, 113 P. 444 (1911).

Purpose of confirmation is to bind all parties, including the state, and to set at rest at an early date the legal existence of district. *Progressive Irrigation Dist. v. Anderson*, 19 Idaho 504, 114 P. 16 (1911).

This section authorizes special statutory proceedings, which may be brought by directors of irrigation district in district court to determine validity of the successive steps taken under this title for the purpose of authorizing district to contract with United States as provided by §§ 2397 and 2398 R.C. (§§ 43-402, 43-403 herein), but this proceeding is not brought for purpose of assessing

benefits to lands within such irrigation district. *Nampa & Meridian Irrigation Dist. v. Petrie*, 28 Idaho 227, 153 P. 425 (1915).

It was for purpose of settling question of validity of bonds and payment at maturity, and in order that they might be more readily sold that legislature passed the confirmatory acts, providing that districts might have judicial determination of legal status of bonds when issued. *American Falls Reservoir Dist. v. Thrall*, 39 Idaho 105, 39 Idaho 130, 228 P. 236 (1924).

Reconfirmation Proceedings.

Reconfirmation did not waive any benefits secured to district by prior confirmation. *Progressive Irrigation Dist. v. Anderson*, 19 Idaho 504, 114 P. 16 (1911).

Sufficiency of Petition.

Petition which set forth in a series of special allegations the various steps taken in the issuance of its bonds, but omitted to allege generally that "due and lawful proceedings were taken to issue bonds," was sufficient, where allegations of fact were such as to support the finding of court that such proceedings had been duly and regularly taken. *Emmett Irrigation Dist. v. Shane*, 19 Idaho 332, 113 P. 444 (1911).

In determining sufficiency of petition, court will keep § 43-408 in mind and disregard errors that do not affect substantial rights. *Emmett Irrigation Dist. v. Shane*, 19 Idaho 332, 113 P. 444 (1911).

43-407. Confirmation of proceedings — Notice — Rules of procedure. — The court or judge shall fix the time for the hearing of said petition, and shall order the clerk of the court to give a notice of the filing of said petition. Such notice shall be given by publication in a newspaper published in the same county in three (3) successive issues if published in a daily newspaper, or by publication in one (1) issue if published in a weekly newspaper, the first of which publications shall be at least fifteen (15) days before the date fixed for said hearing. Additionally, the notice shall, not less than fifteen (15) days before the date fixed for said hearing, be mailed to each owner of such land, if known, or his agent if known, addressed to such person at his post-office address if known, or if unknown, to the post office serving the area wherein his land lies. The notice shall state the time and place fixed for the hearing of the petition, and the prayer of the petition, and that any person interested in the subject matter of said petition may, on or before the day fixed for the hearing thereof, demur to or answer said petition. None of the pleadings in said matter need be sworn to. Every material statement of the petition not controverted by answer must be taken as true, and every person or party failing to answer the petition shall be deemed to have admitted all the material allegations of the petition. The rules of pleading and practice provided by the Code of Civil Procedure which are not inconsistent with this title are applicable to the special proceedings herein provided for. A motion for a new trial, and all proceedings in the

nature of appeals or rehearing, may be had as in any ordinary suit at law. [1903, p. 150, § 17; am. 1907, p. 484, § 1, subd. 17; reen. R.C. & C.L., § 2402; C.S., § 4365; I.C.A., § 42-407; am. 1974, ch. 2, § 2, p. 14.]

Compiler's notes. Section 1 of S.L. 1974, ch. 2, is compiled as § 43-405.

Section 3 of S.L. 1974, ch. 2 declared an emergency. Approved February 5, 1974.

Sec. to sec. ref. This section is referred to in §§ 42-5116, 42-5235, 43-1401, 43-2204 and 43-2308.

Cited in: Black Canyon Irrigation Dist. v. Marple, 19 Idaho 176, 112 P. 766 (1911); Emmett Irrigation Dist. v. Shane, 19 Idaho 332, 113 P. 444 (1911); Black Canyon Irrigation Dist. v. Fallon, 21 Idaho 537, 122 P. 850 (1912); Nampa & Meridian Irrigation Dist. v. Petrie, 28 Idaho 227, 153 P. 425 (1915); In re King Hill Irrigation Dist., 37 Idaho 89, 221 P. 839 (1923).

ANALYSIS

Appeal.

Sufficiency of notice.

Sufficiency of service.

Appeal.

Where judgment of confirmation had been made by district court and appeal taken but no error assigned and it was conceded that the law was fully complied with, judgment

was affirmed. Sunnyside Irrigation Dist. v. Stephens, 21 Idaho 94, 120 P. 169 (1912); Crane Creek Irrigation Dist. v. Martin, 21 Idaho 96, 120 P. 169 (1912).

Sufficiency of Notice.

In a notice for confirmation of bonds, naming of district by its corporate name was a sufficient description and notice that all property in district was affected by the proceeding. Little Willow Irrigation Dist. v. Haynes, 24 Idaho 317, 133 P. 905 (1913); Payette Heights Irrigation Dist. v. Haynes, 24 Idaho 321, 133 P. 907 (1913).

Sufficiency of Service.

Constructive service by posting application, authorized by this section, was sufficient to confer jurisdiction. Nampa & M. Irrigation Dist. v. Brose, 11 Idaho 474, 83 P. 499 (1905); Knowles v. New Sweden Irrigation Dist., 16 Idaho 217, 101 P. 81 (1908).

It was not necessary that personal service be made upon landowners of district in order to give court jurisdiction and power to enter judgment of confirmation and make it valid and binding. Smith v. Progressive Irrigation Dist., 28 Idaho 812, 156 P. 1133 (1916).

43-408. Confirmation of proceedings — Hearing and order. —

Upon the hearing of such special proceedings, the court shall examine all of the proceedings set up in the petition, and may ratify, approve and confirm said assessment, list, apportionment and distribution, the court shall hear all objections either filed in said proceedings or brought up from the hearing before the board of directors as aforesaid, and for that purpose any person desiring to be heard upon objections overruled by the board of directors, shall state the substance of said objections and the ruling of the board in his answer. The court shall disregard every error, irregularity or omission which does not affect the substantial rights of any party, and if the court shall find that said assessment, list and apportionment are in any substantial matter erroneous or unjust, the same shall not be returned to said board, but the court shall proceed to correct the same so as to conform to this title and the rights of all parties in the premises, and the final order or decree of the court may approve and confirm such proceedings in part, and disapprove other parts of said proceedings; and in case the proceedings for the organization of the district and the issue of bonds are approved, the court shall correct all the errors in the assessment, apportionment and distribution of costs as above provided, and render a final decree approving and confirming all of the said proceedings. In case of the approval of the organization of the district and the disapproval of the proceedings for issuing bonds, the district shall have the right to institute further proceedings for the issue of bonds de novo. The costs of the special proceedings may be allowed and apportioned

among the parties thereto in the discretion of the court. [1903, p. 150, § 19; am. 1907, p. 484, § 1, subd. 19; reen. R.C. & C.L., § 2403; C.S., § 4366; I.C.A., § 42-408.]

Sec. to sec. ref. This section is referred to in §§ 43-1401 and 43-2308.

Cited in: Gerber v. Nampa & Meridian Irrigation Dist., 16 Idaho 1, 100 P. 80 (1908); Emmett Irrigation Dist. v. Shane, 19 Idaho 332, 113 P. 444 (1911); In re King Hill Irrigation Dist., 37 Idaho 89, 221 P. 839 (1923).

ANALYSIS

Effect of failure to appear.

Findings.

Jurisdiction of court.

Res judicata.

Effect of Failure to Appear.

Any land holder dissatisfied with assessment of benefits or list made, should appear and contest the same in district court, and having failed to do so, is concluded by judgment of district court. Oregon S.L.R.R. v. Pioneer Irrigation Dist., 16 Idaho 578, 102 P. 904 (1909).

It was incumbent upon those desiring to have their lands excluded from such district to appear in such proceedings and show that their lands were not benefited by organization of such district and inclusion therein, and failing to do so, they were precluded thereafter from having their lands excluded therefrom. Smith v. Progressive Irrigation Dist., 28 Idaho 812, 156 P. 1133 (1916).

Findings.

Legality of formation of irrigation district or proposed issue of bonds of said district for the construction or purchase of a canal system were not affected by fact that canal system of said district may water lands outside of said district. Settlers' Irrigation Dist. v. Settlers' Canal Co., 14 Idaho 504, 94 P. 829 (1908).

Where answer was filed to petition denying material allegations of complaint, court should find on all of the material issues but where no answer was filed, a general finding that all things required by the statute had been done and that all the allegations in petition were true was sufficient to support judgment of confirmation. Black Canyon Irrigation Dist. v. Fallon, 21 Idaho 537, 122 P. 850 (1912).

Court is required, upon hearing of such special proceedings, to examine all proceedings set up in petition and may ratify, approve, or confirm same in whole or in part. Crane Creek Reservoir Admin. Bd. v. Washington County Irrigation Dist., 48 Idaho 662, 284 P. 557 (1930).

Jurisdiction of Court.

On proceedings for confirmation of organization of irrigation district and of bonds issued by it, court may examine and determine legality and validity of, and approve and confirm, each and all of the proceedings for organization of such district from and including the petition for its organization, together with all other proceedings which may affect the legality or validity of bonds, and order for the sale thereof. Nampa & M. Irrigation Dist. v. Brose, 11 Idaho 474, 83 P. 499 (1905).

Where it appeared to court in the proceedings for confirmation that said district contained some lands not benefited, court had jurisdiction to exclude such lands. Progressive Irrigation Dist. v. Anderson, 19 Idaho 504, 114 P. 16 (1911).

In confirmation proceeding, court had power to make any adjustment as to apportionment of benefits to which objection had been made, and did not act merely in the capacity of a rubber stamp. Haga v. Nampa & Meridian Irrigation Dist., 38 Idaho 333, 221 P. 147 (1923).

Res Judicata.

Determination of benefits is res judicata and cannot be attacked collaterally by one who had opportunity to be heard in the manner provided by law. Knowles v. New Sweden Irrigation Dist., 16 Idaho 217, 101 P. 81 (1908); Smith v. Progressive Irrigation Dist., 28 Idaho 812, 156 P. 1133 (1916).

Where irrigation district had proceeded in conformity with the statute to issue irrigation district bonds and had procured an adjudication and confirmation of the proceedings and of the assessment of benefits against the several tracts of land within district, the same was res judicata against both landowners and district in all subsequent proceedings insofar as the same may have involved the assessment of benefits against the several tracts of land. Russell v. Irish, 20 Idaho 194, 118 P. 501 (1911).

Judgment of district court which confirmed proceedings of irrigation district in entering into a contract with the United States to supply water to irrigate lands within district, and providing for the joint construction of drainage system, was not res judicata so far as assessment of benefits to lands within district was concerned, and did not preclude statutory proceedings for such assessment. Nampa & Meridian Irrigation Dist. v. Petrie, 28 Idaho 227, 153 P. 425 (1915), appeal dismissed, 248 U.S. 154, 39 S. Ct. 25, 63 L. Ed. 178 (1918).

Decree confirming bond issue and matters in connection therewith and holding valid a contract defining rights and interests of district property owners could not be attacked in

subsequent action. Crane Creek Reservoir Admin. Bd. v. Washington County Irrigation Dist., 48 Idaho 662, 284 P. 557 (1930).

43-409. Sale of bonds — Assessments in lieu of bonds canceled. — The board may sell said bonds from time to time, in such quantities as may be necessary and most advantageous, to raise money for the construction of said canals and works, the acquisition of said property and rights, and otherwise to carry out the object and purposes of this title.

Before making any sale the board shall, by resolution, declare its intention to sell a specified amount of the bonds, and if said bonds can then be sold at their face value and accrued interest, they may be sold without advertisement, otherwise said resolution shall state the day and hour and place of such sale, and shall cause such resolutions to be entered on the minutes, and notice of sale to be given by publication thereof at least four (4) weeks in three (3) newspapers published in the state of Idaho, one (1) of which shall be a newspaper published in the county in which the office of the board of directors is situated, if there be a newspaper published in said county, and in other newspapers at their discretion. Said notice shall state that sealed proposals will be received by the board at their office for the purchase of bonds until the day and hour named in the resolution.

At the time appointed the board shall open the proposals and award the purchase of the bonds to the highest responsible bidder, or may reject all bids; but in case no bids are received, or all bids are rejected, at the time stated in the advertisement, it shall not be again necessary to advertise the sale of the same bonds, but they may be sold at any time until canceled: provided, said board shall in no event sell any of the said bonds for less than the par or face value thereof and accrued interest.

If, for any reason, the duly authorized bonds of a district cannot be sold, or if at any time it shall be deemed for the best interests of the district to withdraw from sale all or any portion of an authorized bond issue, the board of directors may, in their discretion, cancel the same and they may levy assessments to the amount of the bonds canceled: provided, that the revenue derived from said assessments must be employed for the same purpose as was contemplated by the bond authorization; but no levy shall be made to pay for work or material, payment for which was contemplated by bonds which have been authorized, until bonds to the amount of said assessment have been canceled. Assessments made in lieu of bonds canceled shall be collected in the manner, and shall have the same force and effect, as assessments levied under any provision of this title: provided, that such assessment shall not, during any one (1) year, exceed ten per cent (10%) of the total bond issue authorized by such district, unless a greater assessment shall be authorized by a majority vote of the qualified electors of the district voting at a general election or a special election called for that purpose, said special election to be held in the manner provided in section 43-321. [1903, p. 150, § 21; am. 1907, p. 484, § 1, subd. 21; reen. R.C., § 2404; am. 1915, ch. 143, § 7, p. 304; reen. C.L., § 2404; C.S., § 4367; I.C.A., § 42-409.]

Compiler's notes. Amendatory matter of 1915 which relates to disposition of bonds in case of contract with United States was transferred to 167:10 in C.L. (§ 43-1810 herein).

Sec. to sec. ref. This section is referred to in § 43-1810.

Cited in: *Nampa & M. Irrigation Dist. v. Brose*, 11 Idaho 474, 83 P. 499 (1905); *City of Nampa v. Nampa & Meridian Irrigation Dist.*, 19 Idaho 779, 115 P. 979 (1911); writ of, error dismissed, 238 U.S. 643, 35 S. Ct. 602, 59 L. Ed. 1502 (1915).

ANALYSIS

Construction.

Failure to act promptly.

Construction.

Provisions of statute, by expressly conferring upon board power to withdraw from sale and cancel all or any portion of bond issue, preclude withdrawal in any other manner. *Turner v. Roseberry Irrigation Dist.*, 33 Idaho

746, 198 P. 465 (1921).

From statute as whole, intention appears that issue of bonds should be all or some part of series of bonds offered for sale at any one time, and that bonds should begin to mature from date of resolution by board of directors offering issue for sale, and that board may continue to make issues by such resolutions until total amount of bonds authorized is exhausted. *Turner v. Roseberry Irrigation Dist.*, 33 Idaho 746, 198 P. 465 (1921).

Failure to Act Promptly.

Failure of board to act promptly did not nullify action of electors nor operate to relieve board of their duty or authority to issue bonds duly authorized, provided they had not previously withdrawn bonds from issue in accordance with statute and that no showing was made of such change of circumstances as would render it impossible to carry out purpose of issue. *Turner v. Roseberry Irrigation Dist.*, 33 Idaho 746, 198 P. 465 (1921).

43-410. Payment of contractor with bonds. — In lieu of the sale of bonds as provided in section 43-409, and the payment for construction work in cash, as provided in section 43-901, bonds authorized by the vote of the district for the purpose of acquiring or constructing irrigation works may be issued and delivered by the board of directors directly to the contractor in payment for such construction work. [Part of R.C., § 2404a, as added by 1913, ch. 169, § 1, p. 541; reen. C.L., § 2404a; C.S., § 4368; I.C.A., § 42-410.]

Compiler's notes. Portion of R.C., § 2404a, transferred to § 2416a in C.L. (§ 43-902 herein).

43-411. Payment of bonds and interest. — Said bonds and the interest thereon shall be paid by revenue derived from the assessment upon the land in the district; and all the land in the district shall be and remain liable to be assessed for such payment: provided, that payment of interest may be made in accordance with the provisions of chapter 5 of this title; and provided also that the board of directors may fix rates of tolls and charges for use of water from the canals and irrigation system of the district, proportionate to the assessment and apportionment of benefits, for the purpose of paying the whole or any part of the principal or interest or both then due or next thereafter to become due. Where a toll is fixed for the payment of bond principal or interest, any portion of such toll remaining unpaid at the time fixed for levying the next annual assessment for payment of bond principal or interest, shall be added to and become part of the assessment against the land delinquent in the payment of such toll. The board in its order fixing or levying such tolls may fix the date or dates on or before which the same must be paid, may make the same payable in advance of the delivery of any water during the year for which the same are fixed, and may make provision for the collection thereof and the keeping of a toll book by the district treasurer.

[1903, p. 150, § 22; am. 1907, p. 481, § 1, subd. 22; reen. R.C., § 2405; am. 1915, ch. 38, § 1, p. 119; compiled and reen. C.L., § 2405; C.S., § 4369; I.C.A., § 42-411; am. 1966 (2nd E.S.), ch. 8, § 2, p. 20.]

General Lien.

It is the intention of legislature to make obligations of irrigation district general and not specific lien against all property of district, hence none of the lands within district

can be released from any of the district's indebtedness except by payment of same. *American Falls Reservoir Dist. v. Thrall*, 39 Idaho 105, 39 Idaho 130, 228 P. 236 (1924).

43-412. Redemption of bonds. — Upon the presentation of the coupons due to the treasurer, he shall pay the same from the bond fund. Whenever, after ten (10) years from the issuance of said bonds, said fund shall amount to the sum of \$10,000, the board of directors may direct the treasurer to pay such an amount of said bonds not due as the money in said fund will redeem, at the lowest value at which they may be offered for liquidation, after advertising for at least four (4) weeks in some newspaper published in the county, and in other newspapers which said board may deem advisable, for sealed proposals for the redemption of said bonds. Said proposals shall be opened by the board in open meeting, at a time to be named in the notice, and the lowest bids for said bonds must be accepted: provided, that no bond shall be redeemed at a rate above par. In case the bids are equal, the lowest numbered bond shall have the preference. In case none of the holders of said bonds shall desire to have the same redeemed, as herein provided for, said money shall be invested by the treasurer under the direction of the board, in United States bonds or the bonds or warrants of the state, or municipal or school bonds, which shall be kept in said bond fund and may be used to redeem said district bonds whenever the holders thereof may desire. [1903, p. 150, § 32; reen. R.C. & C.L., § 2406; C.S., § 4370; I.C.A., § 42-412.]

43-413. Safety fund for payment of bonds and contract obligations. — The board of directors of any irrigation district organized under the laws of this state, may, when in the opinion of the board it will improve the credit of the district, or the marketability of the district bonds, or tend to reduce the rate of interest necessary to be paid thereon, or in any other way be to the benefit of the district, provide by the adoption of a suitable resolution of the board of directors for inserting in the bonds of the district or the district contract of the United States, an agreement to the effect that a safety fund will be provided to insure the payment of the district's obligations under the bonds or contract. Said resolution shall provide that the safety fund provided for in this section may be funded through either or both of the following methods:

(a) by making all annual levies for payment of the principal or interest of such bonds or the obligation of such contract (until a safety fund of at least ten per cent (10%) of the unpaid bonded indebtedness or contract indebtedness of the district has been created), fifteen per cent (15%) in excess of the amount which would be required to meet such obligations if all district taxes were paid without delinquency,

(b) by depositing in said safety fund from the proceeds of sale of such bonds an amount equal to at least ten per cent (10%) of the original principal amount of the issue of bonds.

Said safety fund shall be used to meet any deficiency which might otherwise occur in the payment of the principal and interest of said bonds or contract obligations as set forth in the resolution providing for the safety fund and said safety fund shall be kept intact by initiating or renewing such fifteen per cent (15%) excess levies whenever such safety fund is reduced below ten per cent (10%) of the unpaid bonded indebtedness or United States contract indebtedness of the district and continuing the same until such safety fund is again brought up to at least ten per cent (10%) of such unpaid bond or contract indebtedness.

Whenever such agreement shall have been inserted in the bonds or contract of any irrigation district, all levies thereafter made in such district shall be made in full compliance with such agreement until such bonds or contracts have been fully paid. [1923, ch. 84, § 1, p. 96; I.C.A., § 42-413; am. 1979, ch. 46, § 1, p. 135.]

Compiler's notes. The words enclosed in parentheses so appeared in the law as enacted.

Section 2 of S.L. 1923, ch. 84 declared an emergency.

Section 2 of S.L. 1979, ch. 46 declared an emergency. Approved March 17, 1979.

Sec. to sec. ref. This section is referred to in § 43-2202.

Constitutionality.

Provisions of this statute allowing board of directors of district to make annual levy to

meet deficiencies are valid delegation of taxing power. *American Falls Reservoir Dist. v. Thrall*, 39 Idaho 105, 39 Idaho 130, 228 P. 236 (1924).

Statutory method of organizing irrigation districts and assessing lands therein, according to cost of system and benefit to lands, is constitutional. *American Falls Reservoir Dist. v. Thrall*, 39 Idaho 105, 39 Idaho 130, 228 P. 236 (1924).

43-414. Interim notes. — In addition to the permanent financing contemplated in this chapter, the board of any district may borrow money and issue interim notes in evidence thereof whenever it is deemed advisable and in the interests of the district to borrow funds temporarily for any of the purposes herein provided in advance of permanent financing. No election shall be required on the issuance of interim notes. The board may, from time to time and pursuant to appropriate resolution, borrow money and issue interim notes to evidence borrowing for the purpose of obtaining funds for any of the purposes authorized in this chapter. Any resolution authorizing the issuance of interim notes shall describe generally the purpose for which such notes are to be issued and shall specify the principal amount, rate of interest and maturity date, which shall be the same for all interim notes and which shall be not to exceed five (5) years from the date of issue of such notes, and such other pertinent terms as may be specified in such resolution. The interim notes shall be issued from time to time by the board as funds are borrowed in the manner the board may determine. Interest on the interim notes may be made payable semiannually, annually or at maturity. The interim notes may be made redeemable prior to maturity at the option of the board in the manner and upon the terms fixed by the resolution authorizing their issuance. Such interim notes shall be sold at such price or

prices as may be determined by resolution of the board. All such interim notes and the interest thereon may be secured by a pledge of the proceeds of assessments to be levied and collected by the board pursuant to the provisions of section 43-404, Idaho Code, representing the amount of benefits which will accrue to each tract or legal subdivision of land in the district based upon the allocation of the cost of the project for which permanent financing has been authorized to each such tract or legal subdivision of land, but only when there shall have been held, in said district, an election on the right of the district to issue bonds for said project, which bonds shall have been approved at said election, and which election shall have been called, held and conducted in the manner now or hereafter provided in this chapter. Said interim notes and the interest thereon shall be payable solely from such assessments and from the proceeds to be derived from the sale of any bonds for permanent financing authorized to be issued pursuant to this chapter, provided, however, that none of the provisions of this title requiring the filing of a petition for confirmation of proceedings taken in connection with a bond issue of any district shall apply to interim notes of said district. Contemporaneously, with the issuance of the bonds as provided by this chapter, all interim notes, even though they may not have then matured, shall be paid, both principal and interest and applicable premium, if any, to date of payment, from the funds derived from the sale of bonds authorized hereunder for the permanent financing, and such interim notes shall thereupon be surrendered and canceled. [I.C., § 43-414, as added by 1979, ch. 37, § 1, p. 57.]

Compiler's notes. Section 2 of S.L. 1979, ch. 37 declared an emergency. Approved March 16, 1979.

CHAPTER 5

SECONDARY BONDS TO PAY INTEREST

SECTION.

43-501. Issuance and sale authorized.

43-502. Election to authorize secondary bonds.

SECTION.

43-503. Form of bonds.

43-504. Lien of bonds.

43-501. Issuance and sale authorized. — In any irrigation district now organized or hereafter to be organized, for any portion of the time from the time said bonds begin to bear interest until five (5) years after the irrigation works of such district have been completed and water used in the irrigation of the lands in such district, in lieu of paying the interest on said bonds by revenues derived from the assessments on the lands in the district, the board of directors may pay any part of such interest with the proceeds of the sale of coupon bonds of such district to be issued and sold by them for said purpose. [Part of R.C., § 2405; am. 1915, ch. 38, § 1, subd. 2405, p. 118; reen. C.L., § 2406a; C.S., § 4371; I.C.A., § 42-501.]

Cross ref. Interest rate on warrants after presentment for payment, § 31-2124; indorsement when not paid upon presentation, § 31-2125.

Sec. to sec. ref. This chapter is referred to in §§ 43-401A, 43-411, 43-701 and 57-111.

Cited in: American Falls Reservoir Dist. v. Thrall, 39 Idaho 105, 39 Idaho 130, 228 P. 236 (1924).

Collateral References. 11 C.J.S., Bonds, § 55.

43-502. Election to authorize secondary bonds. — Before the board of directors of any such irrigation district shall cause to be issued and sold any of the coupon bonds of said district mentioned in the preceding section, they shall first call a special election and there shall be submitted to the qualified electors of said district who are residents of the district, the holders of title or evidence of title to lands in said district, the question of whether or not the bonds in said district in the amount determined and set forth in the resolution of the board of directors of the district shall be authorized to be issued for said purpose.

Notice of such election must be given by posting notice in three (3) public places in each election precinct in said district at least four (4) weeks before the date of said election, and the publication thereof for the same length of time in some newspaper published in the district, and in case no paper is published in the district, then in a paper published in each of the counties in which the district or any part thereof is located. Such notice must specify the time for holding said election, the amount of bonds proposed to be issued and the purposes for which the same are to be issued. Said election must be held and the results thereof determined and declared in all respects, as nearly as practicable, in conformity with the provisions of chapter 4 of this title, governing bond elections: provided, that no informality in conducting such election shall invalidate the same if the election shall have been otherwise correctly conducted. At such election the ballots shall contain the words "Bonds — yes" and "Bonds — no," or other words equivalent thereto. If two thirds ($\frac{2}{3}$) of the votes cast are "Bonds — yes" the board of directors shall cause the bonds in said amounts to be issued; if more than one third ($\frac{1}{3}$) of the votes cast are "Bonds — no" the result shall be so declared and entered of record. [R.C., § 2405a, as added by 1915, ch. 38, § 2, p. 118; reen. C.L., § 2406b; C.S., § 4372; I.C.A., § 42-502.]

43-503. Form of bonds. — Any bonds authorized by any vote of any special election held under the provisions of section 43-502 shall be in the form and in all respects conform to all the provisions of chapter 4 of this title, governing and describing the form and contents of the bonds of irrigation districts. [R.C., § 2405b, as added by 1915, ch. 38, § 2, p. 118; reen. C.L., § 2406c; C.S., § 4373; I.C.A., § 42-503.]

43-504. Lien of bonds. — Any bonds issued and sold under the provisions of this chapter shall have the same lien and priority of lien upon the lands embraced in said irrigation district as any bonds of the district issued under chapter 4 of this title. [R.C., § 2405c, as added by 1915, ch. 38, § 2, p. 118; reen. C.L., § 2406d; C.S., § 4374; I.C.A., § 42-504.]

CHAPTER 6

REFUNDING BONDS

SECTION.

- 43-601. Refunding bonds authorized.
 43-602. Election to authorize.
 43-603. Amount — Dates of maturity — Rate of interest.
 43-604. Sale, exchange and registration.
 43-605. Nonpayment when due.
 43-606. Payment — Apportionment of benefits.
 43-607. Hearings — Confirmation of proceedings.
 43-608. Levy and collection of taxes.
 43-609. Lien of taxes.
 43-610. Refunding bonds — Issuance upon resolution of board.

SECTION.

- 43-611. Resolution authorizing bond issue to state issued under this act.
 43-612. Liability of tracts of land limited.
 43-613. Payment of assessment a bar to further assessments.
 43-614. Emergency fund — Levy and collection — Disbursement.
 43-615. Payment of assessments in cash, coupons or bonds.
 43-616. Certificate issued upon payment of benefits apportioned against land and recorded.
 43-617. Maintenance fund repository of unexpended moneys.

43-601. Refunding bonds authorized. — The board of directors of any irrigation district organized under the laws of the state of Idaho may issue negotiable coupon bonds, to be denominated refunding bonds, for the purpose of refunding any of the bonded indebtedness of the district, whether due or not due, or which has or may hereafter become payable at the option of the district or by consent of the bondholders, or by any lawful means, whether such bonded indebtedness be now existing or may hereafter be created, and there shall not be funds in the treasury of such district available for the payment or redemption of such bonds and the accrued and unpaid interest thereon; but the amount of such refunding bonds to be issued under the provisions of this chapter shall first be determined by such directors, and a certificate of such determination shall be made and entered in and upon the records of said district prior to the issuance of said refunding bonds. [1915, ch. 142, § 1, p. 299; reen. C.L., § 2406g; C.S., § 4375; I.C.A., § 42-601.]

Compiler's notes. The words "this chapter" refer to S.L. 1915, ch. 142, which is compiled herein as §§ 43-601 — 43-609.

Sec. to sec. ref. This chapter is referred to in §§ 43-401A, 43-701, 43-722.

Sections 43-601 — 43-610 are referred to in § 43-611.

Cited in: American Falls Reservoir Dist. v. Thrall, 39 Idaho 105, 39 Idaho 130, 228 P. 236 (1924).

ANALYSIS

Constitutionality.
 Construction.

Constitutionality.

This chapter does not impair obligation of contract, and sufficiency of its title cannot be attacked after its incorporation in the general code of laws of the state by legislative enact-

ment. Emmett Irrigation Dist. v. McNish, 38 Idaho 241, 220 P. 409 (1923).

Construction.

Language of this section authorized the refunding of total debt arising from original bond issue, including accumulated unpaid interest thereon, judgments on such unpaid interest, and interest on such judgments, and it authorizes irrigation district to issue refunding bonds as a single issue and a single series though bonds thus refunded matured serially. Emmett Irrigation Dist. v. McNish, 38 Idaho 241, 220 P. 409 (1923).

Collateral References. 64 Am. Jur. 2d, Public Securities and Obligations, §§ 222-228.

Governmental unit's power to issue bonds as implying power to refund them. 1 A.L.R.2d 134.

43-602. Election to authorize. — Whenever the board of directors shall deem it expedient to issue refunding bonds under the provisions of this chapter they shall, by resolution duly adopted and made a part of the district records, call a special election of the qualified voters of the district, for the purpose of voting upon the question of authorizing the board of directors of the district to issue such refunding bonds, or the question may be submitted at a general election for district officers.

At any election held under the provisions of this chapter the question of authorizing the refunding of all or any part of the then outstanding bonded indebtedness of the district, including accrued and unpaid interest, may be submitted as one (1) question for determination whether such bonds are of the same or of different issues.

The notice of said election shall be published and posted for the same length of time and in the same manner, and the election shall be conducted and the result thereof determined and declared in all respects, as nearly as may be, in conformity with the provisions of the irrigation district laws of Idaho governing elections authorizing original bond issues. Said election notice shall specify the time and place for holding said election, the amount and date of the bonds to be refunded, the amount of refunding bonds proposed to be issued, the rate of interest they shall bear, and the time or times when the debt evidenced by such refunding bonds shall be paid: provided, that the said time or times shall not extend beyond a period of forty (40) years from the date of said refunding bonds: provided further, that provision may be made, if deemed expedient by the board of directors, for the payment of the principal, with interest, in suitable instalments throughout the term of the loan evidenced by said refunding bonds.

At such election the ballots shall contain the words "Refunding bonds — yes" and the words "Refunding bonds — no," and the voter shall answer the question submitted by marking a cross (X) opposite the words expressing his choice. [1915, ch. 142, § 2, p. 299; reen. C.L., § 2406h; C.S., § 4376; I.C.A., § 42-602; am. 1935, ch. 92, § 1, p. 173; am. 1970, ch. 133, § 10, p. 309.]

Compiler's notes. For sections in which "this chapter" is compiled see compiler's note, § 43-601.

Section 9 of S.L. 1970, ch. 133 is compiled herein as § 43-402.

Cross ref. Electors authorizing original bond issues, § 43-401.

43-603. Amount — Dates of maturity — Rate of interest. — If upon canvassing the vote cast at any election held under the provisions of this chapter it shall be determined by the board of directors that a majority of the legal votes cast upon the question submitted are in favor of refunding, the board of directors shall make such determination a part of the official records of the district, and shall immediately thereafter adopt and make a part of the records of said district a resolution providing for the issue of said refunding bonds in accordance with the provisions of this chapter. Such resolution may provide that the refunding bonds so authorized will be issued in one or more series, shall designate the denomination or denominations thereof, fix the date or dates of said refunding bonds, the rate or rates of interest, the maturity date or dates, the place or places, within or

without the state of Idaho, for payment of both principal and interest and shall prescribe the form of said refunding bonds. Such refunding bonds shall be negotiable in form, shall recite the title of the act under which they are issued, shall be executed in the name of the district and signed by the president, with the seal of the district affixed thereto, and attested by the secretary. The interest accruing on such refunding bonds shall be evidenced by interest coupons thereto attached, bearing the engraved facsimile signature of the treasurer of the district and when so executed such coupons shall be the binding obligations of the district according to their import. In the adoption of said resolution providing for the issue of such refunding bonds, the directors may, in their discretion, within the limits of the authority granted by the voters at the refunding bond election, make the principal of the debt or of each instalment of the debt, as the case may be, payable in certain specified sums, at certain specified times during the currency of the period (not exceeding forty (40) years) within which the debt or each instalment of the debt, as the case may be, is to be discharged: provided, that the first instalment of the debt evidenced by said refunding bonds shall be payable not more than ten (10) years from the date of said refunding bonds, and the instalments thereafter shall be of such amounts that the total thereof shall equal the aggregate principal indebtedness; and the directors may issue the refunding bonds of the district for the amounts and payable at the times corresponding with such specified sums, together with interest, payable semiannually, as may be set forth and provided by such resolution. [1915, ch. 142, § 3, p. 299; compiled and reen. C.L., § 2406i, C.S., § 4377; I.C.A., § 42-603; am. 1935, ch. 92, § 2, p. 173; am. 1970, ch. 133, § 11, p. 309.]

Compiler's notes. For sections in which "this chapter" is compiled see compiler's note, § 43-601.

The words enclosed in parentheses so appeared in the law as enacted.

Section 12 of S.L. 1970, ch. 133 is compiled herein as § 43-1811.

Section 3 of S.L. 1935, ch. 92 declared an emergency. Approved Mar. 6, 1935.

43-604. Sale, exchange and registration. — All or any part of such refunding bonds may be exchanged, dollar for dollar, for the bonds to be refunded, or they may be sold, at not less than their par value, as directed by the board of directors, and the proceeds thereof shall be applied only to the purposes for which said refunding bonds are issued. The authority vested in the board of directors by any election held pursuant to the provisions of this chapter shall be and remain effective until all of the bonded indebtedness so authorized to be refunded has been paid, redeemed or refunded. At the time of the issue, by exchange or sale, of refunding bonds authorized under the provisions of this chapter, each bond shall be registered by the treasurer of the district, in a book to be kept by him for such purpose, and interest thereon shall begin to run only from the date of such registration. Coupons evidencing unearned interest shall be detached and canceled. Each bond, so registered, shall bear thereon indorsed the treasurer's certificate of such registration, and only such bonds as shall bear such certificate shall be valid; but such certificate shall be conclusive evidence that the bond so certified has been duly issued in full conformity with the

provisions of this chapter. All district bonds redeemed under the provisions of this chapter shall thereupon be canceled by the district treasurer, and a record of such cancellation made and preserved in the records of his office. [1915, ch. 142, § 4, p. 299; reen. C.L., § 2406j; C.S., § 4378; I.C.A., § 42-604.]

Compiler's notes. For sections in which "this chapter" is compiled see compiler's note, § 43-601.

43-605. Nonpayment when due. — Whenever any coupon or coupons detached from any refunding bonds issued in conformity with the provisions of this chapter are presented for payment on or after the due date or dates thereof, and there shall not be funds available for the payment of such coupon or coupons, the district treasurer shall indorse on the back thereof: "Presented for payment ____ (here insert date). Not paid for want of funds," keeping a record of such presentation for payment and such nonpayment; and all coupons so indorsed shall bear interest from that date until paid at the rate specified in the refunding bonds, which interest shall be paid out of the moneys arising from penalties and interest collected upon delinquent assessments for bond interest upon redemption from such delinquent assessments, and, if such moneys so arising shall not be sufficient for such purpose, then the deficiency shall be raised by an increase in the next annual interest levy to be made as provided in section 43-608. [1915, ch. 142, § 5, p. 299; reen. C.L., § 2406k; C.S., § 4379; am. 1929, ch. 203, § 1, p. 398; I.C.A., § 42-605.]

Compiler's notes. For sections in which "this chapter" is compiled see compiler's note, § 43-601.

The words enclosed in parentheses so appeared in the law as enacted.

43-606. Payment — Apportionment of benefits. — Whenever the electors shall have authorized an issue of refunding bonds as herein provided, the board of directors shall, as soon thereafter as practicable and before the issuance or sale of any such refunding bonds, determine the benefits which will accrue to each of the several tracts or subdivisions of land within such irrigation district from the issuance of such refunding bonds; and the amount of such refunding bond issue shall be apportioned or distributed over such tracts or subdivisions of land in proportion to such benefits; and the amount so apportioned or distributed to each of said tracts or subdivisions shall be and remain the basis for levying all taxes for the payment of the principal and interest of such refunding bonds. The board of directors shall make, or cause to be made, a list of such apportionment or distribution of benefits, which list shall contain a complete description of each tract or subdivision of land within such district, with the amount and rate per acre of such apportionment or distribution of benefits, and the name of the owner thereof, if known; or the same may be shown on the map of the district with the rate per acre of such apportionment entered or designated thereon: provided, that where all lands on any map or sections of a map are assessed at the same rate a general statement to that effect shall be

sufficient. Said list or map shall be made in duplicate, and one (1) copy shall be filed in the office of the department of water resources and one (1) copy shall remain in the office of the board of directors for public inspection. Whenever thereafter any assessment is made or tax levied for the payment of interest or principal of such refunding bonds, it shall be spread upon the lands in the same proportion as the assessment of benefits, and the whole amount of the assessment of benefits shall equal the amount of such refunding bonds. [1915, ch. 142, § 6, p. 299; reen. C.L., § 2406l; C.S., § 4380; I.C.A., § 42-606.]

Compiler's notes. The name of the department of water administration (formerly the department of reclamation) has been

changed to the department of water resources on authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

43-607. Hearings — Confirmation of proceedings. — The proceedings of the board of directors for apportioning such benefits and the giving of notice of hearings for such purposes shall be substantially the same as may be provided by law for the apportionment of benefits in the case of original bond issues; and all proceedings of the board of directors relative to the authorization and sale of such refunding bonds and the holding of said election and the apportionment of such benefits shall, before the issuance and sale of any of said bonds, be examined, approved and confirmed by the district court of the county in which the office of the district is situated, substantially in the manner provided by law for the confirmation of proceedings of the board of directors relative to original bond issues; and all the provisions of the statutes relative to the confirmation of the proceedings relative to original bond issues of irrigation districts shall apply to the confirmation of proceedings under this chapter. [1915, ch. 142, § 7, p. 299; reen. C.L., § 2406m; C.S., § 4381; I.C.A., § 42-607.]

Compiler's notes. For sections in which "this chapter" is compiled see compiler's note, § 43-601.

Confirmation of proceedings, §§ 43-406 — 43-408.

Cross ref. Apportionment of benefits, §§ 43-404, 43-405.

43-608. Levy and collection of taxes. — The board of directors of the district shall annually at the time provided by law for making tax levies for original bond issues, or as soon thereafter as practicable, levy a separate tax for the purpose of discharging the interest upon and the principal of any refunding bonds issued, registered and outstanding pursuant to the provisions of this chapter. Such taxes shall be levied and collected in the manner provided by law for the levy and collection of taxes for the payment of interest and principal of original bond issues, and such refunding bonds and the interest thereon shall be paid from the revenue derived from the annual assessment on the land in the district and all the land in the district shall be and remain liable to be assessed for such payment. [1915, ch. 142, § 8, p. 299; reen. C.L., § 2406n; C.S., § 4382; I.C.A., § 42-608.]

Compiler's notes. For sections in which "this chapter" is compiled see compiler's note, § 43-601.

Cross ref. Levy and payment of assessments, §§ 43-704 — 43-732.

Sec. to sec. ref. This section is referred to in § 43-605.

ANALYSIS

Contracts with United States.
General lien.

Contracts with United States.

Where irrigation district had contracted with the United States for additional water

rights to be furnished by the United States, assessments to pay therefor should have been levied as provided in this section. *Haga v. Nampa & Meridian Irrigation Dist.*, 38 Idaho 333, 221 P. 147 (1923).

General Lien.

It is intention of legislature to make obligations of irrigation district general and not specific lien against all property of district, hence none of the lands within district can be released from any of district's indebtedness, except upon payment of same. *American Falls Reservoir Dist. v. Thrall*, 39 Idaho 105, 39 Idaho 130, 228 P. 236 (1924).

43-609. Lien of taxes. — All taxes for interest on and for the redemption of such refunding bonds shall be a lien on the taxable property of the district prior to all other liens, except the lien of general, state, county and school district taxes. Taxes levied for the payment of interest shall be payable in cash only, or by means of interest coupons detached from the refunding bonds issued under the provisions of this chapter, and maturing during the year in which such taxes are by law made payable; taxes levied for the payment of principal indebtedness shall be payable in cash only, or by means of refunding bonds issued under the provisions of this chapter, and maturing during the year in which such taxes are by law made payable. All taxes for interest shall be kept by the treasurer of the district as a special fund, to be used in payment of interest only; and all taxes for the redemption of such refunding bonds shall be kept by such district treasurer as a special fund, to be used for the redemption only of the principal of such refunding bonds. [1915, ch. 142, § 9, p. 299; reen. C.L., § 2406o; C.S., § 4383; I.C.A., § 42-609.]

Compiler's notes. For sections in which "this chapter" is compiled see compiler's note, § 43-601.

43-610. Refunding bonds — Issuance upon resolution of board. — Whenever the board of directors of an irrigation district deems it for the best interests of the district to issue refunding bonds under this chapter without holding an election, a resolution may be adopted by the unanimous vote of the board of directors and made a part of the records of said district, dispensing with the calling and holding of an election as provided by this chapter. Such resolution shall specify the amount, date and maturities and amount of interest due on the bonds to be refunded, the amount and date of the refunding bonds proposed to be issued, whether the same will comprise one or more issues, the denomination or denominations thereof, the rate of interest they shall bear, which shall not exceed the rate of interest provided for in the bonds to be refunded, the place or places within or without the state of Idaho for payment of both principal and interest thereon, and the time or times when the debt evidenced by such refunding bonds shall be paid and such resolution shall prescribe the form of said refunding bonds; provided, that the said time or times of payment shall not extend beyond a

date forty (40) years from the date of such issue of such refunding bonds; and provided further, that provisions shall be made by the board of directors for the payment of the principal of such refunding bonds in suitable annual or semiannual instalments commencing such number of years after the date of the bonds as the board of directors may deem best suited to the needs of the district, with semiannual interest payments throughout the term such bonds shall run, conforming as nearly as may be practicable to the amortization plan, so called, so that the combined payments of principal and interest shall be approximately the same each year in which any of the refunding bonds authorized by said resolution mature. All of the provisions of this chapter, except as herein otherwise specifically provided, shall apply to refunding bonds issued under the provisions of this section. [C.S., § 4383A, as added by 1927, ch. 35, § 1, p. 47; I.C.A., § 42-610; am. 1935, ch. 39, § 1, p. 67.]

Compiler's notes. Section 2 of S.L. 1935, ch. 39 declared an emergency. Approved Feb. 20, 1935.

Constitutionality.

The constitutional limitation on the retirement of a state indebtedness to twenty years does not apply to refunding bonds issued by an irrigation district. *Lewiston Orchards Irrigation Dist. v. Gilmore*, 53 Idaho 377, 23 P.2d

720 (1933); *Marsing v. Gem Irrigation Dist.*, 56 Idaho 26, 48 P.2d 1099 (1935).

The issuance of refunding bonds is not the incurring of any indebtedness or liability exceeding the current year's revenue within the constitutional meaning. *Lewiston Orchards Irrigation Dist. v. Gilmore*, 53 Idaho 377, 23 P.2d 720 (1933).

43-611. Resolution authorizing bond issue to state issued under this act. — Whenever an irrigation district desires to issue refunding bonds under the authority conferred by §§ 43-601 — 43-610, the board of directors of such district shall determine whether the taxes and assessments levied for the payment of such bonds shall be limited as provided in this act, and if the board determines to issue such refunding bonds subject to the provisions of this act, the resolution of the board of directors authorizing the issuance of such refunding bonds, or calling the election for authorizing the issuance thereof, and the bonds so issued, shall expressly state that such bonds are issued under the provisions of this act. [1933, ch. 207, § 1, p. 418.]

Compiler's notes. As originally enacted the figures "§§ 43-601 — 43-610" read "Chapter 6 of Title 42, Idaho Code Annotated."

The words "this act" refer to S.L. 1933, ch. 207, which is compiled herein as §§ 43-611 — 43-617.

43-612. Liability of tracts of land limited. — When refunding bonds are issued under this act no tract or parcel of land against which benefits have been apportioned or assessed for the payment thereof shall be liable for the payment of more than the amount of the benefits so apportioned and assessed, together with interest thereon at the rate specified in such refunding bonds on the amount of the apportionment of benefits remaining unpaid, and in addition thereto to an assessment not exceeding fifty cents (50¢) per acre per annum for each irrigable acre for an emergency fund as hereinafter provided. [1933, ch. 207, § 2, p. 418.]

Compiler's notes. For sections in which "this act" is compiled see compiler's note, § 43-611.

43-613. Payment of assessment a bar to further assessments. — Upon payment of the full amount of benefits apportioned or assessed against any parcel of land, with interest as aforesaid, such land shall thereafter be forever relieved from the payment of any taxes or assessments levied on account of such refunding bonds, except taxes levied for the emergency fund as herein provided. [1933, ch. 207, § 3, p. 418.]

43-614. Emergency fund — Levy and collection — Disbursement. — The board of directors shall provide an emergency fund which may be used for both or either of the following purposes, to-wit: For temporarily supplementing the bond fund in case of deficiencies due to accidents, delinquencies or other contingencies, or for the purpose of protecting any tax title which the district may acquire on account of taxes levied for the payment of such refunding bonds, by paying and discharging any state and county, or other taxes, the lien of which may be prior or superior to the taxes levied by the district. This emergency fund shall consist of a levy of not to exceed fifty cents (50¢) per acre per annum upon each irrigable acre in the district, and shall be at the same rate per acre for all lands; such levy shall be made annually and at the rate of fifty cents (50¢) per acre during the first five (5) years after the issuance of such refunding bonds, and thereafter, whenever the amount in such emergency fund is less than one dollar and fifty cents (\$1.50) per acre for each irrigable acre in the district, the board shall levy an assessment of not to exceed fifty cents (50¢) per acre during any one (1) year. The taxes levied for such emergency fund shall be levied and collected as other taxes and assessments for the payment of the interest and principal of such refunding bonds. All moneys in the emergency fund shall be disbursed by the treasurer of the district upon order of the board of directors. [1933, ch. 207, § 4, p. 418.]

43-615. Payment of assessments in cash, coupons or bonds. — Any taxes levied for the payment of refunding bonds issued under the provisions of this act, except taxes levied for the emergency fund, may be paid in matured coupons or matured or unmatured bonds for the payment of which such taxes were levied, and the unpaid portion of any benefits apportioned or assessed against any parcel or tract of land, with interest thereon to the next interest paying date on such refunding bonds, may be paid, without any tax having first been levied for the payment thereof, to the treasurer of the district either in lawful money of the United States or by surrendering for cancellation such matured coupons or matured or unmatured bonds, which shall be accepted at their par or face value and when so received such coupons and bonds shall be canceled. [1933, ch. 207, § 5, p. 418.]

Compiler's notes. For sections in which "this act" is compiled see compiler's note, § 43-611.

43-616. Certificate issued upon payment of benefits apportioned against land and recorded. — Whenever the full amount of benefits apportioned against any parcel of land, with interest as herein provided, has been paid, the district shall issue to the owner or person making such payment, a certificate showing payment in full of the benefits so apportioned against such parcel; such certificate shall describe the land on which such apportionment of benefits or assessment has been paid, and shall identify or describe by appropriate reference the bond issue and apportionment of benefits from the payment of which the land so described has been released. Said certificate shall be issued in the name of the district, be signed by the president and secretary thereof and the corporate seal of the district shall be affixed thereto, and shall be acknowledged as conveyances of real property. All such certificates shall be entitled to record in the office of the county recorder of the county where the land is situated. After the apportionment of benefits or assessments against any parcel of land has been paid in full, no taxes or assessments shall be levied against such parcel for the payment of any outstanding bonds of the refunding issue described in such certificate or for the payment of which such assessment of benefits was made; provided, however, that such parcels shall be subject to taxes at not to exceed fifty cents (50¢) per irrigable acre per annum, levied as aforesaid for the emergency fund, until all such refunding bonds have been paid and discharged, with interest thereon as provided by such bonds. [1933, ch. 207, § 6, p. 418.]

43-617. Maintenance fund repository of unexpended moneys. — Any money remaining in the emergency fund after all such refunding bonds have been paid with interest, and all lands and the proceeds from the sale of lands acquired by the district under taxes levied for the payment of such refunding bonds, shall be converted into the maintenance fund of the district. [1933, ch. 207, § 7, p. 418.]

CHAPTER 7

LEVY AND COLLECTION OF ASSESSMENTS

SECTION.

- 43-701. Preparation of assessment book —
Levy of assessments.
- 43-701A. Rehabilitation of irrigation works
— Levy for preliminary study costs.
- 43-701B. Flat rate assessments for tracts of one acre or less.
- 43-701C. Flat rate assessments — Preparation and certification of lists — Changes in legal descriptions.
- 43-701D. Flat rate assessments — Collection by county officers.
- 43-701E. Flat rate assessments — Special

SECTION.

- handling of unpaid assessments on property exempt from general taxation.
- 43-701F. Flat rate assessments — Assessment and collection expenses.
- 43-701G. Flat rate assessments — Accelerated collection of indebtedness.
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- 43-701DD. Flat rate assessments — Collection by district.
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- 43-717. Delinquency entries — Service of notice of pending issuance of tax deed — Exclusive procedure for judicial review.
- 43-718. Affidavit of compliance.
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- 43-724. Tax deed — Short form.
- 43-725. State lands exempt from assessment.
- 43-726. Sale for assessments — Limitation of actions to determine validity — Tender.
- 43-727. County officers — Collection of district assessments.
- 43-728. County officers — District bond and contract obligations — Levy and collection of assessments.
- 43-729. Collection by county officers — Reversion to plan of collection by district treasurer.
- 43-730. Contracts with cities, irrigation lateral districts or other entities in lieu of charges, levies and assessments.
- 43-731. Water held in trust.
- 43-732. Certain lands may be assessed at different amounts — Additional service charge.

43-701. Preparation of assessment book — Levy of assessments.

— (1) The secretary of the board of directors shall be the assessor of the district, and on or before August 1 of each year shall prepare an assessment book containing a full and accurate list and description of all of the land of the district, and a list of the persons who own, claim or have in possession or control thereof during said year, giving the number of acres listed to each person: provided, that where the property to be listed is described by metes and bounds description, the assessor of the district may give to each tract of land within the district which is described by metes and bounds description an irrigation district assessment number, which number shall be placed on the assessment roll to indicate the certain piece of land bearing such number, and entered on a plat book to indicate what tract is designated by such irrigation district assessment number, and no further description of such land shall be necessary upon the irrigation district assessment roll. The assessor of the district must, in the event irrigation district assessment numbers are used in lieu of the metes and bounds description, on or before the first day of August of each year, file with the board of directors of the district an accurate and complete list of all irrigation district assessment numbers entered on the assessment rolls for the year, showing opposite each number an accurate description of the tract of land designated by such

number. Thereafter, in all cases where an irrigation district assessment number is used to designate the same tract of land in the assessment of succeeding year, the assessor of the district shall not include such number in his list of the irrigation district assessment numbers filed with the board of directors of the district.

(2) Whenever a tract of land which has been given an irrigation district assessment number is subdivided, the assessor of the district shall give each subdivision a new irrigation district assessment number, which number with an accurate description of the tract of land designated by such new number, shall be included in his list of irrigation district assessment numbers filed with the board of directors; provided, that the owners of two (2) or more lots each of which is less than five (5) acres in size in any subdivision which has been given new assessment numbers may request of the assessor in writing that those lots be combined for assessment purposes, whereupon the assessor shall combine those lots into a single assessment number, which may be the same as the number previously assigned to one (1) of the lots, which number with an accurate description of the lots designated by such number shall be included in his list of irrigation district assessment numbers filed with the board of directors; thereafter, such combined area shall be deemed to be a single parcel for all purposes related to the levy and collection of assessments and all subsequent assessments shall constitute a single lien against the entire combined area. The request to combine the parcels for assessment purposes shall include the name and mailing address of the person designated by the requesting landowners to receive notices from the district. All assessment notices which otherwise would be sent to the individual landowners, shall be sent to the person thus designated, and shall be deemed to have been sent to the owner of each parcel included in the combined area.

(3) In all irrigation districts where the collection of assessments is made by county officers as provided for by sections 43-727, 43-728 and 43-729, Idaho Code, said assessment book shall be prepared on or before June fifteenth of each year and the provisions of this section with reference to assessment numbers shall not apply. If the name of the person owning, claiming, possessing or controlling any tract of said land is not known, it shall be listed to unknown owners.

In all districts in which an assessment is levied for the purpose of maintaining and operating the works of said district, at a regular meeting of the board between August 1 and November 8 of each year, the board of directors shall levy an assessment upon all the lands of the district for the expense of maintaining and operating the property of the district; provided, that in all districts where the collection of assessments is made by county officers as provided by sections 43-727, 43-729, Idaho Code, said levy shall be made on or before the third Tuesday of July of each year.

(4) At the time of meeting of the board of directors to levy assessments as in this section provided, the board of directors of the irrigation district are authorized to determine the aggregate amount necessary to be raised for all purposes connected with the maintaining and operating of the works of said district, and may determine the total amount of said sum necessary and

required to pay the expense of making the assessment book and extension of the assessments thereon, giving notice of assessments and making collections of assessments, which shall be designated as assessment expense fund. If the district has adopted a flat rate method of assessing residential lots of one (1) acre or less as authorized by section 43-701B, Idaho Code, the share of the assessment expense to be apportioned against the residential lots and the share to be apportioned against the tracts of land assessed by the regular method shall be determined separately so as to allocate as accurately as reasonably possible, between (1) such residential lots and (2) all other parcels, the assessment expenses specified above. The balance of said amount necessary to be raised shall be designated as operation and maintenance fund. The board of directors are authorized to apportion the total amount of assessment expense fund against the several tracts of land as shown on the assessment book, so that each tract shall pay its proportionate share of the cost of making assessments and collections thereof. The amount of said assessment designated operation and maintenance fund shall be spread upon all the lands in the district and shall be proportionate to the benefits received by such lands growing out of the maintenance and operation of the said works of said district. Such assessments shall be carried out by the secretary and entered into an appropriate column on the assessment roll immediately and shall be subject to review by the board of correction hereinafter provided for.

(5) In districts that furnish water to landowners who have previously petitioned out of such district, the board of directors shall assess such owners in the same proportionate amount for maintenance and operation of the irrigation works of the district as they do on the land within such district, and in addition thereto shall assess such landowners in the same proportionate amount for bond interest and redemption of bonds outstanding under the provisions of chapters 4, 5, and 6, of this title, or other contract indebtedness of the district, as they do against the land of the district, and such assessment shall be considered as a toll, and if not paid by the first day of January following such assessment, the board of directors may refuse to deliver water to such landowner until this, or any other delinquent payment has been paid. [1903, p. 150, § 23; reen. R.C., § 2407; am. 1911, ch. 71, §§ 4, p. 194; am. 1911, ch. 154, § 9(8), p. 461; reen. C.L., § 2407; C.S., § 4384; am. 1931, ch. 125, § 1, p. 221; I.C.A., § 42-701; am. 1941, ch. 93, § 1, p. 170; am. 1945, ch. 126, § 1, p. 192; am. 1947, ch. 54, § 1, p. 71; am. 1949, ch. 220, § 1, p. 463; am. 1967, ch. 397, § 1, p. 1179; am. 1988, ch. 137, § 1, p. 244; am. 1989, ch. 368, § 1, p. 922.]

Compiler's notes. Section 2 of S.L. 1945, ch. 126 declared an emergency. Approved Mar. 14, 1945.

Cross ref. Levy for extermination of rodents, § 43-315.

Levy for safety fund, § 43-413.

Sec. to sec. ref. This chapter is referred to in §§ 43-318, 43-714A and 43-730.

This section is referred to in §§ 43-701A, 43-701B, 43-701F, 43-701I, 43-702, 43-703, 43-707, 43-730, 43-732, 43-905 and 43-2520.

Cited in: Oregon S.L.R.R. v. Pioneer Irrigation Dist., 16 Idaho 578, 102 P. 904 (1909); Haga v. Nampa & Meridian Irrigation Dist., 38 Idaho 333, 221 P. 147 (1923); Oregon S.L.R.R. v. Minidoka Irrigation Dist., 48 Idaho 584, 283 P. 614 (1929); Barker v. Wagner, 96 Idaho 214, 526 P.2d 174 (1974).

ANALYSIS

Assessments during construction.
Basis of assessment.

Cash basis.
Construction.
Maintenance fund.
Method of assessment.
Nature of assessment.

Assessments During Construction.

During the course of the construction of an irrigation system, it would be unjust to exact payment for maintenance and operation, because tracts of land to which water has not been made available should not be assessed for that purpose. *Gedney v. Snake River Irrigation Dist.*, 61 Idaho 605, 104 P.2d 909 (1940).

Basis of Assessment.

Benefits cannot be ignored in assessing for maintenance, but almost invariably benefits derived from maintenance are substantially equal, and therefore a flat assessment per acre is justifiable. *Nampa & Meridian Irrigation Dist. v. Petrie*, 37 Idaho 45, 223 P. 531 (1923).

It was the intention of the legislature, under this section, that the irrigable lands within the district should be considered as a whole and must be assessed for maintenance and operation of the water system at the same rate where the benefits, that is the water needed and received, are the same. *Gedney v. Snake River Irrigation Dist.*, 61 Idaho 605, 104 P.2d 909 (1940).

Cash Basis.

Provisions of statute relative to levy of assessments and tolls for maintenance are designed to keep annual expenses as nearly as possible on cash basis, as is compulsory by constitutional provision (Const., art. 7, § 15). *Little v. Emmett Irrigation Dist.*, 45 Idaho 485, 263 P. 40, 56 A.L.R. 822 (1928).

Construction.

Lands irrigable within district must be considered as a whole, and a uniform assessment made, where benefits are the same. *Colburn v. Wilson*, 24 Idaho 94, 132 P. 579 (1913).

Benefits, as used in this section in connection with assessments for maintenance, mean such benefits as contribute to promote prosperity of district and add value to the property of respective owners of entire district. *Colburn v. Wilson*, 24 Idaho 94, 132 P. 579 (1913).

To the extent there is any conflict between the provision of this statute providing for

uniform assessment upon lands for operation and maintenance of a water distribution system and the provision of § 43-1824 providing that assessment upon lands for such operation and maintenance be apportioned pursuant to the provisions of an act of congress, the latter must prevail. *Little v. Nampa-Meridian Irrigation Dist.*, 82 Idaho 167, 350 P.2d 740 (1960).

Maintenance Fund.

So-called maintenance fund is not special or particular fund created by statute and existence of fund does not create or is not necessary to create cause of action in warrant holder. *Little v. Emmett Irrigation Dist.*, 45 Idaho 485, 263 P. 40, 56 A.L.R. 822 (1928).

Method of Assessment.

Special assessments are not provided for in this section and §§ 43-702, 43-703, and are therefore to be levied and collected in conformity to the procedure for levying and collecting assessments for the payment of principal and interest of bonds. *Holland v. Avondale Irrigation Dist.*, 30 Idaho 479, 166 P. 259 (1917).

This chapter provides a system for the levy and collection of taxes somewhat analogous to the collection of general taxes by counties. *Cowan v. Lineberger*, 35 Idaho 403, 206 P. 805 (1922).

It could not have been the legislative intention to create two methods of raising money for maintenance and operation of a completed irrigation system, one by assessment which must be uniform according to its benefits, and the other by tolls which need not be uniform or based upon benefits, but may be based upon costs of delivery. *Gedney v. Snake River Irrigation Dist.*, 61 Idaho 605, 104 P.2d 909 (1940).

Nature of Assessment.

Such assessment is not a tax, neither is it based upon valuation for governmental taxation purposes, but rather it is assessment for local improvements based upon benefits. *Brown v. Shupe*, 40 Idaho 252, 233 P. 59 (1924).

There is distinction between taxes and assessments for drainage districts, and construction of statutes relating to two will not be the same. *Booth v. Clark*, 42 Idaho 284, 244 P. 1099 (1926).

Collateral References. 94 C.J.S., Waters, §§ 543-581.

43-701A. Rehabilitation of irrigation works — Levy for preliminary study costs. — If the rehabilitation, reconstruction or replacement of irrigation works is determined necessary by the board of directors and a bond issue authorized by section 43-401A, Idaho Code, or other financing arrangement will be required for the project, the board of a district

constructing the works or a district which will pay a proportionate share of the cost of the project may include in its assessment levy under section 43-701, Idaho Code, an amount sufficient to obtain surveys, examinations, plans and professional services necessary to determine the cost or feasibility of the project, or obtain its authorization. If other water user organizations contract with the constructing district for payment of a share of the costs of the project, sums expended by the constructing district or others as herein authorized may be included in total project cost; provided that if the monies so assessed and expended by the constructing district or other participating district are repaid, the district may (i) use the money to meet and offset future expenses or assessments of the district, and/or (ii) refund part or all of said money as an adjustment to the original assessment to the present landowners of the district in proportion to the previous assessments from which said money was obtained; provided further that in the event a district is a nonoperating entity, said district may refund part or all as above provided to the irrigation entities that comprise said district in proportion to the previous assessments to landowners within such irrigation entities levied against the lands of said irrigation entities. [I.C., § 43-701A, as added by 1973, ch. 254, § 1, p. 505; am. 1981, ch. 7, § 1, p. 14.]

Compiler's notes. Section 2 of S.L. 1973, ch. 254 declared an emergency. Approved March 17, 1973. Section 2 of S.L. 1981, ch. 7 declared an emergency. Approved March 2, 1981.

43-701B. Flat rate assessments for tracts of one acre or less. — Notwithstanding the provisions of section 43-701, Idaho Code, whenever the cost of making and collecting assessments against residential tracts, one (1) acre or less in size, is determined by the board of directors to be burdensome on the district and on the owners of such lots, the board may assess all such tracts at a flat rate, to be determined by dividing the total amount assessable against all such tracts by the total number of such tracts, and the flat rate assessments thus determined may be certified to the county officers as specified in section 43-701C, Idaho Code, for collection or may be collected by the district in substantially the same manner that other assessments are collected pursuant to this chapter. The board, in the reasonable exercise of its discretion, may establish the maximum lot size for flat rate assessments at any size within the range between one-fourth (1/4) acre and one (1) acre. Tracts included or retained in an irrigation district for drainage purposes only shall be assessed only for drainage costs and may be certified to the county officers on a separate list. The board may, in its discretion, exclude from the flat rate assessment procedure any tracts upon which liens for construction costs exist under the provisions of sections 43-328 through and including 43-330, Idaho Code. [I.C., § 43-701B, as added by 1982, ch. 103, § 1, p. 281; am. 1988, ch. 137, § 2, p. 244.]

Sec. to sec. ref. This section is referred to in §§ 43-701, 43-701G, 43-701DD.

43-701C. Flat rate assessments — Preparation and certification of lists — Changes in legal descriptions. — As soon as possible after the board of directors determines to make flat rate assessments as provided in section 43-701B, Idaho Code, the treasurer of the district shall prepare a list containing the legal description, the assessor's parcel number and the name and last known address of the owner of record of each residential tract, one (1) acre or less in size, assessed by the district for all purposes, and a separate list in like manner for such tracts assessed only for drainage. The list or lists may be certified by the treasurer to the county auditor of the county in which the lands are situate. When an irrigation district includes lands in more than one (1) county, separate lists may be prepared for each county. When a tract lies partly in one (1) county and partly in one or more other counties, only the portion in any county shall be included in the list for that county if the treasurer is certifying a list or lists to the county auditor. If the legal description of any tract or tracts on any such list differs from the legal description as shown by the assessor's records, the auditor shall notify the irrigation district treasurer of the discrepancy and the description in the list shall be changed by the irrigation district treasurer, by an addendum, to conform with the assessor's records; provided, however, that where the discrepancy between the descriptions occurs because a portion of the parcel lies outside the boundaries of the irrigation district, no change in description shall be required, and the irrigation district assessments shall be effective only as to the portions of any such parcel that are within the boundaries of the irrigation district. [I.C., § 43-701C, as added by 1982, ch. 103, § 2, p. 281; am. 1988, ch. 137, § 3, p. 244.]

Sec. to sec. ref. This section is referred to in §§ 43-701F, 43-701G.

43-701D. Flat rate assessments — Collection by county officers. — After any list of tracts has been certified and conformed as provided for in section 43-701C, Idaho Code, the treasurer of the district may notify the appropriate county officers, on or before the third Tuesday of July of each year, of the amount assessed against the tracts identified on each such list, and the amount assessed shall be uniform for all tracts on the same list. After the receipt of any such notification from the treasurer of any irrigation district, the appropriate county officer shall each year enter upon the county assessment roll against the property therein described the levy so made by the board of directors of said district as shown upon the notification furnished to the said county officer as above provided, in manner similar to that in which other municipal, school or highway district assessments are entered by him on said assessment roll, except that the sum assessed and charged against each description of land therein contained for such irrigation district purposes shall be entered by the officer as the operation and maintenance assessment or the drainage assessment of the (name of district) irrigation district against the same. Such district operation and maintenance tax shall be collected and accounted for by the county officers in the same manner as other municipal taxes and paid over to the district treasurer together with any penalties or interest collected thereon, and the

collection thereof shall be enforced in the same manner, and neglect to pay the same shall be subject to the same penalties as the other taxes of the county; provided, however, that the collection of such district assessments by such county officers, as herein provided, shall not make the bonds, contracts and interest due from such irrigation districts the obligation of such county or counties. [I.C., § 43-701D, as added by 1982, ch. 103, § 3, p. 281; am. 1988, ch. 137, § 4, p. 244.]

Compiler's notes. The words enclosed in parentheses so appeared in the law as enacted.

Sec. to sec. ref. This section is referred to in §§ 43-701F and 43-701DD.

43-701E. Flat rate assessments — Special handling of unpaid assessments on property exempt from general taxation. — Any irrigation district assessment certified by the treasurer to the county officers which is placed on property exempt from general ad valorem taxation may be returned to the irrigation district if the assessment is not paid within three (3) years of the date on which it is due, and upon return of any such assessment the district shall be responsible for collection thereof, and the county officers shall be relieved of any further responsibility for collection of that assessment. Entry of delinquent assessments and the penalties thereon by the tax collector in accordance with chapter 10, title 63, Idaho Code, shall constitute compliance with the provisions of sections 43-710 and 43-711, Idaho Code, and the treasurer of the district shall not be required to make any separate delinquency entry with respect to any parcel of property to which this section applies. [I.C., § 43-701E, as added by 1982, ch. 103, § 4, p. 281; am. 1996, ch. 322, § 41, p. 1029.]

Compiler's notes. Sections 40 and 42 of S.L. 1996, ch. 322 are compiled as §§ 42-3708 and 43-717, respectively.

43-701F. Flat rate assessments — Assessment and collection expenses. — The costs incurred by the irrigation district in preparing and certifying any list of tracts as provided for in section 43-701C, Idaho Code, shall be assessed against the tracts described in that list, at the same amount for each tract, and the amount so assessed shall be included in the first notification made by the irrigation district treasurer to the county as provided for in section 43-701D, Idaho Code, if the district is utilizing the county for collecting the assessment. Thereafter all tracts on any one list shall be regarded as a single tract for determining assessment expense as provided for in section 43-701, Idaho Code. The county commissioners initially shall levy an additional fee against the tracts described in any such list for the cost of transferring and conforming the list and initiating the collection process, at a uniform amount for each tract, and may levy annually an additional assessment for the current cost of collection and remittance to the district, at a uniform amount for each tract. [I.C., § 43-701F, as added by 1982, ch. 103, § 5, p. 281; am. 1988, ch. 137, § 6, p. 244.]

Compiler's notes. Section 5 of S.L. 1988, ch. 137 is compiled as § 43-701DD.

43-701G. Flat rate assessments — Accelerated collection of indebtedness. — In order to implement the flat rate assessments authorized in section 43-701B, Idaho Code, the board of directors, before any list of tracts is certified to the county officers as provided for in section 43-701C, Idaho Code, or before the list is used by the district for collection of flat rate assessments utilizing its own personnel and procedures, shall assess, against all tracts it has determined to assess at a flat rate as in this chapter provided, the entire unpaid balance of principal and any accrued interest on any contract or bonded indebtedness apportioned to each such tract. If any landowner shall object to such assessment, his tract of land shall not be included in the list certified to the county officers, and that tract shall be assessed by the district in the regular manner for all purposes, instead of under the flat rate procedure authorized in this chapter. [I.C., § 43-701G, as added by 1982, ch. 103, § 6, p. 281; am. 1988, ch. 137, § 7, p. 244.]

43-701H. Flat rate assessments — Water rights not affected. — Conversion by an irrigation district to the flat rate assessment procedure authorized in this chapter shall not affect in any manner the water rights appurtenant to or allocated to any tract of land in the irrigation district. [I.C., § 43-701H, as added by 1982, ch. 103, § 7, p. 281.]

Compiler's notes. Section 8 of S.L. 1982, ch. 103 declared an emergency. Approved March 18, 1982.

43-701I. Recharge projects — Levy for preliminary study costs — Purchase or lease of water. — If a ground water recharge project within all or part of the district is or may be deemed necessary by the board of directors of an irrigation district and a bond issue or other method of financing the project will be required, the board of directors may levy an assessment pursuant to section 43-701, Idaho Code, proportionate to the benefits received by the various tracts of land within all or part of the district, in an amount sufficient to obtain data, surveys, examinations, plans and professional services necessary to determine the cost or feasibility of the project, to purchase or lease water necessary for the project under such terms as are in compliance with section 42-222, Idaho Code, or to obtain authorization for the project. The board of directors may contract with any state or federal agency as well as any individual, firm, partnership, association, corporation or other recognized legal entity in order to obtain the data, surveys, examinations, plans or professional services that are required pursuant to this section. [I.C., § 43-701I, as added by 1988, ch. 163, § 1, p. 244.]

Compiler's notes. Section 2 of S.L. 1988, ch. 163 declared an emergency. Approved March 24, 1988.

43-701DD. Flat rate assessments — Collection by district. — If the district has adopted a flat rate method of assessing residential lots of one (1) acre or less as authorized by section 43-701B, Idaho Code, and if the district has elected not to have that assessment collected by county officers pursuant to section 43-701D, Idaho Code, the assessment shall be collected by the district in substantially the same manner that other assessments are collected pursuant to this chapter. [I.C., § 43-701DD, as added by 1988, ch. 137, § 5, p. 244.]

Compiler's notes. Section 6 of S.L. 1988, ch. 137 is compiled as § 43-701F.

43-702. Notice of correction of assessments. — Within ten (10) days after the date of levying the assessment as provided in section 43-701, the secretary of the board must give notice of the time the board of directors will meet to correct assessments, by publication in a newspaper published in each of the counties comprising the district, which notice shall be published weekly for a period of two (2) weeks. The time fixed for the meeting shall not be less than two (2) weeks, nor more than five (5) weeks from the first publication of the notice. In the meantime the assessment books must remain in the office of the secretary for the inspection of all persons interested. [1903, p. 150, § 24; reen. R.C. & C.L., § 2408; C.S., § 4385; I.C.A., § 42-702; am. 1949, ch. 220, § 2, p. 463; am. 1967, ch. 397, § 2, p. 1179.]

Cited in: *Cowan v. Lineberger*, 35 Idaho 403, 206 P. 805 (1922); *Brown v. Shupe*, 40 Idaho 252, 233 P. 59 (1924).

43-703. Board of correction. — Upon the day specified in the notice required by the preceding section of the meeting, the board of directors, which is hereby constituted a board of corrections for that purpose, shall meet and continue in session, from day to day, as long as may be necessary not to exceed five (5) days, exclusive of holidays, and may make such changes in said assessment book as may be necessary to make it conform to the facts. In the event that the time set for the board of directors to meet to correct assessments should coincide with the time of the regular meeting of the board, the board of directors will in addition to their regular duties be regarded as sitting as a board of correction as above provided. Assessments levied for maintenance and operation of the district as provided in section 43-701 may be reviewed by the board of correction upon the request of any person interested. Within five (5) days after the close of said session the secretary of the board shall have the corrected assessment book complete. [1903, p. 150, § 25; reen. R.C., § 2409; am. 1911, ch. 71, § 5, p. 194; am. 1911, ch. 154, § 10, p. 461; reen. C.L., § 2409; C.S., § 4386; I.C.A., § 42-703; am. 1949, ch. 220, § 3, p. 463; am. 1967, ch. 397, § 3, p. 1179.]

Cross ref. See note under the heading *v. Avondale Irr. Co.* (1917), 30 Idaho 479, 166 P. 259.
“Method of Assessment” in § 43-701; *Holland*

Sec. to sec. ref. This section is referred to in § 43-905.

Cited in: Cowan v. Lineberger, 35 Idaho 403, 206 P. 805 (1922); Haga v. Nampa & Meridian Irrigation Dist., 38 Idaho 333, 221 P. 147 (1923).

ANALYSIS

Equitable remedy.

Failure to object.

Nature of board.

Equitable Remedy.

Person aggrieved by wrongful assessment could not invoke powers of equity to enjoin

tax, unless he first sought redress in manner provided by statute. Brown v. Shupe, 40 Idaho 252, 233 P. 59 (1924).

Failure to Object.

Person who failed to make objections before board waived them. Brown v. Shupe, 40 Idaho 252, 233 P. 59 (1924).

Nature of Board.

Board of corrections of irrigation district is analogous to board of equalization of county, so far as correcting assessments is concerned. Brown v. Shupe, 40 Idaho 252, 233 P. 59 (1924).

43-704. Levy of assessments. — At a regular meeting between August 1 and November 8 of each year the board of directors shall levy an assessment upon the lands in said district upon the basis, and in the proportion, of the list and apportionment of benefits approved by the court as hereinbefore provided, which assessment shall be sufficient to pay principal of and interest on the outstanding bonds of the district as the same fall due. The secretary of the board must compute and enter in a separate column of the assessment book the respective sums, in dollars and cents, to be paid as an assessment on the property therein enumerated. When collected, the assessment shall be paid into the district treasury and shall constitute a special fund to be called "Bond fund of _____ irrigation district."

In case any assessment should be made for the purpose contemplated by a bond authorization, it shall be entered in a separate column of the assessment book in the same manner as the bond fund; and when collected shall constitute the "Construction fund of _____ irrigation district." [1903, p. 150, § 26; am. 1907, p. 484, § 1; am. R.C., § 2410; am. 1915, ch. 143, § 8, p. 304; reen. C.L., § 2410; C.S., § 4387; I.C.A., § 42-704; am. 1949, ch. 221, § 1, p. 467; am. 1966 (2nd E.S.), ch. 8, § 3, p. 20; am. 1967, ch. 397, § 4, p. 1179; am. 1980, ch. 75, § 1, p. 157.]

Compiler's notes. Section 4 of S.L. 1966 (2nd E.S.), ch. 8 declared an emergency. Approved March 10, 1966.

Cross ref. List and apportionment of benefits, §§ 43-404, 43-405.

Sec. to sec. ref. This section is referred to in § 43-1817.

Cited in: American Falls Reservoir Dist. v. Thrall, 39 Idaho 105, 39 Idaho 130, 228 P. 236 (1924).

ANALYSIS

Application.

Constitutionality.

Designation of land.

Application.

District could not levy assessment under this section until after confirmation of benefits in accordance with § 43-406. Haga v.

Nampa & Meridian Irrigation Dist., 38 Idaho 333, 221 P. 147 (1923).

Constitutionality.

Legislation vesting irrigation district with power to levy assessments for local improvement is authorized by the provisions of Const., Art. 7, § 6. Oregon S.L.R.R. v. Pioneer Irrigation Dist., 16 Idaho 578, 102 P. 904 (1909).

Designation of Land.

Designation of land was sufficient where it afforded owner the means of identification and did not positively mislead him or was not calculated to mislead him. Oregon S.L.R.R. v. Pioneer Irrigation Dist., 16 Idaho 578, 102 P. 904 (1909).

Collateral References. 45 Am. Jur. 2d, Irrigation, §§ 71-73.

Inclusion of amount to cover delinquencies

in assessment for public improvement as contrary to constitutional guaranties. 40 A.L.R. 1352; 42 A.L.R. 1185.

43-705. Subsequent levy when first void for irregularity. — If the levy or levies of any assessment or assessments for any year or years, provided for by this chapter, on any or all the lands of the district, which remain unpaid, shall be discovered to be irregular or void because of any irregularity, informality or error in the assessment books or on account of the assessment books not having been made, completed or returned within the time required by law, or on account of any property having been listed on the assessment books without any name or with the name of any other person than that of the true owner, or in any of the various notices required by law to be published or given, or in the proceedings of any of the officers connected with the assessment, correction, levying or collection of such assessment or assessments, or in the issuance or recording of the certificates of sale therefor, another levy of such assessment or assessments may be made on such land or lands the year following the discovery of such irregularity, informality or error, in the manner provided by this chapter, and such subsequent levy or levies shall have the same force and effect as the original would have had if made in full accordance with the statutes: provided, however, that the provisions of this section shall not apply to assessments for construction or purchase of irrigation works levied otherwise than in accordance with the apportionment of benefits as confirmed by the court. [C.S., § 4387A, as added by 1925, ch. 65, § 1, p. 96; I.C.A., § 42-705.]

43-706. Lien of assessment. — All assessments shall be liens against the property assessed from and after the first Monday in March of any year, the lien for the bonds of any series shall be a preferred lien to that of any subsequent series, except as in this title otherwise provided, and such lien shall not be removed until the assessments are paid or the property sold for the payment thereof. [1903, p. 150, § 27; reen. R.C., § 2411; am. 1911, ch. 71, § 6, p. 194; am. 1911, ch. 154, § 11, p. 461; am. 1915, ch. 143, § 9, p. 304; reen. C.L., § 2411; C.S., § 4388; I.C.A., § 42-706.]

Compiler's notes. Amendatory matter relating to contracts with federal reclamation service was transferred to 167:18 in C.L. (§ 43-1818 herein).

Sec. to sec. ref. This section is referred to in § 43-1104.

Cited in: Cowan v. Lineberger, 35 Idaho 403, 206 P. 805 (1922).

43-707. Payment of assessments — When delinquent. — Except in districts which have prior to such assessment entered into contracts with the United States requiring payments to the United States on or before December first of that year, on or before the first day of November the secretary must deliver the assessment book to the treasurer of the district, who shall within ten (10) days publish a notice in a newspaper published in each county in which any portion of the district may lie, that said assessments are due and payable and will become delinquent at five o'clock p.m. on the twentieth day of December next thereafter, and also the times

and places at which the payment of the assessments may be made, which notice shall be published for the period of two (2) weeks. The treasurer must attend at the times and places specified in the notice to receive assessments, which must be paid in lawful money of the United States: provided, that maintenance warrants of the district may be accepted as cash in the hands of the original owner for the payment of the maintenance assessments; and that matured bonds of the district and the accrued interest coupons detached from any of the bonds of the district, when presented by landowners within the irrigation district, may be accepted as cash in payment of assessments levied for bond interest and principal, and in the event that the said bonds so used are of a greater denomination than the said assessments the treasurer shall indorse upon said bond or bonds the amount necessary to pay said assessment or assessments and the date of said payment, and take a receipt from such bond holder for the amount so credited, and either such receipt describing the bond so indorsed or such indorsement shall be prima facie evidence that the said sum so indorsed has been paid on said bond or bonds. He must mark the date of payment of any assessment in the assessment book opposite the name of the person paying and give a receipt to such person, specifying the amount of the assessment and the amount paid with a description of the property assessed. On the twentieth day of December, at five o'clock p.m. of each year, all unpaid assessments for the current year are delinquent; provided, that if any person shall pay one-half ($\frac{1}{2}$) of his assessment before they become delinquent as aforesaid, the remaining one-half ($\frac{1}{2}$) shall not become delinquent until the twentieth day of June at five o'clock p.m. of each year.

Where subdivided parcels have been combined for assessment purposes as permitted by section 43-701, Idaho Code, payment of any assessment against the parcels in the combined area shall be made by the designated person or by someone acting under his authority, by a single remittance or, if payment is made in two (2) installments, then by two (2) remittances. It shall be the responsibility of the owners of the parcels within the combined area to determine their respective shares of the assessment and to provide funds to the designated person for payment of their respective shares thereof.

The treasurer of the district shall not be required to accept partial payments of any installment of an assessment. [1903, p. 150, § 28; am. 1907, p. 484, § 1; reen. R.C., § 2412; am. 1911, ch. 127, § 1, p. 414; am. 1911, ch. 139, § 1, p. 435; am. 1913, ch. 170, § 1, p. 542; am. 1915, ch. 88, § 1, p. 206; reen. C.L., § 2412; am. 1919, ch. 141, § 1, p. 436; am. 1919, ch. 16, § 1, p. 79; C.S., § 4389; am. 1929, ch. 74, § 1, p. 111; I.C.A., § 42-707; am. 1959, ch. 93, § 1, p. 204; am. 1989, ch. 368, § 2, p. 922.]

Compiler's notes. Section 1 of S.L. 1989, ch. 368 is compiled as § 43-701.

Section 2 of S.L. 1919, ch. 16 declared an emergency. Approved March 3, 1919.

Section 2 of S.L. 1959, ch. 93 declared an emergency. Approved March 7, 1959.

Section 3 of S.L. 1989, ch. 368 declared an emergency. Approved April 5, 1989.

ANALYSIS

Construction.
Estoppel of landowner.

Payment in money.
 Statute of limitations.
 Unpaid assessments.

Construction.

Maintenance warrants were payable by assessments made in year in which work, labor, or materials were furnished. *Little v. Emmett Irrigation Dist.*, 45 Idaho 485, 263 P. 40, 56 A.L.R. 822 (1928).

Estoppel of Landowner.

Landowner within irrigation district who sought to avoid payment by alleging irregularities in issuance of the bonds, and who, with full knowledge of such defects, had by his silence acquiesced in expenditure of fund derived from sale of said bonds, was estopped from objecting to the payment of such assessments. *Page v. Oneida Irrigation Dist.*, 26

Idaho 108, 141 P. 238 (1914).

Payment in Money.

Agreement of treasurer to receive payment other than "lawful money of United States" was legal nullity. *Holland v. Avondale Irrigation Dist.*, 30 Idaho 479, 166 P. 259 (1917).

Statute of Limitations.

So-called maintenance fund was not special or particular fund created by statute, and its existence was not necessary for statute of limitations to begin to run. *Little v. Emmett Irrigation Dist.*, 45 Idaho 485, 263 P. 40, 56 A.L.R. 822 (1928).

Unpaid Assessments.

Where assessment was delinquent, it was duty of treasurer to sell land. *Holland v. Avondale Irrigation Dist.*, 30 Idaho 479, 166 P. 259 (1917).

43-707A. Acceptance of bank drafts or checks. — (1) Notwithstanding any other provisions of title 43, Idaho Code, irrigation district treasurers may accept personal or other nonguaranteed forms of bank drafts or checks if (1) the remitter identifies by legal description the parcel for which the payment is tendered, (2) the amount for which the draft or check is presented is the exact amount of the assessment due, including, where a delinquency exists and a tax deed has not been issued, penalties, interest and county redemption fees. The following procedures shall be followed in processing payments by bank drafts or checks:

(a) The assessment number of the identified parcel shall be entered on the draft or check.

(b) The treasurer shall prepare the current tax receipt or redemption certificate or both, and deliver them to the remitter. Such receipts shall be invalid, and shall so state, if payment of the draft or check is refused by the bank or other entity on which it is drawn. Any drafts or checks upon which payment has been refused will be noted in the records of the treasurer and notice of nonpayment shall be delivered to the county recorder. The notation and notice of nonpayment shall be sufficient reversal of any entries made upon the books of the district treasurer and upon the lien records of the county recorder.

(c) Notice shall be sent to the remitter that payment has not been received, that receipts and releases are therefore invalid and withdrawn and that the draft or check can be redeemed by payment with United States currency or a guaranteed bank draft or money order in the amount of the original draft or check plus the additional interest accrued, plus a repetition of the county filing fees and plus a handling charge not to exceed ten dollars (\$10.00).

(2) Full compliance with procedures enumerated in this section shall exempt the treasurer from any personal liability for the acceptance of bank drafts or checks. [I.C., § 43-707A, as added by 1983, ch. 168, § 1, p. 475.]

43-708. Delinquent assessments — Entry on roll — Effect — Penalties for delinquencies. — On or before the second Monday of

January of each year succeeding the year in which the assessments are levied the treasurer shall carry out and enter all delinquent assessments, with the penalties thereon, on the assessment roll, which entry shall be considered to be dated as of the first day of January in such succeeding year, and shall have the force and effect of a sale to the treasurer of the district as grantee in trust for the district for all lands entered upon the assessment roll upon which one-half ($\frac{1}{2}$) or more of the original amount of such assessments have not been paid before delinquency.

On or before the second Monday of July of such succeeding year the treasurer shall make delinquency entries as hereinbefore described for all lands entered on the assessment roll on which the remaining one-half ($\frac{1}{2}$) of the original amount of such assessment has not been paid before delinquency, which entries shall also be considered to be dated as of January first of such year.

The penalties required to be added on delinquent assessments shall be two per cent (2%) of the amount remaining unpaid and the treasurer shall collect such delinquent assessments with such penalty added, together with interest on the amount of such delinquent assessments at the rate of one per cent (1%) per month from said first day of January until redemption, provided that where such penalties and interest do not aggregate the sum of one dollar (\$1.00) on any one assessment number, the treasurer shall not be required to collect such penalty and interest.

Provided, that if the first half ($\frac{1}{2}$) of such taxes be not paid prior to the said twentieth day of December, the amount of such one-half ($\frac{1}{2}$), plus a penalty of two per cent (2%) thereof with interest on the total at the rate of one per cent (1%) per month from the date of delinquency may be paid at any time between the third Monday of January in the year succeeding the year in which such taxes are levied and the twentieth day of June next thereafter, and, in the event of such payment, the second one-half ($\frac{1}{2}$) of such taxes may be paid thereafter, without penalty, at any time between the two (2) dates last above-mentioned. [C.S., § 4389A, as added by 1925, ch. 128, § 1, p. 173; am. 1927, ch. 194, § 1, p. 260; I.C.A., § 42-708; am. 1937, ch. 110, § 1, p. 165; am. 1959, ch. 88, § 1, p. 200; 1965, ch. 237, § 2, p. 575; am. 1980, ch. 77, § 1, p. 159.]

Compiler's notes. This section was also amended by S.L. 1965, ch. 21, § 1, which amending act was specifically repealed by S.L. 1965, ch. 237, § 1.

Section 2 of S.L. 1980, ch. 77 provided that the act should take effect on and after January 1, 1981.

Section 2 of S.L. 1927, ch. 194, declared an emergency. Approved March 11, 1927.

Section 2 of S.L. 1959, ch. 88 declared an emergency. Approved March 7, 1959.

Sec. to sec. ref. Sections 43-708 — 43-718 are referred to in § 43-722.

Collateral References. Inclusion of amount to cover delinquencies in assessment for public improvement as contrary to constitutional guaranties. 40 A.L.R. 1352; 42 A.L.R. 1185.

43-709. Delinquent assessments — Certificate of amount collected. — On or before the third Monday of January of each year succeeding the year in which the assessments were levied, the treasurer shall make his certificate to the secretary of the district showing the amount of such assessments collected into the several funds before date of delinquency and

the amounts of such assessments which have become delinquent, and on or before the third Monday of July of such year the treasurer shall make a certificate to the secretary of the district showing the amounts of the second instalments of such assessment which have been collected into the several funds before date of delinquency and the amounts of such second instalments which have become delinquent. [C.S., § 4389B, as added by 1925, ch. 128, § 1, p. 173; I.C.A., § 42-709.]

43-710. List of delinquency entries where redemptions not made.

— On or before the fourth Monday of July of the year succeeding the year in which such assessments were levied, the treasurer shall compile a list of such delinquency entries in cases where redemptions have not been made, which list shall contain the description of the lands covered by such delinquency entries, the name of the person to whom they were assessed, together with the amount of such delinquent assessments with said penalty, numbering each entry on such list consecutively in the order such entries appear on the assessment roll, and in case such list is not in the alphabetical order of the names of the persons to whom the property was assessed, he shall supplement such list with such alphabetical index. [C.S., § 4389C, as added by 1925, ch. 128, § 1, p. 173; I.C.A., § 42-710.]

Sec. to sec. ref. This section is referred to in § 43-701E.

43-711. Delinquency list — Filing of certified copy. — On or before the fourth Monday of July of the year succeeding the year in which such assessments were levied, the treasurer shall file a certified copy of the delinquency list as provided in the preceding section with the county recorder of the county in which the lands covered by the various delinquent assessments are located, which list shall be kept with the records of said county recorder in a book to be furnished by the district designated, "Record of Delinquent Assessments _____ Irrigation District." Upon receiving such certified list, the recorder shall enter the same on his reception book and be entitled to a filing fee of two dollars (\$2.00) therefor. [C.S., § 4389D, as added by 1925, ch. 128, § 1, p. 173; I.C.A., § 42-711.]

Sec. to sec. ref. This section is referred to in § 43-701E.

43-712. Delinquent assessments — Redemption of land. — After delinquency and prior to three (3) years from the date of entry of such delinquency, and thereafter until assessment deed is issued by the treasurer, redemption of lands may be made by paying to the treasurer an amount equal to the delinquent assessments thereon, plus the penalty of two per cent (2%) thereon, together with interest at the rate of eight per cent (8%) per annum from the date of delinquency entry until paid. Upon redemption, the treasurer shall note the redemption on the delinquent list and shall issue a redemption certificate in triplicate, showing the name of the redemptioner, the amount paid in redemption, description of lands

redeemed, year in which assessment was levied, and the delinquency entry number, delivering one (1) copy to the redemptioner, and in case the land being redeemed has been included in a list filed with the county recorder, he shall file one (1) copy with the county recorder of the county in which the land is located, and thereupon the county recorder shall enter the redemption opposite the corresponding entry in his record of delinquent assessments, for which service he shall be entitled to charge a fee as provided by section 31-3205, Idaho Code, which fee shall be added to the amount necessary for redemption paid by the redemptioner, and be transmitted to the county recorder by the district treasurer.

If the property on which the assessments are delinquent is not redeemed within the time hereinbefore limited, and if the assessment deed for the delinquency is made by the treasurer to the district, such property may nevertheless be redeemed by the owner thereof, or by any party in interest, up to the time a sale of the property is made by the board of directors and deed or contract for sale is delivered to the purchaser, by paying to the district treasurer the amount of all unpaid assessments levied or assessed against the said property to the time of redemption together with penalty and interest thereon and also by paying assessments for the year or years since the date of issuance of assessment deed to the district together with penalty and interest thereon, and all costs incurred for a sale of the property by the district, and the sum of two dollars (\$2.00) for redemption deed from the district, and all other fees and charges for redemption otherwise prescribed by law. All assessments accruing against such property subsequent to the issuance of deed to the district shall be extended by the treasurer and be computed according to the authorized levies for the year or years to be extended. Upon payment to the district treasurer of the amounts required to be paid as herein provided, the district treasurer must issue a redemption deed to the redemptioner. [C.S., § 4389E, as added by 1925, ch. 128, § 1, p. 173; I.C.A., § 42-712; am. 1937, ch. 110, § 2, p. 165; am. 1970, ch. 96, § 1, p. 243; am. 1984, ch. 174, § 1, p. 419.]

Sec. to sec. ref. This section is referred to in §§ 42-4221, 42-5124, 42-5243 and 43-720.

43-713. Alternate system of payment in instalments of delinquent assessments of districts. — Notwithstanding the provisions of 43-712 as amended, 43-715, and 43-716 as amended, redemption of the assessments levied for the years 1935 to 1940, inclusive, or any of them, may be made in accordance with the following formula:

If a redemptioner shall, on or before the third Monday of December, 1941, pay the oldest half year's delinquency, plus the penalty and interest thereon, and shall also pay the first half of the assessment levied for the year 1939, the period of redemption on the remaining delinquency shall be automatically extended to the third Monday of June, 1942, and if, before the third Monday of June, 1942 he shall pay the next oldest half year's delinquency, plus the penalty and interest thereon, and shall also pay the second half of the assessment levied for the year 1941, the period of redemption on the remaining delinquency shall be automatically extended to the third Monday

of December, 1942; and thereafter, so long as the redemptioner continues to pay one half ($\frac{1}{2}$) year's delinquency and one half ($\frac{1}{2}$) year's current undelinquent assessment before the next semiannual tax delinquency date, the period of redemption on the remaining delinquency shall be automatically extended to the next following semiannual tax delinquency date. In all cases where the district treasurer has heretofore complied with the provisions of sections 43-717 and 43-718 by giving the notice therein required, such notice need not again be given, mailed or published. This act shall not be construed to reduce the period of redemption of three (3) years now provided by sections 43-712 as amended, 43-715 and 43-716 as amended. [I.C.A., § 42-712a, as added by 1941, ch. 105, § 1, p. 187.]

Compiler's notes. The words "this act" refer to S.L. 1941, ch. 105 compiled herein as §§ 43-713, 43-714.

43-714. Restricting application of alternate system of payment. — The provisions of this act shall not apply to irrigation districts which have arranged for the collection of the district assessments by county officers under the provisions of sections 43-728 to 43-730 inclusive. [1941, ch. 105, § 2, p. 187.]

Compiler's notes. The words "this act" refer to S.L. 1941, ch. 105 compiled herein as §§ 43-713, 43-714. Section 3 of S.L. 1941, ch. 105 declared an emergency. Approved Mar. 7, 1941.

43-714A. Definitions. — Words and terms used in this chapter, unless the context otherwise requires, are defined as follows:

(1) "District" means an irrigation district organized under the provisions of title 43, Idaho Code.

(2) "Board" means the board of directors of a district.

(3) "Treasurer" means the duly appointed officer of an irrigation district, and his or her deputies or employees. Such treasurer acts as ex officio tax collector for the purposes of this chapter.

(4) The term "delinquent assessments" as herein used shall be deemed and construed to include all general and special assessments and charges for operation and maintenance, bond or loan contract payments, or other authorized expenditures, entered in irrigation district assessment rolls, not paid when due, and collectible in the manner provided in chapter 7, title 43, Idaho Code.

(5) "Facsimile" means the reproduction or supplying of an exact copy from an original document.

(6) "Party in interest" means a person or persons, partnership, corporation, business venture, or other entity which holds a valid and legally binding purchase contract, mortgage or deed of trust, properly recorded, in and for the property for which a delinquency entry has been made.

(7) "Record owner or owners" means the person or entity in whose name or names the property stands upon the records in the county recorder's office. Where the record owners are husband and wife at the time the notice

described in section 43-717, Idaho Code, shall issue, notice to one (1) spouse shall be deemed and imputed as notice to the other spouse.

(8) "Tax certificate" means a written assignment of a district's right to a tax deed as provided in section 43-715, Idaho Code. [I.C., § 43-714A, as added by 1994, ch. 144, § 1, p. 316.]

43-715. Delinquent assessments — Sale of rights to tax deed — Purchaser's rights after redemption period. — (1) After the delinquency list has been filed with the county recorder and prior to the expiration of the period of redemption, the board may by written assignment convey its right to tax deed on any delinquency entry to any person paying to the treasurer the amount of such delinquency entry, together with the penalty and interest to the date of assignment as required in case of redemption. Whereupon, the treasurer shall note such assignment opposite the entry on his list of delinquency entries and in case of subsequent redemption thereof, he shall pay the amount so received in redemption to the assignee upon surrender of the tax certificate reassigned to the district: provided, however, that no assignment shall be made unless all prior assessments against the lands covered by such delinquency entry be first fully paid.

(2) During such time, any person shall be entitled to become a purchaser of the rights of the district in any unredeemed delinquency entry and the board shall make to the purchaser a proper tax certificate therefor upon receipt of said sums in cash.

(3) After the expiration of the period of redemption, the owner of any tax certificate shall be entitled to tax deed thereon upon delivering to the treasurer his tax certificate from the district, with proper assignments from any previous owner; or, in case of the loss of the tax certificate, of satisfactory proof that he is the owner of the tax certificate: provided, that notice of the pending issuance of tax deed has been served as required by section 43-717, Idaho Code, and that, after compliance with section 43-719(1) or (2), the board has directed the treasurer to issue the tax deed. Any tax certificate upon which tax deed has not been claimed by the owner of the tax certificate within two (2) years from the expiration of the period of redemption shall become null and void. [C.S., § 4389F, as added by 1925, ch. 128, § 1, p. 173; am. 1929, ch. 44, § 1, p. 53; I.C.A., § 42-713; am. 1994, ch. 144, § 2, p. 316.]

Sec. to sec. ref. Sections 43-715 — 43-721 are referred to in §§ 42-4221, 42-5124 and 42-5243.

42-5124, 43-713, 43-714A, 43-2005 and 43-2006.

This section is referred to in §§ 42-4221,

Sections 43-715 — 43-721 are referred to in § 42-5243.

43-716. Delinquent assessments — Issuance of tax deed — General provisions. — If the property is not redeemed within three (3) years from the date of delinquency entry, the treasurer of the district or his successor in office must make to the district or to the owner of the tax certificate, a tax deed to the property. However, the district or the owner of the tax certificate shall not be entitled to a tax deed for such property until;

(1) a notice of pending issuance of tax deed be served, as required in section 43-717, Idaho Code; and (2) an affidavit of compliance be filed, as required in section 43-718, Idaho Code. [C.S., § 4389G, as added by 1925, ch. 128, § 1, p. 173; I.C.A., § 42-714; am. 1933, ch. 3, § 1, p. 4; am. 1994, ch. 144, § 3, p. 316.]

Compiler's notes. Section 2 of S.L. 1933, ch. 3 provides as follows: "If any section, subdivision, sentence, or clause in this act shall for any reason be held unconstitutional or void, such decision shall not affect the validity of any other portion of this act."

Section 3 of S.L. 1933, ch. 3 declared an emergency. Approved Jan. 4, 1933.

Sec. to sec. ref. This section is referred to in § 43-713.

Relief from Judgment.

Irrigation district failed to establish that it was entitled to relief from judgment and order of the district court holding that foreclosure procedures established by this section and §§ 43-717 and 43-724 were unconstitutional in failing to provide due process protection to property owners whose land was sold at tax

sale to cover past due irrigation district assessments; irrigation district did not establish existence of jurisdictional defect, property owner's injury was not dependent on their ability to prevail at a hearing, and facts of case were undisputed. *Dufur v. Nampa & Meridian Irrigation Dist.*, 128 Idaho 319, 912 P.2d 687 (Ct. App. 1996).

Where this section, §§ 43-717 and 43-724 were found to be unconstitutional due to failure to provide due process protection to property owners whose land was sold at tax sale to cover past due irrigation district assessments, tax deeds to purchaser at tax sale were appropriately voided and title was restored to original owners. *Dufur v. Nampa & Meridian Irrigation Dist.*, 128 Idaho 319, 912 P.2d 687 (Ct. App. 1996).

43-717. Delinquency entries — Service of notice of pending issuance of tax deed — Exclusive procedure for judicial review. —

(1) The treasurer of the district wherein the property for which a tax deed may issue, or the owner of the tax certificate, shall serve or cause to be served written notice of pending issuance of tax deed upon the record owner or owners and parties in interest of record in the following exclusive manner:

(a) By serving or causing to be served a copy of such notice by certified mail with return receipt demanded upon the record owner or owners and parties in interest of record at their last known address, such service of notice to be made no more than five (5) months nor less than two (2) months before the time set for the tax deed to issue;

(b) In the event that such notice is served as above described and returned undelivered and after reasonable and diligent search and inquiry in attempting to locate and serve the record owner or owners and parties in interest of record, then by publishing a summary of such notice in a newspaper having general circulation in the county wherein the property is situated. Such publication must be made at least once a week for four (4) consecutive weeks, the last publication of which is to be no more than two (2) months nor less than fourteen (14) days before the time set for the tax deed to issue.

(c) For purposes of paragraph (b) of this section, an examination of the ownership records maintained by the assessor of the county in which the property is located in accordance with section 63-307, Idaho Code, and an examination of the current telephone directory for the area where the property is located, shall be deemed a reasonable and diligent search and inquiry in attempting to locate and serve the record owner or owners and parties in interest of record.

(2) The record owner or owners and parties in interest of record shall be liable for and shall pay to the treasurer or to the owner of the tax certificate all reasonable costs and fees in the preparation, service and publication of such notice and such reasonable costs shall become a lien upon the property in favor of the district or the owner of the tax certificate and shall be added to the delinquent assessment.

(3) Such notice and summary thereof must contain the following items:

(a) The name and last known address of the record owner or owners;

(b) An accurate description of the property for which the delinquency entry has been made, or, in lieu thereof, the irrigation district assessment number assigned to the property in the assessment roll of the district, and either:

i. A street address or other information which would be of assistance to the public in ascertaining the location of the property; or

ii. The name and telephone number of a person, firm or business office from whom information concerning the location of the property may be obtained;

(c) The year for which the assessment was levied and for which the assessment is delinquent;

(d) An itemized statement showing assessment, penalty, interest and all costs and fees incident to the delinquency entry and such notice up to and including the date of the making of such notice;

(e) The date the delinquency entry was made;

(f) The time, date, place at which, and by whom the tax deed will issue; and

(g) A statement that the record owner or owners or any party in interest shall have adequate opportunity to be heard by the board, to confront and cross-examine any evidence or witness against the record owner or owners, and obtain and present evidence on behalf of the record owner or owners or any party in interest. Such statement shall also contain notice of to whom written inquiries and objections shall be directed concerning the notice and information contained therein and by what date such inquiries and objections must be received. Verbal inquiries and objections shall not be considered for any purpose.

(h) A statement that a hearing before the board and judicial review of the board's decision are the exclusive remedies for challenging the issuance of the tax deed and that no other action can be taken to determine the validity of a properly executed tax deed and that the tax deed conveys complete title to the described land to the grantee named in the tax deed.

(4) Judicial review of a decision of the board as provided in section 43-719(2), Idaho Code, shall be the exclusive method for judicial determination of the regularity of all proceedings from the assessment by the board, inclusive, up to the execution of the tax deed, and no separate or independent action shall lie for the determination of the regularity of those proceedings.

(5) Any party in interest may file a written request for such notice in the office of the treasurer of the district wherein the property for which the delinquency entry has been made is situated. Such request shall contain the following items:

- (a) The name and address of the record owner or owners;
 - (b) An accurate description of the property covered by the interest, or, in lieu thereof, the irrigation district assessment number used in assessing the same;
 - (c) The name and address of the party in interest;
 - (d) An accurate description of the interest held; and
 - (e) The date of termination of the interest held.
- (6) If a record owner or owners or a party in interest shall have actual knowledge of the notice of pending issuance of a tax deed or that issuance of a tax deed is pending, it shall be deemed sufficient notice under this section.
- (7) Service shall be deemed completed upon depositing the certified mailing containing the original or a copy of the notice of pending issuance of tax deed with return receipt demanded in any United States post office mail box, or upon physical delivery of such notice or copy thereof by the treasurer or by the owner of the tax certificate or by appointed agent of either, to the record owner or owners or party in interest, or upon the date of last publication. [I.C., § 43-717, as added by 1994, ch. 144, § 5, p. 316; am. 1996, ch. 322, § 42, p. 1029.]

Compiler's notes. Former § 43-717, which comprised C.S., § 4389H, as added by 1925, ch. 128, § 1, p. 173; am. 1929, ch. 44, § 1, p. 53; I.C.A., § 42-715, was repealed by S.L. 1994, ch. 144, § 4, effective July 1, 1994.

Sections 41 and 43 of S.L. 1996, ch. 322 are compiled as §§ 43-701E and 44-2102, respectively.

Sec. to sec. ref. This section is referred to in §§ 43-713, 43-714A, 43-715, 43-719.

Relief from Judgment.

Irrigation district failed to establish that it was entitled to relief from judgment and order of the district court holding that foreclosure procedures established by § 43-716, this section and § 43-724 were unconstitutional in failing to provide due process protection to property owners whose land was sold at tax

sale to cover past due irrigation district assessments; irrigation district did not establish existence of jurisdictional defect, property owner's injury was not dependent on their ability to prevail at a hearing, and facts of case were undisputed. *Dufur v. Nampa & Meridian Irrigation Dist.*, 128 Idaho 319, 912 P.2d 687 (Ct. App. 1996).

Where § 43-716, this section and § 43-724 were found to be unconstitutional due to failure to provide due process protection to property owners whose land was sold at tax sale to cover past due irrigation district assessments, tax deeds to purchaser at tax sale were appropriately voided and title was restored to original owners. *Dufur v. Nampa & Meridian Irrigation Dist.*, 128 Idaho 319, 912 P.2d 687 (Ct. App. 1996).

43-718. Affidavit of compliance. — (1) At least five (5) days before the tax deed is to be issued, the treasurer or the owner of the tax certificate shall make an affidavit of compliance stating that he or she has complied with the conditions of issuance of notice of pending issuance of tax deed described in section 43-717, Idaho Code, and stating particularly the facts relied on as constituting such compliance.

(2) Such affidavit shall be delivered to the secretary of the district to be by such officer entered on the records of his or her office and carefully preserved among the files of such office. The treasurer or the owner of the tax certificate shall also cause to be filed with the secretary of the district an affidavit by the publisher of each newspaper in which notice of the pending issuance of the tax deed was printed and published, which affidavits of publication shall be filed and preserved among the files of the office of such

secretary. Such record or affidavit shall be prima facie evidence that such notice has been given.

(3) Any person who knowingly and intentionally swears falsely to facts averred in such affidavit shall be guilty of perjury and be punished by [a] fine of not more than three hundred dollars (\$300). [I.C., § 43-718, as added by 1994, ch. 144, § 5, p. 316.]

Compiler's notes. Former § 43-718, which comprised C.S., § 4389I, as added by 1925, ch. 128, § 1, p. 173; am. 1929, ch. 44, § 1, p. 53; I.C.A., § 42-716, was repealed by S.L. 1994, ch. 144, § 4, effective July 1, 1994.

The bracketed word "a" in subsection (3) was inserted by the compiler.

Sec. to sec. ref. This section is referred to in §§ 43-713, 43-716 and 43-722.

43-719. Delinquent assessments — Hearing and issuance of tax deed. — (1) When a record owner or owners or any party in interest upon whom a notice of pending issuance of tax deed is served or who has actual knowledge of such notice or its contents fails to appear or otherwise defend and answer at the time set for hearing in such notice and it is made to appear to the board that the owner of the tax certificate or the treasurer has fulfilled the requirements of sections 43-717 and 43-718, Idaho Code, the board shall, without further notice to the record owner or owners or any party in interest upon whom such notice has been served or who has actual knowledge of such notice and its contents, immediately direct that the treasurer shall issue a tax deed in favor of the district or the owner of the tax certificate, as the case may be.

(2) When a record owner or owners or any party in interest upon whom such notice is served or who has actual knowledge of such notice or its contents appears or answers at the date specified in such notice, the board shall consider documentary evidence and hear testimony and make a final decision in writing. Such final decision shall be mailed by certified mail, return receipt demanded, to all parties shown by the record of the proceedings to be affected by the board's action. If the board shall find that the owner of the tax certificate or the treasurer has conformed to the requirements of sections 43-717 and 43-718, Idaho Code, and that a delinquent assessment was owing on the property described and that such delinquency has not been paid, the board shall immediately direct that the treasurer issue a tax deed in favor of the district or the owner of the tax certificate, as the case may be. Such final decision shall include findings of fact and conclusions of law.

(3) A record of the proceeding shall be kept and entered into the district's minute book.

(4) Any person who is aggrieved by a final decision of the board concerning the issuance of a tax deed is entitled to have that decision reviewed by the district court of the judicial district wherein the property described is located by filing a petition in the district court within thirty (30) days after receipt of the final decision of the board. Such filing does not itself stay enforcement of the board's decision; however, the board may grant, or the reviewing court may order, a stay upon appropriate terms. Review shall be conducted by the court without a jury and shall be confined to the record in the district's minute book. The court may reverse or modify the decision of

the board if substantial rights of the appellant have been prejudiced because the board's finding, conclusions or decisions are:

- (a) Made upon unlawful procedure;
- (b) Clearly erroneous in view of reliable, probative, and substantial evidence on the whole record;
- (c) In violation of constitutional or statutory provisions; or
- (d) In excess of the statutory authority of the district.

(5) All costs and fees of any hearing or proceeding shall be awarded to the prevailing party; provided however, the costs and fees shall not be ordered paid by any district or its officials in absence of a showing of gross negligence, gross nonfeasance, or gross malfeasance by the district or its officers and a showing of substantial and definite injury to the petitioning party. [I.C., § 43-719, as added by 1994, ch. 144, § 5, p. 316.]

Compiler's notes. Former § 43-719, § 1, p. 196, was repealed by S.L. 1994, ch. 144, § 4, effective July 1, 1994. which comprised C.S., § 4389J, as added by 1925, ch. 128, § 1, p. 173; am. 1929, ch. 44, § 1, p. 53; I.C.A., § 42-717; am. 1957, ch. 117, in §§ 43-715, 43-717. **Sec. to sec. ref.** This section is referred to

43-720. Tax deed — Recitals — Effect as evidence — Title conveyed. — The matters recited in the delinquency entry must be recited in the deed, and such deed duly acknowledged or proved is prima facie evidence that:

(1) Benefits were apportioned to the property as required by law or water rights were properly allocated to the property.

(2) The assessment was levied in accordance with law.

(3) The assessment was equalized as required by law.

(4) The assessment, together with statutory penalties, interest and any other charges, was unpaid.

(5) At the proper time the delinquency entry was made as prescribed by law and by the proper officer.

(6) The property was unredeemed within the time allowed by the first paragraph of section 43-712, Idaho Code.

(7) The person who executed the tax deed was the proper officer. Such deed duly acknowledged and proved is prima facie evidence of the regularity of all other proceedings for the assessment, inclusive, up to the execution of the deed. The deed conveys to the grantee the absolute title to the lands described therein, free of all encumbrances except mortgages of record to the holders of which notice as has not been sent as in this chapter provided, and except any lien for assessments which have attached subsequent to the assessment resulting in the issuance of the tax deed and except any lien for state and county taxes.

Any number of descriptions of land in the same district may be included in one (1) deed where the certificates are held by one (1) person, or the district. [C.S., § 4389K, as added by 1925, ch. 128, § 1 p. 173; I.C.A., § 42-718; am. 1994, ch. 144, § 6, p. 316.]

Compiler's notes. C.S., § 4389K, as added by S.L. 1929, ch. 187, § 1 was repealed by S.L. 1931, ch. 61, § 2.

Section 7 of S.L. 1994, ch. 144 is compiled as § 43-726.

Cross ref. Short form of tax deed, § 43-724.

County Tax Deed.

A deed from the county, to property acquired by it for nonpayment of taxes, con-

veyed to the county's purchaser the property free from irrigation assessments and also municipal taxes levied against such property. *Smith v. Nampa*, 57 Idaho 736, 68 P.2d 344 (1937).

43-721. Tax deed as evidence. — Such deed duly acknowledged and proved, is prima facie evidence of the regularity of all other proceedings, from the assessment by the secretary inclusive, up to the execution of the deed. [1919, ch. 61, § 3, p. 195; C.S., § 4399; I.C.A., § 42-719.]

Compiler's notes. The words "such deed" referred to the deed mentioned in C.S., § 4398 (see § 43-723, note). It may be that the words now refer to the deed mentioned in § 43-720.

person questioning the tax title to prove defects or irregularities so as to overcome the prima facie effect of the tax deed. *Bogart v. Bagley*, 65 Idaho 177, 141 P.2d 975 (1943).

ANALYSIS

Effect of statute.

Sale of delinquent lands.

Effect of Statute.

The effect of this statute was to change the order of proof, and to cast the burden upon the

Sale of delinquent lands.

Tax deeds were prima facie evidence of sale of delinquent lands in irrigation district but positive evidence proving there was no sale was properly admitted. *Eberhard v. Purcell*, 50 Idaho 393, 296 P. 593 (1931).

43-722. Application of preceding sections. — The provisions of sections 43-708 to 43-718, inclusive, shall apply to all assessments of irrigation districts organized and existing under chapters 1 to 15, inclusive, of this title, which are levied in the year 1925 and subsequent years.

Provided that the provisions of sections 43-708 to 43-718, inclusive, shall not apply to irrigation districts which have arranged for the collection of the district assessments by county officers under the provisions of sections 43-727 to 43-729, inclusive. [1925, ch. 128, § 2, p. 173; am. 1927, ch. 140, § 1, p. 182; I.C.A., § 42-720.]

43-723. Application of sections replaced. — Sections 4391, 4395, 4396, 4397, 4398, and 4400 of the Compiled Statutes of Idaho, section 4390 as amended by House Bill 29; passed at this session of the legislature, and sections 4392, 4393, 4394 and 4401, as amended by this act, shall not apply to assessments levied in the year 1925 and subsequent years, but shall be continued in force and effect for the purpose of proceedings under any assessments levied prior to the year 1925. [1925, ch. 128, § 7, p. 173; I.C.A., § 42-721.]

Compiler's notes. The sections of the Compiled Statutes of Idaho above referred to and continued in effect for the purpose of proceedings under any assessments levied prior to the year 1925 are surely obsolete after

the lapse of so many years. Consequently, this section as set out above is now probably obsolete.

Cited in: *Cowan v. Lineberger*, 35 Idaho 403, 206 P. 805 (1922).

43-724. Tax deed — Short form. — Upon the expiration of the period of redemption, the treasurer shall execute to the district or the holder and owner of any tax certificate a deed to the property described in said certificate, which deed shall recite that in consideration of the amount of tax (specifying the amount) for the year (naming the year) the treasurer transfers to the holder of said certificate the property therein described. Such deed shall be duly acknowledged by the treasurer and shall be bona fide evidence of the full compliance by the district and of all its officers with every act and thing required to be done as a condition to the issuance of said deed and of the full compliance with the law prerequisite to the execution of a valid tax deed and that the property has not been redeemed. Any number of descriptions of land in the same district may be included in one (1) deed where the certificates are held by one (1) person, or the district. [C.S., § 4401-A, as added by 1931, ch. 61, § 1, p. 104; I.C.A., § 42-722.]

Compiler’s notes. The words enclosed in parentheses so appeared in the law as enacted.
Sec. to sec. ref. This section is referred to in §§ 42-4221, 42-5124 and 42-5243.

Relief from Judgment.
Irrigation district failed to establish that it was entitled to relief from judgment and order of the district court holding that foreclosure procedures established by §§ 43-716, 43-717, and this section were unconstitutional in failing to provide due process protection to property owners whose land was sold at tax sale to cover past due irrigation district assessments; irrigation district did not establish existence

of jurisdictional defect, property owner’s injury was not dependent on their ability to prevail at a hearing, and facts of case were undisputed. *Dufur v. Nampa & Meridian Irrigation Dist.*, 128 Idaho 319, 912 P.2d 687 (Ct. App. 1996).
Where §§ 43-716, 43-717, and this section were found to be unconstitutional due to failure to provide due process protection to property owners whose land was sold at tax sale to cover past due irrigation district assessments, tax deeds to purchaser at tax sale were appropriately voided and title was restored to original owners. *Dufur v. Nampa & Meridian Irrigation Dist.*, 128 Idaho 319, 912 P.2d 687 (Ct. App. 1996).

43-725. State lands exempt from assessment. — No state lands included within any legally organized irrigation district shall ever be assessed, nor shall any of the preceding sections relative to the levying and collecting of assessments and taxes apply. The county recorder of every county in which certificates of sale of any state lands for irrigation district taxes have heretofore been filed or recorded shall cancel the same upon the records of said counties. [1903, p. 185, § 59; am. 1905, p. 378, § 1; reen. R.C., § 2439; am. 1917, ch. 164, § 1, subd. 2439, p. 493; reen. C.L., § 2415a; C.S., § 4402; I.C.A., § 42-723.]

Compiler’s notes. I.C.A. § 42-724, since it relates to both irrigation and drainage districts, has been compiled as § 43-2007.

Dist. v. Gallet, 43 Idaho 519, 253 P. 128 (1927).

ANALYSIS

Application.
Estoppel.
Payment for waste water.
Title to land in state.

Application.
Irrigation district has no lien on land the title to which are in state as existence of such lien is expressly prohibited. *Gem Irrigation*

Estoppel.
Purchaser of state lands, before completion of contract, cannot by estoppel or otherwise subject said lands to taxation levied by an irrigation district, since lands granted to the state by an act of congress remain state lands until a purchaser thereof has completed his purchase by payment in full (Act of Congress July 3, 1890, 26 Statutes 215). *Florer v. Wood River Valley Irrigation Dist.*, 56 Idaho 176, 51 P.2d 700 (1935).

Payment for Waste Water.

Where it was not shown that purchaser of land, under contract from state, in using waste water on such land interfered with rights of district within which such land was situated, he could not be compelled to pay district for such water. *Milner Low Rift Irrigation Dist. v. Eagen*, 49 Idaho 184, 286 P. 608 (1930).

Title to Land in State.

Land purchased from the state, under an agreement whereby the state retained title until complete payment, may not be taken for irrigation district assessments, and a deed issued based upon such assessments conveyed no title. *Florer v. Wood River Valley Irrigation Dist.*, 56 Idaho 176, 51 P.2d 700 (1935).

43-726. Sale for assessments — Limitation of actions to determine validity — Tender. — Every action, suit or proceeding which may be commenced for the purpose of determining the validity of a tax deed, brought by the original owner of the land or his assigns against the grantee named in the tax deed or his assigns, or to quiet title against him or them, or to remove the cloud of the tax deed, or to recover the possession from the tax deed grantee in possession, in cases where the assessment for which the land was sold had been paid before the issuance of the tax deed or the land redeemed after the issuance of the tax deed, or the lands were not subject to taxation at the time of assessment shall be commenced within two (2) years from the date of the issuance of the tax deed; and in every such action, suit or proceeding, whether before or after the issuance of tax deed, the party claiming to be the owner as against the district or against a party claiming under the tax certificate or under the tax deed shall tender with the first pleading in such action, suit or proceeding, and pay into court at the time of filing the same, the amount of the purchase price for which such lands were sold, or the amount of the assessment, penalties and interest for which a tax deed was issued to the district, together with all taxes and assessments which have been paid by the purchaser or paid or assessed by the district on said land after issuance of the tax deed, together with interest thereon at the rate of ten per cent (10%) per annum from the respective time of payment of such sums up to the time of filing of such pleading, the same, or such portion thereof as the court shall find to be just, to be paid to the district or said purchaser, his heirs or assigns, in case the right or title of the district or said purchaser shall fail in such suit, action or proceeding. [C.S., § 4402A, as added by 1925, ch. 128, § 8, p. 173; am. 1929, ch. 44, § 2, p. 53; I.C.A., § 42-725; am. 1994, ch. 144, § 7, p. 316.]

Compiler's notes. Section 6 of S.L. 1994, ch. 144 is compiled as § 43-720.

Sec. to sec. ref. This section is referred to in §§ 42-4221, 42-5124 and 42-5243.

Constitutionality.

Requirement of tender of purchase price for which land sold with first pleading does not violate Const., Art. 1, §§ 13, 18. *Eberhard v. Purcell*, 50 Idaho 393, 296 P. 593 (1931).

District court had the authority to fashion an equitable remedy in quiet-title action where it was established that statutory foreclosure proceedings were unconstitutional as they failed to provide due process protection

to property owners whose land was sold at tax sale to cover past due irrigation district assessments and court was not limited to exclusive statutory remedy offered by former § 43-726 as it had already declared statutory scheme relating to irrigation districts unconstitutional in earlier action. *Dufur v. Nampa & Meridian Irrigation Dist.*, 128 Idaho 319, 912 P.2d 687 (Ct. App. 1996).

Collateral References. Failure of property owner to avail himself of remedy provided by statute or ordinance as precluding attack based on improper inclusion or exclusion of property from assessment. 100 A.L.R. 1298.

43-727. County officers — Collection of district assessments. —

The board of directors of any irrigation district organized under the laws of this state desiring to provide for the collection of district assessments by the county officers instead of the district treasurer, may do so by adopting a resolution providing for such collection by the county officers, and furnishing a copy thereof to the county auditor of each county in which any of the district lands are located:[] provided, that the county commissioners of said county or counties, must first by unanimous vote concur in and agree to such resolution by a proper resolution made and entered upon the minutes of such board or boards of county commissioners. Such resolution may provide that only assessments against lands subdivided into tracts of four (4) acres or less shall be collected by the county officers. In addition to collection fees otherwise provided by law, the county commissioners may levy an additional fee against the irrigation district for the cost of transferring records and initiating the collection process. After the adoption of such resolution the board of directors of such district shall furnish the county auditor of each county in which any part of the district lands are located a duplicate or certified copy of any apportionment of benefits which has been made, and copy of the list or map showing said apportionment theretofore made in such district, and a notice of any district bond issue or district contract with the United States, stating clearly the amount thereof, the rate of interest, and the conditions of payment, and each year thereafter shall furnish the said auditor or auditors a certified copy, or duplicate, of any additional apportionment, including any annual apportionment for operation and maintenance purposes, and shall each year furnish such auditor or auditors a certified copy, or duplicate of the levy or assessment made by the order of said board of directors for operation and maintenance purposes, including organization expenses and maintenance of the district organization. All tracts benefited to the same extent, on a proportionate basis, by the water rights and irrigation system of the district, and by the operation and maintenance thereof, shall be included in a separate category plainly identified in the list showing said apportionment of benefits. After the receipt of said copy of such resolution of the board of directors of any irrigation district, the county auditor shall each year enter upon the county assessment roll against the property therein described the levy so made by the board of directors of said district as shown upon the copy or duplicate thereof furnished to the said auditor as above provided, in manner similar to that in which other municipal school or road district assessments are entered by him on said assessment roll, except that the sum assessed and charged against each description of land therein contained for such irrigation district purposes shall be entered by the auditor as the operation and maintenance assessment of the irrigation district against the same. Such district operation and maintenance tax shall be collected and accounted for by the county officers in the same manner as other municipal taxes and paid over to the district treasurer together with any penalties or interest collected thereon, and the collection thereof shall be enforced in the same manner, and neglect to pay the same shall be subject to the same penalties as the other taxes of the county:[] provided, however, that the

collection of such district assessments by such county officers, as herein provided, shall not make the bonds, contracts and interests due from such irrigation districts the obligation of such county or counties. [1923, ch. 178, 1st par. of § 1, p. 276; I.C.A., § 42-726; am. 1978, ch. 274, § 1, p. 638.]

Compiler's notes. The bracketed semicolons in the first and last sentences were inserted by the compiler.

Sec. to sec. ref. This section is referred to in §§ 43-701, 43-722, 43-801.

ANALYSIS

Construction.
State control of assessments.
State treasurer's duties.
Surety bonds.

Construction.

When condition that obligations of irrigation district may be collected by county officers was indorsed upon the obligation, it was irrevocable until represented indebtedness was paid. *American Falls Reservoir Dist. v. Thrall*, 39 Idaho 105, 39 Idaho 130, 228 P. 236 (1924).

State Control of Assessments.

Under this act, the state assumes complete control over assessments levied on account of

interest, principal, and safety fund. *Hurlebaus v. American Falls Reservoir Dist.*, 49 Idaho 158, 286 P. 598 (1930).

State Treasurer's Duties.

State treasurer, as custodian of district's funds, still acts in capacity of state treasurer, and fills duties of that office in manner provided for district treasurer. *Hurlebaus v. American Falls Reservoir Dist.*, 49 Idaho 158, 286 P. 598 (1930).

Surety Bonds.

Money coming into county treasurer's hands under this act is protected by his official bond, and district is not authorized to procure additional bond. *Hurlebaus v. American Falls Reservoir Dist.*, 49 Idaho 158, 286 P. 598 (1930).

Collateral References. Right of governmental unit or officers thereof, other than irrigation district, to compensation for collecting assessments levied by or owed irrigation district. 114 A.L.R. 1098.

43-728. County officers — District bond and contract obligations — Levy and collection of assessments. — After receipt of said notice of bond issues and contracts with the United States it shall be the duty of the county auditors of each county in which any of such district lands are located to furnish the board of county commissioners at or before its meeting on the second Monday in September, a statement showing the amount of the annual payment on said bonds or contract and the amount of interest thereon which will fall due during the next ensuing year should the board of directors adopt such a resolution. It shall be the duty of the board of county commissioners, or boards of county commissioners of the county or counties in which such district lands are located to levy on the lands in said district the tax necessary to meet the annual payment on said bonds or contracts and the interest thereon as they become due. If said district includes lands in more than one county, the board of county commissioners of each county shall levy upon the district lands in that county the proportionate part of the total tax necessary to meet the annual payment on said bonds or contract and the interest thereon as they become due, in the proportion that the benefits apportioned to the district lands in such county are of the total benefits of such bond issue or contract apportioned to all the lands of the district, and whether the district be one or more than one county, the levy upon each of the several tracts of district lands for the payment of the annual instalments on said bonds or contract and the interest thereon shall be in proportion to the apportionment of benefits of such bond issue or contract and apportioned among the several tracts of land in the district in like manner as provided by law with reference to similar levies made by the

boards of directors of irrigation districts. The county auditor of each county in which such district lands are located shall each year enter upon the county assessment roll against the property therein described the levy so made by the board of county commissioners, in manner similar to that in which school or other municipal or road district assessments are entered by him on said assessment roll, except that the sum assessed and charged against each description of land therein contained for such irrigation district purposes shall be entered by the auditor as the bond or contract assessment of the _____ irrigation district against the same. Such district bond or contract tax shall be collected and accounted for by the county officers in the same manner as other municipal taxes and the collection thereof shall be enforced in the same manner, and neglect to pay the same shall be subject to the same penalties as the other taxes of the county and the same shall be paid over to the state treasurer who shall act as treasurer of the district for the purpose of receiving and depositing such funds and disbursing the same in payment of the district's bond and United States contract obligations and the interest thereon. [1923, ch. 178, part of 2nd par. of § 1, p. 276; I.C.A., § 42-727.]

Sec. to sec. ref. Sections 43-728 — 43-730 are referred to in § 43-714.

This section is referred to in §§ 43-701 and 43-801.

43-729. Collection by county officers — Reversion to plan of collection by district treasurer. — Any district having made provision for such collection of district taxes by the county officers, and desiring to revert to the plan of collection of district taxes by the district treasurer, may do so by adopting a resolution revoking such former resolution providing for collection by the county officers and furnishing copy thereof to the county auditors of each county in which any part of the district lands are located, except that in the case of any district which may have entered into contract with any of the purchasers of its bonds or obligations, or their representatives, or with the United States, providing for collection by the county officers, or have caused to be printed or indorsed upon any of its bonds a statement that the collection of the funds for the payment of the principal or interest thereof, will be made by the county officers, then such resolution providing for collection by the county officers shall be irrevocable until such obligations of the district have been paid. [1923, ch. 178, part of 2d par. of § 1, p. 276; I.C.A., § 42-728.]

Compiler's notes. Section 2 of S.L. 1923, ch. 178 declared an emergency. Approved March 15, 1923.

Sec. to sec. ref. This section is referred to in §§ 43-701, 43-722, 43-801.

43-730. Contracts with cities, irrigation lateral districts or other entities in lieu of charges, levies and assessments. — The board of directors of an irrigation district shall have the power to enter into a contract in writing with any city, irrigation lateral district or other entity whose boundaries or service area is situated within the boundaries of any irrigation district where water has been purchased, or is being furnished, or

shall be furnished, for lands, property or use within the boundaries or service area of such city, irrigation lateral district or other entity by an irrigation district, whereby such city, irrigation lateral district or other entity shall become obligated to pay charges, levies and assessments now provided to be made pursuant to chapter 7, title 43, sections 43-701 through 43-729, Idaho Code, and amendments thereto in lieu of the officers of the irrigation district making said charges, levies and assessments. [I.C.A., § 42-729, as added by 1937, ch. 128, § 1, p. 193; am. 1993, ch. 259, § 1, p. 890; am. 1997, ch. 402, § 1, p. 1278.]

Compiler's notes. Sections 43-701 to 43-729 referred to in this section might not include §§ 43-714, 43-715 which were added by S.L. 1941, ch. 105, being assigned the number 42-712a, I.C.A., in such act.

Section 2 of S.L. 1993, ch. 259 declared an emergency. Approved March 29, 1993.

Sec. to sec. ref. This section is referred to in § 43-1120.

43-731. Water held in trust. — Upon entering into any such contract, the city, irrigation lateral district or other entity obligated to make the payments as aforesaid shall hold said water in trust for the purpose for which the same was, or shall be, purchased or furnished. [1937, ch. 128, § 2, p. 193; am. 1997, ch. 402, § 2, p. 1278.]

43-732. Certain lands may be assessed at different amounts — Additional service charge. — (1) Notwithstanding any provision of sections 43-701 and 43-1824, Idaho Code, to the contrary, an irrigation district which assesses land in the district under the provisions of chapters 7 and 18, title 43, Idaho Code, may assess any land within the district to which the district furnishes or supplies water for irrigation purposes which: (a) Lies above the level of the canals or ditches of the district and is irrigated by pumping by the landowner, or (b) Is irrigated by a partial, supplemental or intermittent supply of water from the district, or (c) Is irrigated by water of the district which is subject to prior use by other lands within the district; in such amount as the board determines to be just, taking into consideration the benefit to the land assessed and extra expenses, if any, of the landowner or holder, in using such water, but such amount may not exceed the amount assessed against irrigable acres lying below the level of the canals or ditches of the district.

(2) Notwithstanding any provisions of sections 43-701 and 43-1824, Idaho Code, to the contrary, an irrigation district which assesses land in the district under the provisions of chapters 7 and 18, title 43, Idaho Code, may, at the discretion of the board of directors, assess a service charge, in addition to the regular assessment, against subdivided and small tract lands that have appurtenant water rights and to which irrigation water is furnished or is available for delivery, when delivery of water to these lands requires operation, construction and maintenance costs substantially greater than operation, construction and maintenance costs involved in delivering water to the majority of other lands in the district. All such small tract or subdivided lands shall be placed in groupings of two (2) acres or less, or more than two (2) acres but not more than ten (10) acres, and each grouping shall

be assessed as a single class. [I.C., § 43-732, as added by 1973, ch. 63, § 1, p. 104.]

Compiler's notes. Section 2 of S.L. 1973, ch. 63, provided that the act should take effect on and after July 1, 1973.

CHAPTER 8

REPOSSESSION OF WATER RIGHTS UPON ISSUANCE OF TAX DEED

SECTION.	SECTION.
43-801. Tax deed — Title to water rights — Election of district.	43-804. Redemption or repurchase of water rights.
43-802. Rights established upon election by district.	43-805. Outstanding bonds not affected — Duty of directors.
43-803. Notice of election by district — Reservation of title to water right.	43-806. Purpose of chapter.

43-801. Tax deed — Title to water rights — Election of district. — Whenever a tax deed shall issue under the laws of Idaho transferring title to land within an irrigation district organized under sections 43-727, 43-728, and 43-729, which shall be based upon delinquent taxes, including assessments on behalf of said irrigation district for the purchase of a water right for said land, and which was to become appurtenant to said land, title to said water right shall not pass upon the issuance of said deed: provided, the irrigation district shall so elect. [1931, ch. 34, § 1, p. 67; I.C.A., § 42-801.]

Sec. to sec. ref. This chapter is referred to in § 43-401A. **Collateral References.** 94 C.J.S., Waters, §§ 827-834.
This section is referred to in § 43-803.

43-802. Rights established upon election by district. — Upon an election by an irrigation district as provided in section 43-801, rights shall be established as follows:

a. The taxes in favor of the irrigation district and constituting part of the taxes delinquent upon which the deed is based shall be canceled;

b. In lieu of the cancellation of said taxes in favor of the irrigation district, title to the water right shall vest in the irrigation district, subject to the right of redemption as hereinafter provided. [1931, ch. 34, § 2, p. 67; I.C.A., § 42-802.]

43-803. Notice of election by district — Reservation of title to water right. — To constitute an election as provided in section 43-801, the irrigation district shall, at least ten (10) days prior to the date of the issuance of tax deed to the county treasurer on behalf of any taxing unit, or at least ten (10) days prior to the date of any sale of real property acquired by a county on account of delinquent taxes, file with the county treasurer and the clerk of the board of county commissioners of the county a notice in writing, in substantially the following form:

“Notice is hereby given that _____ irrigation district has elected to accept a cancellation of taxes in favor of said irrigation district and constituting

part of the taxes delinquent upon which tax deed may or has issued and in lieu thereof to retain title to the water right for the purchase of which the assessments in favor of the irrigation district were levied. The property affected by this notice is described as follows, to wit: (_____)”

Upon the issuance of a tax deed to any lands within an irrigation district organized as aforesaid for delinquent taxes or a sale of any lands acquired by a county on account of delinquent taxes, the receipt of this notice by the county treasurer or the clerk of the board of county commissioners of the county, substantially in form as herein provided, shall obligate the officer accepting a deed on behalf of a taxing unit and/or the officers executing a deed to lands acquired by the county for delinquent taxes, to reserve title to the water right and title to said water right shall thereupon vest in the irrigation district subject to redemption as hereinafter provided; provided, however, said irrigation district shall as a prerequisite to withdrawal of said water right from the lands and revesting thereof in said district, pay to the county the amount paid by the county to the state as state taxes levied against said lands from which said water right is to be withdrawn. [1931, ch. 34, § 3, p. 67; I.C.A., § 42-803; am. 1933, ch. 112, § 1, p. 178.]

Compiler's notes. The parentheses in this section so appeared in the act.

43-804. Redemption or repurchase of water rights. — The purchaser of any lands within an irrigation district at a sale of lands acquired by a county on account of delinquent taxes, or the holder of a tax deed to any lands within an irrigation district, or the then owner of said lands, the water right to which has vested in said irrigation district under the provisions of this chapter, may, within six (6) months from the date of the issuance of the tax deed, or of the sale of said lands by the county, appear before the board of directors of said irrigation district at a regular or special meeting of said board and make application to redeem or repurchase the water right originally bought for use and to be made appurtenant to said land, and the said board of directors shall, upon receipt of payment of all taxes formerly delinquent against said land in favor of the irrigation district and expenses incurred by the district in connection therewith, reinstate said water right and thereafter said land and water shall be subject to all of the charges required to be paid by lands within the district: provided, however, that during the interim between the issuance of the tax deed to the land, or the sale of said land by the county as herein referred to, and the date of the application to redeem, water represented by said water right shall not be delivered to the land except upon the express consent of the board of directors of the irrigation district.

Should no redemption be made as herein provided within the period herein stated, title to the water right shall vest absolutely in the irrigation district. [1931, ch. 34, § 4, p. 67; I.C.A., § 42-804.]

43-805. Outstanding bonds not affected — Duty of directors. — The election of an irrigation district to cancel delinquent taxes in favor of the irrigation district and accept in lieu thereof title to the water right for the

payment of which said taxes were levied, shall in nowise impair outstanding bonds or obligations of the irrigation district, and upon such an election by an irrigation district as herein provided, the board of directors shall:

- 1. Either set aside in a sinking fund with the state treasurer as the acting treasurer of the irrigation district an amount sufficient to pay the unpaid balance of the taxes to be levied upon the land for which the water right was purchased, based upon the assessments of benefits as confirmed by the court in the proceedings confirming the sale of bonds of said irrigation district;
- 2. Or shall provide an equivalent assessment of benefits against other lands of equal value. [1931, ch. 34, § 5, p. 67; I.C.A., § 42-805.]

43-806. Purpose of chapter. — The purpose of the procedure herein provided is to permit an irrigation district to repossess a water right not paid for and to exclude the land from the benefits theretofore assessed on account of said water right. [1931, ch. 34, § 6, p. 67; I.C.A., § 42-806.]

CHAPTER 9

CONSTRUCTION WORK AND ACQUIREMENT OF PROPERTY

SECTION.	SECTION.
43-901. Contracts for construction work.	43-906. Intersections with streets, railroads, watercourses.
43-902. Construction work — Additional items.	43-907. Right of way over state lands.
43-903. Notice for bids dispensed with.	43-908. Right of eminent domain.
43-904. Payment of claims.	
43-905. Payment of expenses — Maintenance tolls — Accounts of officers.	

43-901. Contracts for construction work. — A. The following provisions relative to competitive bidding apply to all irrigation districts of the state of Idaho, but shall be subject to the provisions of any specific statute pertaining to the letting of any contract, purchase or acquisition of any commodity or thing by soliciting and receiving competitive bids therefor, and shall not be construed as modifying or amending the provisions of any such statute, nor preventing the irrigation district from doing any work by its own employees.

B. The word “expenditure” shall mean the granting of a contract to another by the irrigation district, the construction of any works, or any portion thereof, and every manner and means whereby the irrigation district disburses funds or obligates itself to disburse funds; provided, however, that “expenditure” does not include disbursement of funds to any irrigation district employee, official, agent, or for the performance of personal services to the irrigation district, or for the acquisition of personal property through a contract that has been competitively bid by the state of Idaho, one of its subdivisions or an agency of the federal government, and does not include the purchase of used personal property.

C. When the expenditure contemplated exceeds twenty-five thousand dollars (\$25,000), the expenditure shall be contracted for and let to the lowest responsible bidder.

D. The notice inviting bids shall set a date and place for the opening of bids. The first publication of the notice shall be at least two (2) weeks before the date of opening the bids. Notice shall be published at least twice, not less than one (1) week apart, in the official newspaper of such irrigation district. The notice shall succinctly set forth the project or construction to be done. Any of the following documents shall be made available, upon reasonable deposit, to any interested bidder: bid form, bidder's instructions, contract documents, general and special instructions, drawings and specifications.

E. All bids shall be presented or otherwise delivered under sealed cover to the secretary with a concise statement marked on the outside thereof generally identifying the expenditure to which said bid pertains. All bids shall contain one (1) of the following forms of bidder's security:

- a. Cash;
- b. Cashier's check made payable to the irrigation district;
- c. A certified check made payable to the irrigation district;
- d. A bidder's bond executed by a qualified surety company, made payable to the irrigation district.

F. The security shall be an amount equal to at least ten percent (10%) of the amount bid. A bid shall not be considered unless one (1) of the forms of bidder's security is enclosed with it, and unless the bid is submitted in a form which substantially complies with the form provided by the irrigation district.

G. Any bid received by the irrigation district may not be withdrawn after the time set in the notice for opening of bids. All bids received must be opened at the time and place set in the notice inviting bids, and no person shall be denied the right to be present at the opening of bids.

H. If the successful bidder fails to execute the contract, the amount of his bidder's security shall be forfeited to the irrigation district and the proceeds shall be deposited in the fund out of which the expenses of preparation and printing of the plans and specifications, estimates of costs and publication of notice are paid.

I. The irrigation district may, on refusal or failure of the successful bidder to execute the contract, award it to the next lowest responsible bidder. If the board awards the contract to the next lowest responsible bidder, the amount of the said lowest responsible bidder's security shall be applied by the irrigation district to the difference between the said lowest responsible bid and the said next lowest responsible bid, and the surplus, if any, shall be returned to the said lowest bidder if cash or check is used, or to the surety on the bidder's bond if a bond is used.

J. In its discretion, the board may reject any bids presented and readvertise. If two (2) or more bids are the same and the lowest responsible bids, the board may accept the one it chooses. If no bids are received, the board may make the expenditure without further compliance with this section.

K. After rejecting bids, the board may, after finding it to be a fact, pass a resolution declaring that the thing sought to be accomplished by the expenditure can be performed more economically by day labor, or the materials or supplies furnished at a lower price in the open market. Upon

adoption of the resolution, it may have the thing sought to be accomplished done in the manner stated without further compliance with this section.

L. If there is a great public calamity, as an extraordinary fire, flood, storm, epidemic or other disaster, or if it is necessary to do emergency work to prepare for national or local defense, or if the irrigation system of the district has been seriously damaged or impaired, the board may pass a resolution declaring that the public interest and necessity demand the immediate expenditure of public money to safeguard life, health or property or to replace or repair any damaged portion of the irrigation system or to remove any impediment therefrom. Upon adoption of the resolution, it may expend any sum required in the emergency without compliance with this section. [I.C., § 43-901, as added by 1975, ch. 49, § 2, p. 94; am. 1983, ch. 27, § 1, p. 76; am. 1984, ch. 136, § 4, p. 321; am. 2002, ch. 100, § 1, p. 274.]

Compiler's notes. Former § 43-901, which comprised 1903, p. 150, § 33; reen. R.C., § 2416; am. 1915, ch. 143, § 10, p. 304; reen. C.L., § 2416; C.S., § 4403; I.C.A., § 42-901, was repealed by S.L. 1975, ch. 49, § 1.

Section 2 of S.L. 1984, ch. 136 is compiled as § 31-4002.

Section 3 of S.L. 1984, ch. 136 is repealed.

Section 3 of S.L. 1975, ch. 49 declared an emergency. Approved March 14, 1975.

Section 2 of S.L. 1983, ch. 27 declared an emergency. Approved March 9, 1983.

Cross ref. Payment of contractor with bonds, § 43-410.

Provisions do not apply to contracts with United States, § 43-1805.

Splitting or separating purchases or work

projects to evade competitive bidding, § 59-1026.

Sec. to sec. ref. This chapter is referred to in §§ 43-318A, 43-330C, 43-401, 43-1805 and 43-2508.

Collateral References. 45 Am. Jur. 2d, Irrigation, §§ 83-86.

94 C.J.S., Waters, §§ 786-793.

Differences in character or quality of materials, articles, or work as affecting acceptance of bid for public contract. 27 A.L.R.2d 917.

Right of contractor with federal, state, or local public body to latter's immunity from tort liability. 9 A.L.R.3d 382.

Public contracts: authority of state or its subdivision to reject all bids. 52 A.L.R.4th 186.

43-902. Construction work — Additional items. — The term construction work as herein used, shall be deemed to include the erection of pump houses and electrical and other pumps or appliances for raising water onto the lands, as well as dams, headgates, ditches, laterals and other irrigation works. There may be included in any contract for construction, maintenance, interest and power charges for such period as the directors and the contractor may agree, not to exceed three (3) years, and when so included, interest, electrical, or other power and maintenance charges for the term agreed upon may be paid in bonds of the district to the amount agreed upon. [Last part of R.C., § 2404a, as added by 1913, ch. 169, § 1, p. 541; reen. C.L., § 2416a; C.S., § 4404; I.C.A., § 42-902.]

43-903. Notice for bids dispensed with. — On the petition of fifty (50) or a majority of the owners of land in said district, to be determined as provided by section 43-101, the board of directors may do any work mentioned in the preceding section on behalf of the district, and it may use the construction fund therefor; in such case they need not publish notice for bids as provided in the last preceding section. [1903, p. 150, § 33a, as added by 1907, p. 484, § 1, subd. 33a; reen. R.C. & C.L., § 2417; C.S., § 4405; I.C.A., § 42-903.]

43-904. Payment of claims. — No claim shall be paid by the district until allowed by the board of directors, and only upon a warrant or check signed by two (2) officers authorized by the board. [1903, p. 150, § 34; reen. R.C. & C.L., § 2418; C.S., § 4406; I.C.A., § 42-904; am. 1967, ch. 211, § 2, p. 641.]

43-905. Payment of expenses — Maintenance tolls — Accounts of officers. — The cost and expense of purchasing and acquiring property and constructing works and improvements to carry out the formulated plan, shall be paid out of the construction fund.

For the purpose of defraying the expenses of the organization of the district, and of the care, operation, management, repair and improvement of such portion of said canal and works as are completed and in use, including salaries of officers and employees, the board may fix rates of tolls and charges for use of water from the canals and irrigation works and plants or equipment of the district, and in addition thereto may provide for the payment of such expenses, either in whole or in part, by levy of assessments therefor, as provided in section 43-701. Where a toll is fixed for the payment of part of such expenditures and an assessment levied for the remainder, any portion of such toll, remaining unpaid at the time fixed for levying the next annual assessment, in the discretion of the board may be added to and become part of the assessment against the land delinquent in the payment of such toll; and where both a toll is fixed and assessment levied for the same expenditures, the amount paid as toll may be applied as credit upon such assessment. The board in its order fixing or levying such tolls may fix the date or dates on or before which the same must be paid, may make the same payable in advance of the delivery of any water during the year for which the same are fixed, and may make provision for the collection thereof and the keeping of a toll book by the district treasurer. The procedure for levying and collection of assessments, where not provided for in sections 43-701 and 43-703, shall conform to the provisions of this title relating to the payment of principal and interest of bonds. All assessments shall be listed and carried out in the regular assessment book and collected by the treasurer at the time and in the manner of the regular annual assessment. All special assessments are in lien on the lands assessed from the time when they are ordered.

Whenever an assessment book or toll book shall be delivered to the treasurer, the secretary shall charge the treasurer with the total amount of the various amounts as carried out in said books. On the second Monday of January in each year, the treasurer shall make a semiannual statement with the secretary and deliver to the secretary a statement in brief of all assessments delinquent at that time, and account for all sums therefor collected. The treasurer shall make such settlements for tolls at such times as may be ordered by the board. On the second Monday of July the treasurer shall make final settlement with the secretary and deliver to the secretary a duplicate delinquent list and account for all sums not shown on said delinquent list. The secretary shall then charge the treasurer with the amount of said list and penalties added, and upon receiving the affidavit of

publication thereof, he shall charge the treasurer with twenty-five cents (25¢) additional for each description published. On the first Monday after the sale, the treasurer shall make final settlement for assessments by receiving credit for the property sold to the district and accounting for all the balance. [1903, p. 150, § 35; am. 1907, p. 484, § 1, subd. 35; reen. R.C., § 2419; am. 1911, ch. 71, § 7, p. 194; am. 1911, ch. 154, § 12, p. 461; reen. C.L., § 2419; C.S., § 4407; am. 1925, ch. 128, § 9, p. 173; I.C.A., § 42-905.]

Cross ref. Payment to contractor in bonds, § 43-410.

Rehabilitation of irrigation works, assessment levies for costs of preliminary study, § 43-701A.

ANALYSIS

Construction of section.

Delivery of water.

Legislative intent.

Maintenance tolls as affected by contracts.

Method of paying maintenance.

New works.

Repairs.

Special assessments.

Construction of Section.

When warrant is issued law reads into contract that it is to be paid by revenues raised that year, and it is duty of board to raise amount and failure to do so constitutes violation of contract and gives cause of action for breach. *Little v. Emmett Irrigation Dist.*, 45 Idaho 485, 263 P. 40, 56 A.L.R. 822 (1928).

Delivery of Water.

Where irrigation district was without funds or credit to pay for delivery of water, writ of mandate against board of directors would not lie to compel delivery of water. *Cowan v. Lineberger*, 35 Idaho 403, 206 P. 805 (1922).

Legislative Intent.

The legislative intent was not to create two methods of raising money for maintenance and operation of a completed irrigation system, one by uniform assessment and the other by tolls not necessarily uniform. *Gedney v. Snake River Irrigation Dist.*, 61 Idaho 605, 104 P.2d 909 (1940).

Maintenance Tolls as Affected by Contracts.

Where there was included in a conveyance of land a grant "of free and perpetual use of water" from grantor's canal sufficient to irrigate land conveyed, such did not obligate grantor or his successors or assigns to perpetually pay expense of maintaining canal and water right and delivering water to consumer. *Nampa & Meridian Irrigation Dist. v. Gess*,

17 Idaho 552, 106 P. 993 (1910).

Irrigation district, successor in interest to canal company, was bound by agreements of such company limiting amount grantee of company must pay for maintenance. *Nampa & Meridian Irrigation Dist. v. Briggs*, 27 Idaho 84, 147 P. 75 (1915).

Method of Paying Maintenance.

After completion of irrigation district's works, the cost of maintenance and operation should be uniform and proportionate to benefits received. *Gedney v. Snake River Irrigation Dist.*, 61 Idaho 605, 104 P.2d 909 (1940).

New Works.

Cost of purchase of irrigation works, or construction of new works, must be paid from construction fund of irrigation district, which was raised either by a bond issue under § 43-401, by levy of a special assessment under § 43-321, or by levy of an assessment in lieu of canceled bonds under § 43-409. *City of Nampa v. Nampa & Meridian Irrigation Dist.*, 19 Idaho 779, 115 P. 979 (1911), writ of error dismissed, 238 U.S. 643, 35 S. Ct. 602, 59 L. Ed. 1502 (1915).

Repairs.

Laying of pipeline necessitated by the lawful removal of ditch by municipal authorities was a repair or improvement, funds for defraying which may be included in a maintenance assessment or in increased toll rates charged for delivery of water, and was not new construction which must be defrayed by special assessment under § 43-321, or bond issue under § 43-401, which require assent of voters of district. *City of Nampa v. Nampa & Meridian Irrigation Dist.*, 19 Idaho 779, 115 P. 979 (1911), writ of error dismissed, 238 U.S. 643, 35 S. Ct. 602, 59 L. Ed. 1502 (1915); see also, *Adams v. Nampa & Meridian Irrigation Dist.*, 73 Idaho 521, 254 P.2d 407 (1953).

Special Assessments.

Special assessments are not provided for in §§ 43-701 to 43-703 and are therefore to be levied according to procedure for payment of principal and interest of bonds. *Holland v. Avondale Irrigation Dist.*, 30 Idaho 479, 166 P. 259 (1917).

43-906. Intersections with streets, railroads, watercourses. —

The board of directors shall have power to construct the said works across

any stream of water, watercourse, street, avenue, highway, railway, canal, ditch or flume which the route of said canal or canals may intersect or cross, in such manner as to afford security for life and property; but said board shall restore the same when so crossed or intersected, to its former state as near as may be, or in a sufficient manner not to have impaired unnecessarily its usefulness; and every company whose railroad shall be intersected or crossed by said work shall unite with said board in forming said intersections and crossings and grant the privileges aforesaid; and if such railroad company and said board, or the owners and controllers of said property, thing or franchise to be crossed, cannot agree upon the amount to be paid therefor, or upon the points or the manner of said crossings or intersections, the same shall be ascertained and determined in all respects as herein provided in respect to the taking of land. [1903, p. 150, part of § 36; am. R.C. & C.L., § 2420; C.S., § 4408; I.C.A., § 42-906.]

City Streets and Alleys.

Irrigation district which is authorized to include within its corporate limits lands and lots lying within a village has the implied power conferred upon it by legislature to enter streets and alleys of such village or of that portion of village included within dis-

trict, for purpose of constructing ditches, canals and laterals in order to carry out the purpose of its creation and deliver water to consumers therein. *Nampa v. Nampa & Meridian Irrigation Dist.*, 23 Idaho 422, 131 P. 8 (1913).

43-907. Right of way over state lands. — The right of way is hereby given, dedicated and set apart, to locate, construct and maintain said works over and through any of the lands which are now or may be the property of the state. [1903, p. 150, part of § 36; reen. R.C. & C.L., § 2421; C.S., § 4409; I.C.A., § 42-907.]

43-908. Right of eminent domain. — All irrigation districts organized under the laws of the state of Idaho shall have the right of eminent domain, with the power by and through their boards of directors, to cause to be condemned and appropriated in the name of and for the use of said districts, all lands, water rights, reservoirs, canals and works constructed or being constructed by private owners, and lands for reservoirs for the storage of needful waters, and all necessary appurtenances and other property necessary for the construction, use and supply, maintenance, repair and improvement of said canal or canals and works. Said irrigation districts shall have the right by and through their boards of directors to acquire by purchase or other legal means, any or all of the property mentioned and referred to in this section. In any action or proceeding for the condemnation of any property mentioned and referred to in this section, wherein said irrigation district is a party, the plaintiff must, within six (6) months after final judgment, pay the sum of money assessed, or said judgment will be annulled. Except as otherwise provided in this section, the provisions of the laws of Idaho relative to the right of eminent domain, civil actions and new trials and appeals, shall be applicable to, and constitute the rules of practice in, condemnation proceedings by said irrigation districts. [1907, p. 221, §§ 1, 2, 3, 4; reen. R.C. & C.L., § 2422; C.S., § 4410; I.C.A., § 42-908.]

Cross ref. Eminent domain, §§ 7-701 — 7-721.

New trials, Idaho Rules of Civil Procedure, Rule 59.

Contract Rights.

Grant from canal company for water with preferential maintenance charge was property that could not be confiscated or taken without just compensation. *Nampa & Meridian Irrigation Dist. v. Briggs*, 27 Idaho 84, 147 P. 75 (1915); see also, *Adams v. Nampa & Meridian Irrigation Dist.*, 73 Idaho 521, 254 P.2d 407 (1953).

Collateral References. 26 Am. Jur. 2d, Eminent Domain, § 66.

29A C.J.S., Eminent Domain, § 401.

Effect of combination of public and private purposes in exercise of eminent domain for irrigation purposes. 53 A.L.R. 9.

Easement for irrigating canal as breach of covenant against encumbrances. 64 A.L.R. 1479.

Power of eminent domain as between state and subdivision or agency thereof, or as between different subdivisions or agencies themselves. 35 A.L.R.3d 1293.

CHAPTER 10

ANNEXATION OF LANDS TO DISTRICT

SECTION.

43-1001. Petition for annexation of land.

43-1002. Guardians and administrators may sign petition.

43-1003. Notice of petition.

43-1004. Hearing of petition.

43-1005. Assessments against petitioners.

43-1006. Order accepting or rejecting petition.

SECTION.

43-1007. [Repealed.]

43-1008. Election to determine change.

43-1009. Order changing boundaries.

43-1010. Order to be recorded.

43-1011. Order recorded in minutes — Minutes as evidence.

43-1001. Petition for annexation of land. — The holder or holders of any title, or evidence of title, representing any body of lands, may file with the board of directors of an irrigation district a petition in writing praying that said land may be annexed. The petition shall contain a legal description of the lands, the proposed method by which water will be delivered and any other information the district may require, and the petitioners shall state under oath that petitioners hold the title of one-half (½) or more of said lands. [1903, p. 150, § 44; am. 1907, p. 484, § 1; am. R.C. & C.L., § 2423; C.S., § 4411; I.C.A., § 42-1001; am. 1990, ch. 340, § 1, p. 923.]

Compiler's notes. Section 2 of S.L. 1990, ch. 340 is compiled as § 43-1003.

Cross ref. Secretary of interior authorized to sign petition as if owner of public lands, § 43-1802.

Sec. to sec. ref. This chapter is referred to in §§ 43-2402 and 43-2412.

Procedure Exclusive.

Only method by which owners of land lying outside boundaries of irrigation district may become entitled to use of water or acquire interest in system is under this and the fol-

lowing sections. *Yaden v. Gem Irrigation Dist.*, 37 Idaho 300, 216 P. 250 (1923).

Collateral References. 56 Am. Jur. 2d, Municipal Corporations, Counties, and Other Political Subdivisions, §§ 39-68.

94 C.J.S., Waters, §§ 682-683.

Constitutionality of statutes for formation or change of irrigation districts. 69 A.L.R. 266.

What land is contiguous or adjacent to municipality so as to be subject to annexation. 49 A.L.R.3d 589.

43-1002. Guardians and administrators may sign petition. — A guardian, executor or an administrator of an estate who is appointed as such under the laws of this state, and who, as such guardian, executor or administrator, is entitled to the possession of the lands belonging to the estate which he represents, may, on behalf of his ward or the estate which

he represents, upon being thereunto authorized by the proper court, sign and acknowledge the petition mentioned in this chapter for the change of boundaries of the district. [1903, p. 150, § 54; am. R.C. & C.L., § 2424; C.S., § 4412; I.C.A., § 42-1002.]

43-1003. Notice of petition. — The secretary must cause a notice of the filing of such petition to be published three (3) weeks in the manner of notices of special elections. The notice shall state the filing of such petitions, and the names of the petitioners, a description of the lands mentioned in the said petition, and it shall notify all persons interested in or that may be affected by such change of boundaries of the district, to appear at the office of said board, at a time named in said notice, and show cause in writing, if any they have, why the lands mentioned should not be annexed to said district. The petitioners shall advance to the secretary sufficient money to pay the estimated costs of all proceedings under this chapter. [1903, p. 150, § 45; am. 1907, p. 484, § 1, subd. 45; reen. R.C. & C.L., § 2425; C.S., § 4413; I.C.A., § 42-1003; am. 1990, ch. 340, § 2, p. 923.]

Compiler's notes. Section 1 of S.L. 1990, ch. 340 is compiled as § 43-1001.

Failure to Give Notice.

Where irrigation district failed to give notice required by this section of its intention to change the boundaries, and owners of land to

be taken into such district had no notice of the inclusion of such land within district, such owners were not prevented from challenging legality of change until their day in court. *Oregon S.L.R.R. v. Pioneer Irrigation Dist.*, 16 Idaho 578, 102 P. 904 (1909).

43-1004. Hearing of petition. — The board of directors, at the time mentioned in said notice or at such other time to which the hearing may be adjourned, shall hear the petition and all the objections thereto. The failure of any person to appear and object shall be taken as an assent on his part to a change of the boundaries of the district as prayed for in said petition, or to such a change thereof as will include a part of said lands. [1903, p. 150, § 46; am. 1907, p. 484, § 1, subd. 46; reen. R.C. & C.L., § 2426; C.S., § 4414; I.C.A., § 42-1004; am. 1990, ch. 340, § 3, p. 923.]

Compiler's notes. Section 4 of S.L. 1990, ch. 340 is compiled as § 43-1006.

43-1005. Assessments against petitioners. — The board of directors may require, as a condition to the granting of said petition, that the petitioners shall severally pay to such district such respective sums, as nearly as the same can be estimated, as said petitioners, or their grantors, would have been required to pay such district, had such lands been included in such district, at the time the same was originally formed. [1903, p. 150, § 47; am. 1907, p. 484, § 1, subd. 47; reen. R.C. & C.L., § 2427; C.S., § 4415; I.C.A., § 42-1005.]

43-1006. Order accepting or rejecting petition. — The board of directors, if they deem it not for the best interest of the district to include therein the lands mentioned in the petition, shall order that the petition be rejected. But if they deem it for the best interest of the district, the board

may order the lands mentioned in said petition or some part thereof be annexed to said district. The order shall describe the lands to be annexed to said district and the board may cause a survey thereof to be made if deemed necessary, and said order will not become effective until the ninety (90) day period for presentation of an election petition shall have expired without such petition being presented or until approval of the annexation at an election. [1903, p. 150, § 48; am. 1907, p. 484, § 1, subd. 48; reen. R.C. & C.L., § 2428; C.S., § 4416; I.C.A., § 42-1006; am. 1990, ch. 340, § 4, p. 923.]

Compiler's notes. Section 3 of S.L. 1990, ch. 340 is compiled as § 43-1004.

43-1007. Objections not withdrawn — Resolution of board. [Repealed.]

Compiler's notes. This section, which comprised 1903, p. 150, § 49; am. 1907, p. 484; § 1, subd. 49; reen. R.C. & C.L., § 2429; C.S., § 4417; I.C.A., § 42-1007, was repealed by S.L. 1990, ch. 340, § 5.

43-1008. Election to determine change. — If within ninety (90) days of board approval of an order allowing annexation a petition signed by either ten (10) landowners or by two percent (2%) of the landowners, whichever number is greater, of the district is presented to the board which petition states that those signing request an election to approve or disapprove said annexation, then the board shall order an election be held within said district to determine whether the boundaries of the district shall be changed as mentioned in said order; and shall fix the time at which such election shall be held. Notice thereof shall be given and published, and such election shall be held, and all things pertaining thereto conducted, in the manner prescribed by this title in case of an election to determine whether bonds of the district shall be issued. The ballots cast at said election shall contain the words "For change of boundary," or "Against change of boundary," or words equivalent thereto. The notice of election shall describe the lands to be annexed to said district. [1903, p. 150, § 50; am. 1907, p. 484, § 1, subd. 50; reen. R.C. & C.L., § 2430; C.S., § 4418; I.C.A., § 42-1008; am. 1990, ch. 340, § 6, p. 923.]

Cross ref. Bond election, § 43-401.

43-1009. Order changing boundaries. — If at such election a majority of all the votes cast at said election shall be against such change of the boundaries of the district, the board shall rescind its order and it shall be of no force or effect. But if a majority of such votes be in favor of such change, the order shall have full force and effect. Thereafter such land so annexed shall be subject to such assessments from time to time as the board of directors shall deem right under the circumstances, and such assessments shall be deemed to be assessments for benefits to said lands by reason of their annexation to said district. The directors shall state on their minutes at their next regular meeting which division and election precinct in said district the said lands so annexed shall be attached, and, if necessary, the

board shall make an (an) order redividing the district into divisions and election precincts, in the same manner and to like effect, as near as may be, as provided for that purpose on the formation of a district. [1903, p. 150, § 51; am. 1907, p. 484, § 1, subd. 51; reen. R.C. & C.L., § 2431; C.S., § 4419; I.C.A., § 42-1009; am. 1990, ch. 340, § 7, p. 923.]

Compiler's notes. The word "an" has been enclosed in parentheses by the compiler as surplusage.

Cited in: *Bradshaw v. Milner Low Lift Irrigation Dist.*, 85 Idaho 528, 381 P.2d 440 (1963).

Liability to Assessment.

Where territory had not been included within boundaries of irrigation district in ac-

cordance with law, district had no power or jurisdiction to assess property so included. *Oregon S.L.R.R. v. Pioneer Irrigation Dist.*, 16 Idaho 578, 102 P. 904 (1909).

43-1010. Order to be recorded. — Upon a change of the boundaries of a district becoming effective, a copy of the order of the board of directors ordering such change, certified by the president and secretary of the board, shall be filed for record in the recorder's office of the county within which the annexed lands are situated, and thereupon the district shall be and remain an irrigation district, as fully and to every intent and purpose, as if the lands which are included in the district by the change of the boundaries as aforesaid, had been included therein at the original organization of the district. [1903, p. 150, § 52; reen. R.C. & C.L., § 2432; C.S., § 4420; I.C.A., § 42-1010; am. 1990, ch. 340, § 8, p. 923; am. 2001, ch. 192, § 1, p. 657.]

Compiler's notes. Section 2 of S.L. 2001, ch. 192 is compiled as § 43-1108.

ANALYSIS

Equality of landowners.

Rights of owners of new lands.

Rights of owners of old lands.

Equality of Landowners.

It is the apparent purpose of the provisions of this section to make the landowners within an irrigation district equal (except as to any disparity which may be found to exist in benefits received) so far as may be consistent with priority of water rights as recognized and protected by the provisions of the constitution. *Bradshaw v. Milner Low Lift Irrigation Dist.*, 85 Idaho 528, 381 P.2d 440 (1963).

Rights of Owners of New Lands.

The court recognizes the right acquired by the owners of new lands, by their inclusion

within the district, to the use of any water owned by the district when the use thereof was not required for the proper irrigation of the old lands and when such use was not in conflict with the rights previously acquired by the owners of the old lands. *Bradshaw v. Milner Low Lift Irrigation Dist.*, 85 Idaho 528, 381 P.2d 440 (1963).

Rights of Owners of Old Lands.

The owners of the old lands, through and by means of the irrigation district, acquired, and for many years applied to the irrigation of their lands, valuable water rights which had become appurtenant and dedicated to their lands and which were held in trust by the district for their use: they could not thereafter, without their consent, be deprived of the use of that water when needed to irrigate their lands. *Bradshaw v. Milner Low Lift Irrigation Dist.*, 85 Idaho 528, 381 P.2d 440 (1963).

43-1011. Order recorded in minutes — Minutes as evidence. — Upon the filing of the copies of the order, as in the last preceding section mentioned, the secretary of the board shall record in the minutes of the board, the petition aforesaid, and the said minutes, or a certified copy thereof, shall be admissible in evidence, with the same effect as the petition.

[1903, p. 150, § 53; reen. R.C. & C.L., § 2433; C.S., § 4421; I.C.A., § 42-1011.]

CHAPTER 11

EXCLUSION OF LANDS FROM DISTRICT

SECTION.	SECTION.
43-1101. Petition.	43-1111. Resolution — Contents.
43-1101A. [Amended and Redesignated.]	43-1112. Notice.
43-1101B. [Amended and Redesignated.]	43-1113. Notice — Contents.
43-1102. Grounds for exclusion, certain lands may remain in the district for drainage purposes.	43-1114. Hearing.
43-1103. Contents of petition — Supporting evidence — Representations, certification and liability.	43-1115. Order — Determination.
43-1104. Hearing on petition — Order of exclusion.	43-1116. Board — Entry of order of exclusion.
43-1105. Survey of land to be excluded.	43-1117. Order — Filing for record.
43-1106. Appeal.	43-1118. Appeals — Procedure.
43-1107. Costs.	43-1119. Exclusion — Loss of water rights — Obligations outstanding — Effect — Enforcement — Payment — Certificate.
43-1108. Changes to be filed for record.	43-1120. Reinstatement of nonagricultural lands — Order — Filing for record.
43-1109. Effect of exclusion.	43-1121. Notice of proposed construction of distribution system — Time for filing written request.
43-1110. Residential land not using water rights — Exclusion — Procedure.	

43-1101. Petition. — Any person or persons owning land within any irrigation district and forming a part thereof may file with the board of directors of such irrigation district a petition in writing requesting the exclusion of the land or lands owned by them and described in the petition from the irrigation district. As many parties owning separate tracts or parcels of lands in any irrigation district or who are united in interest to which the same state of facts apply, may unite in the same petition. The petition shall be signed by all of the petitioners, but need not be acknowledged. A filing fee in the amount of five dollars (\$5.00) for each parcel of land described in the petition shall accompany the filing of each petition, plus an exclusion fee in the amount of twenty-five dollars (\$25.00) for each lot containing less than one (1) acre which is in a subdivision as defined in section 50-1301, Idaho Code, or an exclusion fee of fifty dollars (\$50.00) for each acre or portion thereof in all other parcels of property, for which the district shall provide a suitable receipt evidencing payment. Any petition not accompanied by the required filing fee and exclusion fee shall be returned to the petitioner. All other costs of the exclusion proceeding shall be assessed as provided in section 43-1105, Idaho Code.

A person or persons purchasing land under a written contract shall be deemed to be the owners of that land for purposes of this section. [1905, p. 220, § 1; am. R.C., § 2434; am. 1911, ch. 46, § 1, p. 102; reen. C.L., § 2434; C.S., § 4422; I.C.A., § 42-1101; am. 1972, ch. 325, § 1, p. 804; am. 1974, ch. 155, § 1, p. 1386; am. 1978, ch. 312, § 1, p. 803; am. 1988, ch. 134, § 1, p. 240; am. 1990, ch. 181, § 1, p. 386.]

Compiler's notes. Section 2 of S.L. 1988, ch. 134 is compiled as § 43-1104.

Section 2 of S.L. 1974, ch. 155 declared an emergency. Approved March 30, 1974.

Cross ref. Alternative procedure for exclusion of lands, § 43-1301.

Secretary of interior authorized to sign petition as if owner of public lands, § 43-1802.

Sec. to sec. ref. This chapter is referred to in § 43-722.

This section is referred to in §§ 43-1103, 43-1120.

Exclusion of Lands Not Benefited.

If land which cannot derive a benefit from an irrigation district was included therein, under this section such land may be excluded. *Nielson v. Board of Directors*, 63 Idaho 108, 117 P.2d 472 (1931).

The owners of land that was used only as a gravel pit and that could not be supplied with water by the irrigation district because of the construction of an interstate highway across the land were entitled to have it excluded from the irrigation district. *Lodge v. Miller*, 91 Idaho 662, 429 P.2d 394 (1967).

Where decreed water and storage rights were transferred to other land with the approval of the board of directors and the lands owned by petitioner had not received water through the irrigation system since 1959 and the land was solely irrigated from wells on the land it was proper to exclude the land. *Birney v. Big Lost River Irrigation Dist.*, 94 Idaho 339, 487 P.2d 433 (1971).

Collateral References. 94 C.J.S., Waters, §§ 775-777.

43-1101A. [Amended and Redesignated.]

Compiler's notes. Former § 43-1101A was amended and redesignated as § 43-1102 by § 2 of S.L. 1990, ch. 181.

43-1101B. [Amended and Redesignated.]

Compiler's notes. Former § 43-1101B was amended and redesignated as § 43-1103 by § 3 of S.L. 1990, ch. 181.

43-1102. Grounds for exclusion, certain lands may remain in the district for drainage purposes. — (a) The grounds and reasons for exclusion of lands from an irrigation district are listed as follows:

1. The lands are too high to be watered without pumping by the owners of the lands from water owned or controlled by the irrigation district;
2. The owners of the lands have installed a good and sufficient water system independent of the water system of such irrigation district for the irrigation of the lands because the district does not own a sufficient water right to furnish an adequate water supply for those lands;
3. The lands in their present condition are not agricultural lands and the irrigation district has not:

(i) Adopted a resolution to construct a distribution system for the lands pursuant to section 43-333, Idaho Code; or

(ii) Called an election on the question of constructing a distribution system for the lands under the provisions of section 43-329, Idaho Code; or

(iii) Independently or in cooperation with a city or county established a local improvement district to construct a distribution system for the lands; or

(iv) Constructed a distribution system for the lands; or

4. Prior to acquisition of the land by the petitioning owner, and without his knowledge or consent, the ditch or other transmission facility extending from the delivery point of the district to the lands has been rendered

permanently incapable of carrying water to the lands, but this ground for exclusion shall only apply to parcels less than five (5) acres in size.

(b) If the lands sought to be excluded from an irrigation district under this section or under sections 43-1110 through 43-1117, Idaho Code, are benefited by surface drainage facilities of the irrigation district pursuant to sections 43-306 to 43-312, Idaho Code, but otherwise would qualify for exclusion, the lands shall be excluded for purposes of irrigation but shall remain a part of the district for purposes of drainage and shall continue to be assessable for drainage, but shall not be assessed for irrigation water. [I.C., § 43-1101A, as added by 1972, ch. 325, § 2, p. 804; am. 1978, ch. 312, § 2, p. 803; am. and redesiɡ. 1990, ch. 181, § 2, p. 386; am. 1993, ch. 262, § 1, p. 894.]

Compiler's notes. This section was formerly compiled as § 43-1101A.

Former § 43-1102 was amended and redesignated as § 43-1105 by § 5 of S.L. 1990, ch. 181.

Section 2 of S.L. 1993, ch. 262 declared an emergency. Approved March 29, 1993.

Sec. to sec. ref. This section is referred to in §§ 43-1103, 43-1104, 43-1107, 43-1119.

Served by District.

In action to exclude property from irrigation district, evidence that property in question had never used water from irrigation district, that irrigation district delivered sufficient water to municipal irrigation system to satisfy any irrigation needs of the property and that some system could be constructed at the expense of the property owner to deliver water to the property from its present terminus some 250 feet away and if such water were delivered it would not confer a benefit on

the property but would result in a flooding problem, was sustained by trial court's finding that the property was not served by irrigation district. *Pioneer Irrigation Dist. v. College Park Assocs.*, 104 Idaho 830, 663 P.2d 1132 (1983).

Under paragraph 3 of subsection (a) of this section in order to exclude property from an irrigation district it must be shown that the property sought to be excluded is "served" by an irrigation entity before the question of injury to the irrigation entity becomes relevant. *Pioneer Irrigation Dist. v. College Park Assocs.*, 104 Idaho 830, 663 P.2d 1132 (1983).

The statutory term "served" as used in paragraph 3 of subsection (a) of this section need not be equated with the term "benefited" as used in the case that dealt with inclusion of land within irrigation district and which was decided before the enactment of this section. *Pioneer Irrigation Dist. v. College Park Assocs.*, 104 Idaho 830, 663 P.2d 1132 (1983).

43-1103. Contents of petition — Supporting evidence — Representations, certification and liability. — A petition for exclusion shall set forth all of the following:

1. A description of the land of each petitioner for which exclusion is requested;

2. The reasons why it is claimed the tract or tracts should be excluded and that, except for residential lands for which exclusion is requested under subsection (a)3 or (a)4 of section 43-1102, Idaho Code, the lands sought to be excluded are not benefited by the water rights, or by the irrigation in, or drainage by the district, or by ground water subject to recapture and use by the district and the exclusion will be for the best interests (1) of the owner of the land proposed to be excluded and (2) of the other lands in the district.

3. The petition shall be accompanied by such evidence of ownership of the land as is satisfactory to the board of directors of the district and, except for lands for which exclusion is requested under subsection (a)3 or (a)4 of section 43-1102, Idaho Code, by a deposit for costs in the amount established by the directors of the district as provided in section 43-1105, Idaho Code. The board of directors of the district shall return to the petitioner any

petition not accompanied by both such proof of ownership and the filing and exclusion fees set by section 43-1101, Idaho Code, and no further action shall be required of the board with respect to such petition.

A petition for exclusion filed with an irrigation district constitutes representations to the district by the petitioner or petitioners that the facts stated in the petition are true and correct and that no mortgagee or other person holds a lien of record in the county where the land for which exclusion is requested is located, for which the lienholder's consent to the exclusion is required or that, if such consent is required, the consent has been granted by the lienholder. The petitioner shall be liable for any expenses or damages to lienholders or to other landowners or to the district resulting directly or indirectly from wrongful exclusion of lands by reason of untrue or incorrect statements in the petition. [I.C., § 43-1101B, as added by 1972, ch. 325, § 3, p. 804; am. 1978, ch. 312, § 3, p. 803; am. and redesign. 1990, ch. 181, § 3, p. 386.]

Compiler's notes. This section was formerly compiled as § 43-1101B.

Former § 43-1103 was amended and redesignated as § 43-1104 by § 4 of S.L. 1990, ch. 181.

Section 4 of S.L. 1978, ch. 312 is compiled as § 43-1104.

water by the irrigation district because of the construction of an interstate highway across the land were entitled to have it excluded from the irrigation district. *Lodge v. Miller*, 91 Idaho 662, 429 P.2d 394 (1967).

Exclusion of Lands Not Benefited.

The owners of land that was used only as a gravel pit and that could not be supplied with

43-1104. Hearing on petition — Order of exclusion. — The board of directors of the irrigation district may conduct its own investigation of the facts alleged in the petition and, by resolution duly adopted, which may address the allegations of several petitions, accept the facts as alleged and determine that no hearing is required prior to granting the petition or petitions for exclusion. If the allegations are not thus accepted such petition must be heard by the board of directors of such irrigation district within ninety (90) days of filing of the petition. If no hearing is held within ninety (90) days, the land described in the petition is excluded from the district. If a hearing is ordered, the petitioner or petitioners must establish by competent evidence the allegations of the petition, and the chairman or presiding member of the board is hereby empowered to administer oaths for the purpose of the hearing.

When (1) the board of directors accepts the facts as alleged without a hearing, or (2) the allegations of the petition are established at a hearing, or (3) the land has been excluded by reason of the board's failure to hold a hearing within ninety (90) days of filing of the petition, the board must make an order forthwith changing the boundaries of such district so as to exclude the lands described in the petition which the proof has established to be entitled to exclusion, and thereafter the lands so excluded shall not form a part of the irrigation district for any purpose except as provided in subsection (b) of section 43-1102, Idaho Code: provided, however, that the lands so ordered excluded shall not be relieved of their obligation to pay their proportionate share of any existing bonded or contract indebtedness of

the irrigation district, and the lands shall remain a part of the irrigation district for the purpose of discharging the existing bonded or contract indebtedness.

No hearing shall be held when, prior to the date set for the hearing, the board issues an order excluding the land described in the petition from the district.

When land is excluded from the district pursuant to a petition filed on or before December 1 in any calendar year, assessments against the land for any calendar year subsequent to the year in which the petition was filed shall not be valid and no lien for any such attempted assessment shall attach under section 43-706, Idaho Code. [1905, p. 220, § 3; am. R.C., § 2436; am. and designated § 2436; 1911, ch. 46, § 3, p. 102; reen. C.L., § 2435a; C.S., § 4424; I.C.A., § 42-1103; am. 1971, ch. 254, § 2, p. 1028; am. 1978, ch. 312, § 4, p. 803; am. 1988, ch. 134, § 2, p. 240; am. and redesisg. 1990, ch. 181, § 4, p. 386.]

Compiler's notes. This section was formerly compiled as § 43-1103.

Former § 43-1104 was amended and redesignated as § 43-1106 by § 6 of S.L. 1990, ch. 181.

Section 3 of S.L. 1978, ch. 312 is compiled as § 43-1103.

Section 1 of S.L. 1988, ch. 134 is compiled as § 43-1101.

Sec. to sec. ref. This section is referred to in § 43-1107.

43-1105. Survey of land to be excluded. — The board of directors may cause any survey to be made it deems necessary for the purpose of determining the change in the district by reason of an exclusion or proposed exclusion. In any case where the land is excluded on the ground that it is too high to receive any benefit from the irrigation works of said district without pumping by the landowner, the cost of all surveys shall be borne by the irrigation district. The board may not, however, require a survey when the land sought to be excluded lies entirely within a subdivision as defined in section 50-1301, Idaho Code. If the land described in the petition is described in accordance with the public survey or in accordance with a plat approved, filed and recorded as provided by law, the cost of survey shall be borne by the district. [1905, p. 220, § 2; reen. R.C., § 2435; am. 1911, ch. 46, § 2, first part of subd. § 2435, p. 102; reen. C.L., § 2435; C.S., § 4423; I.C.A., § 42-1102; am. 1971, ch. 254, § 1, p. 1028; am. 1972, ch. 325, § 4, p. 804; am. and redesisg. 1990, ch. 181, § 5, p. 386.]

Compiler's notes. This section was formerly compiled as § 43-1102.

Former § 43-1105 was amended and redesignated as § 43-1107 by § 7 of S.L. 1990, ch. 181.

Sec. to sec. ref. This section is referred to in §§ 43-1101 and 43-1103.

43-1106. Appeal. — An appeal shall lie from the decision of the board of directors of such irrigation district denying the petition or any part thereof to the district court of the county where the lands described in the petition are located. The appeal to be taken in the same manner and within the same period of time as appeals are taken from decisions or orders of the board of

county commissioners. If an appeal results in an order of the district court excluding the lands described in the petition, or any of them, the time of segregation shall date from the date of the hearing before the board of directors of the district. [R.C., § 2437; am. 1911, ch. 46, § 4, part of subd. 2437, p. 102; reen. C.L., § 2435b; C.S., § 4425; I.C.A., § 42-1104; am. and redesisg. 1990, ch. 181, § 6, p. 386.]

Compiler's notes. This section was formerly compiled as § 43-1104. Former § 43-1106 was amended and redesignated as § 43-1108 by § 8 of S.L. 1990, ch. 181.

43-1107. Costs. — The costs of excluding any land as provided in this chapter shall be borne by the petitioner or petitioners except in cases where:

(1) The lands excluded are found to be too high or not susceptible of irrigation from the water system of the district without pumping by the landowner; or

(2) The exclusion is requested under subsection (a)3 or (a)4 of section 43-1102, Idaho Code, and for the five (5) irrigation seasons preceding the filing of the petition (a) there has been no pipe, ditch or other delivery system between the land and the assigned delivery point on the district's irrigation system, and (b) the petitioner or previous owners of the land have paid the assessments of the district against that land. If the petitioner is required to pay the costs of exclusion proceedings, the board may require a deposit of the estimated costs before they will hear the petition and the ninety (90) day period in which the petition must be heard as provided in section 43-1104, Idaho Code, shall not begin to run until the estimated costs have been deposited: provided, however, that, in case of a successful appeal by the petitioner, the costs taxed by the district to the petitioner or petitioners whose lands are excluded by the district court shall be borne by the irrigation district. If the actual costs of the exclusion proceedings are less than the amount deposited by the petitioner, the excess deposit shall be credited against any amounts which are to be paid by the petitioner prior to entry of the order of exclusion, and the balance, if any, shall be refunded to the petitioner within fourteen (14) days after the hearing; if the actual costs of the exclusion proceedings are more than the deposit, the difference shall be paid to the district by the petitioner within fourteen (14) days after receipt of a statement to that effect from the district, and the board shall not be required to enter an order of exclusion until the difference is paid. [1905, p. 220, § 4; am. R.C., § 2437; am. 1911, ch. 46, § 4, part of subd. 2437, p. 102; reen. C.L., § 2436; C.S., § 4426; I.C.A., § 42-1105; am. and redesisg. 1990, ch. 181, § 7, p. 386.]

Compiler's notes. This section was formerly compiled as § 43-1105.

Former § 43-1107 was amended and redesignated as § 43-1109 by § 9 of S.L. 1990, ch. 181.

The words "this chapter" refer to S.L. 1911, ch. 46 compiled herein as §§ 43-1101, 43-1104 — 43-1108.

43-1108. Changes to be filed for record. — The decision and order of the board of directors or the district court, in case of appeal, excluding the

petitioner's land and changing the boundaries of such irrigation district shall be filed for record in the recorder's office of the county within which are situated the excluded lands. [1905, p. 220, § 4; am. R.C., § 2435; am. 1911, ch. 46, § 2, last part of subd. 2435, p. 102; reen. C.L., § 2437; C.S., § 4427; I.C.A., § 42-1106; am. and redesisg. 1990, ch. 181, § 8, p. 386; am. 2001, ch. 192, § 2, p. 657.]

Compiler's notes. This section was formerly compiled as § 43-1106. Section 1 of S.L. 2001, ch. 192 is compiled as § 43-1010.

Former § 43-1108 was amended and redesignated as § 43-1110 by § 10 of S.L. 1990, ch. 181.

43-1109. Effect of exclusion. — An exclusion of land from any irrigation district shall not impair its existence, nor its rights, including those in its property or its obligations. The land excluded from an irrigation district shall not thereafter be entitled to receive water from the water rights or from the irrigation works and system of the district and shall not thereafter be entitled to any of the benefits of the district and shall be deemed to have fully relinquished all such rights and benefits to the district, provided, that lands retained for drainage purposes shall be entitled to the benefits of the drainage system of the district. [I.C., § 43-1107, as added by 1972, ch. 325, § 5, p. 804; am. and redesisg. 1990, ch. 181, § 9, p. 386.]

Compiler's notes. This section was formerly compiled as § 43-1107. Ignated as § 43-1111 by § 11 of S.L. 1990, ch. 181.

Former § 43-1109 was amended and redesis-

43-1110. Residential land not using water rights — Exclusion — Procedure. — The board of directors of an irrigation district may by resolution, or must, if petitioned by the owners of record of over fifty per cent (50%) of the number of lots in a platted subdivision, declare its proposal to exclude from the district all lots or parcels of residential land in the district described in the petition which have not received water from the water rights of the district or through the irrigation works and system of the district during the period of five (5) years immediately preceding the adoption of the resolution. Lots or parcels of land in contiguous subdivisions may be included in the same resolution. Platted lots which theretofore received water through the same ditch operated by a lateral ditch water users' association may be included in the same resolution. If the board is petitioned by over fifty per cent (50%) of the lot owners of a subdivision, the board shall conduct the entire proceedings according to sections 43-1110 through 43-1117, Idaho Code.

For purposes of this section, residential land shall mean land on which a house, mobile home, duplex, apartment house or other type of living quarters has been constructed or installed and has been occupied as living quarters by an owner or renter. [1972, ch. 371, § 1, p. 1089; am. and redesisg. 1990, ch. 181, § 10, p. 386.]

Compiler's notes. This section was formerly compiled as § 43-1108. Former § 43-1110 was redesignated as § 43-1112 by § 12 of S.L. 1990, ch. 181.

Sec. to sec. ref. Sections 43-1110 through 43-1117 are referred to in §§ 43-1102, 43-1118.

43-1111. Resolution — Contents. — The resolution proposing to exclude such lands shall:

- (a) Describe each lot or parcel proposed to be excluded;
- (b) Specify the period of time during which each such lot or parcel has not received water from the water rights or through the irrigation works and system of the district;
- (c) Specify the name and address of each person in possession of each such lot or parcel and of each owner thereof as the ownership appears of record in the assessment rolls of the district and of each owner thereof as the ownership appears of record in the office of the county recorder of the county in which the land is situated and of each mortgagee and other lien-holder whose mortgage or lien appears of record in the office of the county recorder of the county in which the land is situated; and,
- (d) Fix the time and place for hearing of the proposed exclusion, which time shall be not less than twenty-eight (28) days from the date of the adoption of the resolution.

The board may procure any survey which it deems necessary and any title reports which it deems advisable to describe each lot or parcel proposed to be excluded and to determine the names of owners and lienholders of such lands. [1972, ch. 371, § 2, p. 1089; am. and redesign. 1990, ch. 181, § 11 p. 386.]

Compiler's notes. This section was formerly compiled as § 43-1109. Former § 43-1111 was amended and redesignated as § 43-1113 by § 13 of S.L. 1990, ch. 181.

43-1112. Notice. — The secretary shall publish notice of such hearing for at least once a week for two (2) weeks before the date of such hearing in the newspaper published in the county in which the land proposed to be excluded is situated. If no newspaper is published in the county containing the land proposed to be excluded, notice shall be posted for the same length of time in at least three (3) public places in the district, one (1) of which notices shall be posted on the land proposed to be excluded. Notice of such hearing on such proposed exclusion shall be given by the secretary of the district by certified or registered mail to each person, firm and corporation named in the resolution. [1972, ch. 371, § 3, p. 1089; redesign. 1990, ch. 181, § 12, p. 386.]

Compiler's notes. This section was formerly compiled as § 43-1110. Former § 43-1112 was redesignated as § 43-1114 by § 14 of S.L. 1990, ch. 181.

43-1113. Notice — Contents. — Such notice shall contain:

- (a) A statement of the date, time and place of the hearing;
- (b) A description of each lot or parcel proposed to be excluded;
- (c) The reasons for the exclusion stated in the resolution of intention; and

(d) Notice to each person, firm and corporation interested in the proposed exclusion to appear at the district office at the date and time fixed, and file objections in writing showing cause, if any they may have, why the land or any part of it should not be excluded as proposed in the resolution of the board. [1972, ch. 371, § 4, p. 1089; am. and redesisg. 1990, ch. 181, § 13, p. 386.]

Compiler's notes. This section was formerly compiled as § 43-1111. Former § 43-1113 was amended and redesignated as § 43-1115 by § 15 of S.L. 1990, ch. 181.

43-1114. Hearing. — At the hearing on the proposed exclusion, the board of directors shall hear all of the objections presented to it in writing and all evidence introduced in support of the exclusion and in support of the objections to the exclusion. [1972, ch. 371, § 5, p. 1089; redesisg. 1990, ch. 181, § 14, p. 386.]

Compiler's notes. This section was formerly compiled as § 43-1112. Former § 43-1114 was amended and redesignated as § 43-1116 by § 16 of S.L. 1990, ch. 181.

43-1115. Order — Determination. — The board after the hearing on its proposal to exclude and the objections thereto shall order the exclusion of all or any part of the land described in the resolution when as to the land to be excluded, the board determines that:

(a) The land has not received water from the irrigation works and system of the district during the period of five (5) years immediately preceding the adoption of the resolution of the board declaring its proposal to exclude the land;

(b) The land will not be directly and presently benefited by the operations of the district;

(c) The ditch rights of other landowners in the same lateral ditch water users' association in the district will not be injured; and,

(d) The exclusion is for the best interests of the owner of the land proposed to be excluded and of the district. [1972, ch. 371, § 6, p. 1089; am. and redesisg. 1990, ch. 181, § 15, p. 386.]

Compiler's notes. This section was formerly compiled as § 43-1113. Former § 43-1115 was amended and redesignated as § 43-1117 by § 17 of S.L. 1990, ch. 181.

43-1116. Board — Entry of order of exclusion. — If the board determines from the hearing that any lot or parcel included in the proceedings should be excluded from the district, the board shall make and enter an order of exclusion in its proceedings describing each lot or parcel being excluded from the district.

If any lot or parcel proposed to be excluded shall not be excluded by such order of exclusion, the board shall make and enter an order describing each lot or parcel included in the proceedings and not excluded from the district. [1972, ch. 371, § 7, p. 1089; am. and redesisg. 1990, ch. 181, § 16, p. 386.]

Compiler's notes. This section was formerly compiled as § 43-1114. Former § 43-1116 was amended and redesignated as § 43-1118 by § 18 of S.L. 1990, ch. 181.

43-1117. Order — Filing for record. — A copy of the order or resolution of exclusion, certified by the president and secretary of the district, shall be filed for record in the office of the county recorder of each county wherein any portion of the land is situated. [1972, ch. 371, § 8, p. 1089; am. and redesisg. 1990, ch. 181, § 17, p. 386.]

Compiler's notes. This section was formerly compiled as § 43-1115. Former § 43-1117 was amended and redesignated as § 43-1119 by § 19 of S.L. 1990, ch. 181.

43-1118. Appeals — Procedure. — An appeal shall lie from the resolution or the order of the board of directors excluding, and from the order of the board of directors not excluding, lands covered by proceedings under sections 43-1110 through 43-1117, Idaho Code, or from any part of any such order. The appeal may be taken by any landowner in the district and by any person, firm or corporation having any interest in any tract of land included in any such order. The appeal shall be to the district court of the county where the lands involved in the appeal are located. The appeal shall be taken in the same manner and within the same period of time as appeals from the board of county commissioners. [1972, ch. 371, § 9, p. 1089; am. and redesisg. 1990, ch. 181, § 18, p. 386.]

Compiler's notes. This section was formerly compiled as § 43-1116. Former § 43-1118, which comprised S.L. 1972, ch. 371, § 11, p. 1089 was repealed by S.L. 1990, ch. 181, § 20.

43-1119. Exclusion — Loss of water rights — Obligations outstanding — Effect — Enforcement — Payment — Certificate. — (1) Land excluded from any irrigation district shall not thereafter be entitled to receive water from the water rights or from the irrigation works and system of the district and, except as provided in subsection (b) of section 43-1102, Idaho Code, shall not thereafter be entitled to any of the benefits of the district. An exclusion of land from any irrigation district shall not impair the water rights or irrigation works and system of the district nor its rights in or to its property or its obligations.

(2) Land excluded from a district shall be subject to assessment and be otherwise chargeable for the payment and discharge of all obligations outstanding at the time of the entry of the order or resolution excluding the land as fully as though the land had not been excluded.

(3) All provisions which could be used to compel the payment by excluded land of its portion of the outstanding obligations had the exclusion not occurred, may be used to compel the payment on the part of the land of the portion of the outstanding obligations of the district for which it is liable.

(4) When any lot or parcel of land shall be excluded from an irrigation district and there shall be paid to the district all of the debts and obligations of the district assessable, chargeable or allocable to the lot or tract excluded, the district may issue its certificate of full payment executed by the

president and secretary of the district, and acknowledged so that the certificate may be recorded in the records of the county wherein the land is situate. [1972, ch. 371, § 10, p. 1089; am. and redesign. 1990, ch. 181, § 19, p. 386.]

Compiler's notes. This section was formerly compiled as § 43-1117.

Former § 43-1119, which comprised S.L. 1972, ch. 371, § 12, p. 1089, was repealed by

S.L. 1990, ch. 181, § 20.

Section 21 of S.L. 1990, ch. 181 declared an emergency. Approved March 27, 1990.

43-1120. Reinstatement of nonagricultural lands — Order — Filing for record. — Where lands have been excluded from an irrigation district under the provisions of this chapter and the owner or owners of the excluded lands desire to receive irrigation water: through an existing distribution system; through a distribution system proposed to be constructed under authority of section 43-329, 43-330A or 43-333, Idaho Code, or under any law authorizing a local improvement district; pursuant to a lease executed under section 43-335 or 43-338, Idaho Code; or pursuant to a contract executed under section 43-730, Idaho Code, the owner or owners may file with the secretary of the irrigation district a written request, signed and acknowledged in the manner required for conveyances of real property, that the lands be reinstated by the irrigation district. Upon receipt of such a request the board of directors of the irrigation district, in its discretion, may enter an order declaring that the lands are reinstated to their former status, including the water rights, and directing the assessor of the irrigation district to enter the lands on the assessment roll. A copy of the order or resolution of reinstatement, certified by the president and secretary of the district, shall be filed for record in the office of the county recorder of each county wherein any portion of the reinstated land is situated. The district may charge a filing fee not to exceed the costs of processing the reinstatement request, and may also charge a reinstatement fee not to exceed the exclusion fee provided in section 43-1101, Idaho Code. [I.C., § 43-1120, as added by 1993, ch. 209, § 1, p. 570; am. 1998, ch. 231, § 1, p. 789.]

Compiler's notes. Former § 43-1120, 1089, was repealed by S.L. 1990, ch. 181, which comprised S.L. 1972, ch. 371, § 13, p. § 20.

43-1121. Notice of proposed construction of distribution system — Time for filing written request. — Prior to construction of a distribution system under the authority of either section 43-329 or 43-333, Idaho Code, or under any law authorizing a local improvement district, an irrigation district shall mail a notice of the intended construction to the current owner of any lot or parcel within the area to which irrigation water can be delivered by that distribution system, which previously had been excluded from the district as not agricultural. The notice shall state that the lot or parcel may be eligible for reinstatement, with water rights, if the owner so requests in writing, properly signed and acknowledged, and shall specify the date, not less than three (3) weeks after mailing of the notice,

after which the irrigation district may decline to consider the request. [I.C., § 43-1121, as added by 1993, ch. 209, § 2, p. 570.]

Compiler's notes. Section 3 of S.L. 1993, ch. 207 declared an emergency. Approved March 26, 1993.

CHAPTER 12

ANNEXATION AND EXCLUSION OF STATE LANDS

SECTION.

43-1201. Resolution of board of land commissioners — Petition.

43-1201. Resolution of board of land commissioners — Petition.

— The state board of land commissioners may, by resolution duly passed at any meeting of said board and recorded in the minutes thereof, after due consideration in each specific case, authorize the governor of the state of Idaho, as chairman of said board of land commissioners, to sign a petition for the annexation of adjacent state lands of the state of Idaho to a regularly organized irrigation district, or sign a petition to exclude such state lands from an irrigation district. The governor of the state of Idaho, as chairman of the state board of land commissioners, shall be deemed the owner of said lands for the purpose of signing any petition herein authorized, with like effect as the owner of private lands. [1927, ch. 157, § 1, p. 211; I.C.A., § 42-1201.]

CHAPTER 13

DISSOLUTION AND MODIFICATION OF DISTRICTS

SECTION.

43-1301. Petition.
43-1302. Election — Call for.
43-1303. Election — Notice.
43-1304. Election — Conduct.
43-1305. Canvass of returns.
43-1306. Petition for confirmation by district court.
43-1307. Character of proceedings for confirmation.
43-1308. Decree of confirmation.
43-1309. Dissolution without election — Petition — Conditions.

SECTION.

43-1310. Dissolution without election — Parties.
43-1311. Dissolution without election — Appointment of officer to marshal assets — Decree.
43-1312. Dissolution without election — Application of other code provisions.
43-1313. Dissolution without election — Appeal.

43-1301. Petition. — Whenever twenty-five (25) or a majority of the landowners in any irrigation district heretofore organized or hereafter to be organized so desire they may petition the board of directors to call a special election for the purpose of submitting to the qualified electors of such irrigation district a proposal to vote on the modification of such district by the exclusion of land within its boundaries or a proposal to vote on the dissolution of such district, or for the sale or transfer of its water rights, canal system and all or any other property or for dissolution and for sale or transfer, as the case may be. Such petition shall set forth the reasons for

such proposal and in case it is proposed to modify said district by the exclusion of lands therein shall set forth particularly the land to be excluded and the reasons therefor. Such petition for modification or dissolution of the district or for such sale or transfer either shall state that all outstanding bonds, warrants and other obligations of every nature whatsoever, legal and enforceable, against said district have been fully satisfied and paid or shall set forth facts showing reasonable ground for the belief that the consent of the holders of all outstanding bonds, warrants and other obligations of the district, legal and enforceable, can be obtained, or that the district is able to satisfy all those not consenting. [R.C., § 2437a, as added by 1917, ch. 167, § 1, part of subd. 2437a; am. 1919, ch. 36, § 1, p. 132; C.S., § 4428; I.C.A., § 42-1301.]

Cross ref. Alternative procedure for exclusion of lands, § 43-1101.

Secretary of interior authorized to sign petition as if owner of public lands, § 43-1802.

Collateral References. 45 Am. Jur. 2d, Irrigation, §§ 58-61.

94 C.J.S., Waters, §§ 835-838.

Constitutionality of statutes for formation or change of irrigation districts. 69 A.L.R. 266.

43-1302. Election — Call for. — It shall be the duty of the said board of directors, if it approves said petition, to call an election for the purpose of submitting to the qualified electors of the district the proposal specified in said petition: provided, that no sale or transfer shall be made unless to a duly organized irrigation company under the laws of Idaho operating only for the benefit of its stockholders. [R.C., § 2437a, as added by 1917, ch. 167, § 1, part of subd. 2437a, p. 498; reen. C.L., § 2437b; am. 1919, ch. 36, § 2, p. 132; C.S., § 4429; I.C.A., § 42-1302.]

43-1303. Election — Notice. — Notice of such election must be given by posting notices in three (3) public places in each election precinct in said district at least four (4) weeks before the date of said election and by the publication thereof for the same length of time in some newspaper published in each county in which the district or any part thereof is located. Such notice must specify the time and place of holding such election and, in case such election involves the exclusion of land from the district, must describe the land proposed to be excluded, and in case of sale or transfer shall set forth briefly the property and rights affected and the terms and basis of participation of district land and water owners in such transfer. [R.C., § 2437b, as added by 1917, ch. 167, § 1, part of subd. 2437b, p. 498; reen. C.L., § 2437c; am. 1919, ch. 36, § 3, p. 132; C.S., § 4430; I.C.A., § 42-1303.]

Cross ref. Notice by mail, § 60-109A.

43-1304. Election — Conduct. — Such election must be held in all respects as near as practicable in conformity with the provisions of law governing elections upon the organization of irrigation districts. All persons who possess the qualifications of electors under the general laws of the state and are residents of said district may vote at such election. Upon the ballots used at such elections should be written or printed "For Modification, Yes"

and "For Modification, No," or "For Dissolution, Yes" and "For Dissolution, No," or "For Sale or Transfer, Yes" and "For Sale or Transfer, No," depending upon the nature of the proposal to be voted upon. [R.C., § 2437b, as added by 1917, ch. 167, § 1, part of subd. 2437b, p. 498; reen. C.L., § 2437d; am. 1919, ch. 36, § 4, p. 132; C.S., § 4431; I.C.A., § 42-1304.]

Cross ref. Election upon organization, § 43-112. Qualifications of electors, §§ 34-401 — 34-438 and § 43-111.

43-1305. Canvass of returns. — On the first Monday after any such election the board of directors of the district shall meet at its usual place of meeting to canvass the returns, and when they shall have declared the result the secretary shall make full entry in his record. [R.C., § 2437c, as added by 1917, ch. 167, § 1, subd. 2437c, p. 498; reen. C.L., § 2437e; C.S., § 4432; I.C.A., § 42-1305.]

43-1306. Petition for confirmation by district court. — Immediately after such election, in case the proposal has carried by a majority vote, the board of directors of the irrigation district shall file in the district court of the county in which their office is situated a petition praying in effect that the proceedings aforesaid for the modification or dissolution of the district, or for the sale or transfer of its properties, as the case may be, may be examined, approved and confirmed by the court. The petition shall set forth a full description of the land formerly embraced within said irrigation district which is affected by the proceedings for the modification or dissolution of such district, or of the property and rights proposed to be sold or transferred, as the case may be, shall set forth generally the proceedings taken with reference to the petition and the election specified in the preceding sections of this chapter, and shall set forth fully every item of legal and enforceable indebtedness of the district with the name and residence of the holder thereof so far as known to the secretary of the district. In case any items of indebtedness are in the hands of unknown owners, they shall be so listed. [R.C., § 2437d, as added by 1917, ch. 167, § 1, part of subd. 2437d, p. 498; reen. C.L., § 2437f; am. 1919, ch. 36, § 5, p. 132; C.S., § 4433; I.C.A., § 42-1306.]

Compiler's notes. The words "this chapter" refer to S.L. 1917, ch. 167, compiled herein as §§ 43-1301 — 43-1308.

43-1307. Character of proceedings for confirmation. — Said proceedings shall be in the nature of a suit to quiet title with respect to so much of the land within said district as is affected by the proposal to modify or dissolve the same. And the decree of the court approving a sale or transfer shall be full and complete authority for carrying out the same and such decree shall further set forth the basis and terms of sale or transfer and the basis of participation by the owners in said district in such sale or transfer. In such proceedings the board of directors shall be the parties plaintiff and the holders of any obligations of the district, including obligations which are or might become liens against any of said lands, are parties defendant. The

provisions of sections 6658, 6659 and 6660 of Idaho Compiled Statutes [§§ 5-325, 5-326 Idaho Code], so far as they can be made applicable, shall govern generally the pleadings, summons, proceedings and force and effect of the decree: provided, that the petition may be in form against all persons having interest in or claim against the district, without naming them, and the summons, directed in same way, and setting forth briefly the purposes of the petition, shall be by publication in the first instance or order of the court or a judge thereof and service on all parties interested, whether unknown owners, heirs, devisees, claimants or otherwise, shall be deemed complete at the time prescribed by the order for publication; and, unless answer be made by any one interested in or making claim against said district, within twenty (20) days after such last day of publication, default may be entered. [R.C., § 2437d, as added by 1917, ch. 167, § 1, part of subd. 2437d, p. 499; reen. C.L., § 2437g; am. 1919, ch. 36, § 6, p. 132; C.S., § 4434; I.C.A., § 42-1307.]

Compiler's notes. C.S. § 6660 referred to in this section is compiled as § 5-326.

C.S. § 6658 was repealed by S.L. 1975, ch. 242, § 1 and prior to repeal was compiled as § 5-325.

C.S. § 6659 was repealed by S.L. 1927, ch. 111, § 2.

The reference in this section to C.S., §§ 6659, 6660 is to said sections as they existed at the time this section was enacted. See *Nampa & Meridian Irrigation Dist. v. Barker*, 38 Idaho 529, 223 P. 529 (1924).

43-1308. Decree of confirmation. — The court or judge shall set a day for the hearing of such petition and if it appears to the court from the proof adduced thereat that there are no such outstanding bonds, warrants or other indebtedness of such district, or in case there is any such indebtedness outstanding that the holders thereof have filed no objections to the proceedings, or have filed their consent thereto, then the court shall enter its decree confirming the said*proceedings, or may hear and determine and make decree as to any controversy. Said decree shall describe particularly the lands involved and thereafter such lands shall be considered as unaffected by any of the matters done by such irrigation district while such lands were a part thereof: provided, that the election authorized by the preceding sections of this chapter shall have no force or effect to modify or dissolve any district, or to permit such sale or transfer, until confirmed by the decree of court as herein set forth. [R.C., § 2437d, as added by 1917, ch. 167, § 1, part of subd. 2437d, p. 499; reen. C.L., § 2437h; am. 1919, ch. 36, § 7, p. 132; C.S., § 4435; I.C.A., § 42-1308.]

Compiler's notes. For sections in which "this chapter" is compiled see compiler's note, § 43-1306.

43-1309. Dissolution without election — Petition — Conditions. — An irrigation district may be dissolved without the holding of the election provided for by this chapter upon complaint or petition of parties holding and owning:

(a) Fifty per cent (50%) or more of the issued outstanding unpaid bonds of such district; or,

(b) Fifty per cent (50%) or more of all the land situate within the boundaries of such district; or,

(c) Claims, warrants, liens or other legal obligations of such district in an amount equal to not less than thirty per cent (30%) of the issued outstanding and unpaid bonds of such district.

It must be made to appear to the satisfaction of the court, by such complaint or petition, that any one or more of the following conditions exist in or as to said district:

1. That the district has been abandoned, or for two (2) or more years last past has ceased to function, and there is little or no probability that it ever will or can function in future;

2. That no useful purpose exists for the further continuance of the organization of the district;

3. That there are not sufficient qualified electors residing within the boundaries of such district to hold a legal election. [C.S., § 4435-A, as added by 1929, ch. 102, § 1, p. 167; I.C.A., § 42-1309.]

Compiler's notes. The words "this chapter" refer to S.L. 1929, ch. 102, which is compiled herein as §§ 43-1309 — 43-1313.

43-1310. Dissolution without election — Parties. — In such petition the petitioners or complainants shall be named as plaintiffs and the irrigation district, and its directors, if any there are, and all persons having interest in or claim against the district, without naming them, shall be defendants; in the course of the proceedings of said case, and at any time before the final hearing thereof, any person interested may join in said case as a party plaintiff or as a party defendant, or any party interested may intervene in said case without order of the court. [C.S., § 4435-B, as added by 1929, ch. 102, § 1, p. 167; I.C.A., § 42-1310.]

43-1311. Dissolution without election — Appointment of officer to marshal assets — Decree. — In the exercise of the jurisdiction given it by this act, the court shall have the power to appoint such referee, master, auditor, or receiver as may be considered necessary or proper to marshal the assets, and protect or preserve them, or ascertain the true condition of such district; after due hearing and consideration of the evidence submitted, the court shall enter a decree establishing the legal and equitable rights, interests and priorities of all parties and claimants, and may decree and direct the sale of all or any part of the properties of the district, whether real, personal or mixed, and direct the disbursement and application of the proceeds and the payment of the costs of the proceeding, and may dissolve the district, or may approve and confirm any settlement or agreement of settlement made between the parties interested in such district, if a settlement is agreed upon by them, or may direct the payment of the indebtedness of the district in the order of priority determined and established by the decree, through assessments made as in case of the dissolution of villages, or may grant such other or further relief as may be equitable or

proper in the premises. [C.S., § 4435-C, as added by 1929, ch. 102, § 1, p. 167; I.C.A., § 42-1311.]

Compiler's notes. For sections in which "this act" is compiled see compiler's note, § 43-1309.

43-1312. Dissolution without election — Application of other code provisions. — The general provisions of this chapter, and the general provisions of sections 5-508, 5-509, and 5-511 relative to issuance, service and publication of process, hearing, entry and execution of judgment and decree, as far as applicable shall apply to the proceedings had under the provisions of this act, the necessary substitutions and changes being considered made. [C.S., § 4435D, as added by 1929, ch. 102, § 1, p. 167; am. 1931, ch. 47, § 1, p. 82; I.C.A., § 42-1312.]

Compiler's notes. For sections in which "this chapter" is compiled see compiler's note, § 43-1309.

Section 5-511 referred to in this section was

repealed by S.L. 1975, ch. 242, § 1. For new law see Idaho Rules of Civil Procedure, Rule 4(d)(6), 4(g).

43-1313. Dissolution without election — Appeal. — Each party to any proceeding under this act shall have the right of appeal as in other civil cases. [C.S., § 4435E, as added by 1929, ch. 102, § 1, p. 167; I.C.A., § 42-1313.]

Compiler's notes. For sections in which "this act" is compiled see compiler's note, § 43-1309.

Section 2 of S.L. 1929, ch. 102 declared an

emergency. Approved March 1, 1929.

Cross ref. Appeal in civil cases, § 13-201 et seq.

CHAPTER 14

CONSOLIDATION OF DISTRICTS

SECTION.

- 43-1401. Petition for consolidation.
- 43-1402. Investigation by department of water resources.
- 43-1403. Election to determine question of consolidation.

SECTION.

- 43-1404. Procedure upon affirmative vote.
- 43-1405. Effect of negative vote.
- 43-1406. Joint interstate districts.
- 43-1407. Joint interstate districts — Right to drain lands.

43-1401. Petition for consolidation. — Whenever the boards of directors of any two (2) or more irrigation districts which are contiguous deem it for the best interests of their respective districts that the same be consolidated into a single district, such boards of directors may petition the board of county commissioners for an order for an election, to vote upon the question of such consolidation, which petition shall state in detail the terms upon which such consolidation is proposed to be made: provided, however, when any two (2) irrigation districts which are contiguous, where one (1) district does not embrace more than one tenth ($\frac{1}{10}$) the land in the larger district, and the board of directors deem it for the best interests of the respective districts that the same be consolidated into a single district, the

board of directors may arrange by contract upon what terms and conditions the smaller district may be consolidated with the larger district, with the name and officers of the larger district still retained, which contract shall be submitted to the board of directors of the smaller district, together with the question of whether or not said districts shall be consolidated under the terms of the agreement, at a special election held for that purpose in such smaller district. Notice of such election shall be published as required for notices of election for indebtedness. At such election should two thirds ($\frac{2}{3}$) of the electors voting, vote in favor of said contract and the consolidation of said districts, the board of directors of the smaller district shall petition the board of directors of the larger district, which notice shall be published in a newspaper published within the county wherein the office of the board of directors of the larger district is situated, for such length of time and covering the same matters as required by a petition of a private owner of land to have same included within the boundaries of an irrigation district. The law applicable to the inclusion of land within the boundaries of an irrigation district, after the petition is filed and notice given, shall apply to the consolidating, including and annexing of a smaller district in and to the boundaries of a larger district. After the board of directors of the larger district has made the order including said smaller district within the boundaries of the larger district, the board of directors of the larger district shall file a petition in the district court within the county wherein the principal office of the larger district is situated, asking for an approval and confirmation of the proceedings thereunder, and the same procedure shall be followed as provided by sections 43-406, 43-407, and 43-408 with reference to the confirmation of the proceedings within irrigation districts. In such petition the prayer shall be that the proceedings, together with the contract, may be examined and approved by the court; that after the confirmation of said proceedings the order of the board of directors admitting the smaller district into the larger district, containing a description of all the land properly certified by the secretary of the district, shall be filed for record in the office of the recorder of the county within which said land lies. [1903, p. 150, part of § 56; reen. R.C. & C.L., § 2438; am. 1919, ch. 120, § 1, p. 405; C.S., § 4436; I.C.A., § 42-1401.]

Cross ref. Annexation of lands, §§ 43-1001 — 43-1011.

Collateral References. 45 Am. Jur. 2d, Irrigation, §§ 58-61.

94 C.J.S., Waters, §§ 786-793.

Constitutionality of statutes for formation or change of irrigation districts. 69 A.L.R. 266.

43-1402. Investigation by department of water resources. — Upon receiving such petitions said board of county commissioners shall request the department of water resources to investigate the conditions of such districts, and all questions affecting such proposed consolidation, and it shall make a report of the result of such investigations to the board of county commissioners not more than ninety (90) days after such request is received. [1903, p. 150, part of § 56; reen. R.C., § 2438; reen. C.L., § 2438a; C.S., § 4437; I.C.A., § 42-1402.]

Compiler's notes. The name of the department of water administration (formerly the department of reclamation) has been changed to the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

43-1403. Election to determine question of consolidation. — At the time said report upon the matter is made, said board of county commissioners, if deemed advisable, shall make an order fixing the time for an election in the said districts to vote upon the question of such proposed consolidation, which time shall not be less than thirty (30) nor more than sixty (60) days after the date of said report. Notice of said election shall be published as required for notice of election in section 43-110; and the said boards of directors shall make all necessary arrangements for such election in their respective districts as provided in this title for other elections. The ballots shall be substantially as follows: "Consolidation — yes," "Consolidation — no." The said boards of directors shall canvass the returns of such election as provided in case of usual district elections, and shall immediately thereafter transmit, by messenger or registered mail, certified abstracts of the result of said election in their respective districts to the clerk of the board of county commissioners. Within ten (10) days after such returns are received by said clerk, the said board of county commissioners shall meet and canvass the same. [1903, p. 150, part of § 56; reen. R.C., § 2438; reen. C.L., § 2438b; C.S., § 4438; I.C.A., § 42-1403.]

43-1404. Procedure upon affirmative vote. — If it appears that a majority of all the votes cast in each of said districts is "Consolidation — yes," said board shall make an order, and enter the same of record in its minutes, establishing said consolidated district, giving its boundaries and designation, and in detail the terms under which the consolidation has been effected, and dividing said consolidated district into three (3) divisions, and shall appoint some person qualified under this title, to act as director for each of said divisions of said district until the next general election for the election of officers, when a board of directors shall be elected as provided in section 43-201: provided, however, that the organization of such district shall not take effect until the first Tuesday of the January following said order of its establishment. If the date provided by law for the election of directors shall come between the date of said order of the board of county commissioners and said first Tuesday of January, then in making such order said board shall designate the board of directors of one (1) of the consolidated districts as a board to take charge of said election, and a director shall in that case be elected for each said division of said consolidated district, and in that case no appointment of directors shall be made by said board of county commissioners. [1903, p. 150, part of § 56; reen. R.C., § 2438; reen. C.L., § 2438c; C.S., § 4439; I.C.A., § 42-1404.]

43-1405. Effect of negative vote. — If, however, upon such canvass by said board of county commissioners, it appears that a majority of the votes cast in any district thus proposed to be consolidated is "Consolidation — no," then a record of that fact shall be entered in the same minutes of said board of county commissioners, and all the proceedings had under the preceding

sections of this chapter shall be void. [1903, p. 150, part of § 56; reen. R.C., § 2438; reen. C.L., § 2438d; C.S., § 4440; I.C.A., § 42-1405.]

43-1406. Joint interstate districts. — One or more irrigation districts organized under the laws of this state may unite with one or more adjacent irrigation districts organized under the laws of any adjoining state in the purchase or construction of an irrigation system or works for the irrigation of the land within said respective irrigation districts; and in such case said irrigation districts are hereby jointly granted the same power of condemnation as is now possessed by one (1) district alone; and in such case the cost of purchase, acquisition or construction of such irrigation system shall be apportioned to each district in proportion to the acreage in each district for which water shall be provided and such joint works shall be owned jointly in proportion to such respective acreage; a joint commission not exceeding seven (7) in number shall be chosen by the board of directors of the respective irrigation districts, the members of which shall be apportioned to each district as nearly as practicable in accordance with the acreage for which water shall be provided in each respective district; said commission shall control and manage such joint works subject to the board of directors of the respective districts and each member of such commission shall hold office at the will of the board of directors of the district appointing him. [1917, ch. 31, § 1, p. 73; reen. C.L., § 2438n; C.S., § 4441; I.C.A., § 42-1406.]

Collateral References. Cooperation or compacts between states as to water rights. 134 A.L.R. 1411.

43-1407. Joint interstate districts — Right to drain lands. — The authority extended to joint interstate districts under the preceding section shall be construed to include the right to drain its lands under section 43-1406. [Compiled from 1917, ch. 31, § 2, p. 73; reen. C.L., § 2438o; C.S., § 4442; I.C.A., § 42-1407.]

CHAPTER 15

MISCELLANEOUS PROVISIONS OF DISTRICT LAW

SECTION.	SECTION.
43-1501. Navigation and mining industries not impaired.	43-1507. Investment of certain funds authorized.
43-1502. Publication of notices.	43-1508. Disposition of lands acquired by tax title — Perfection of title by district — Ratification of prior acts.
43-1503. Other laws unaffected.	43-1509. Right to purchase lands when holding tax title.
43-1504. Existing districts to be governed by this title.	
43-1505. Irrigation lateral districts.	
43-1506. Change of name of irrigation districts.	

43-1501. Navigation and mining industries not impaired. — Navigation shall never in anywise be impaired by the operation of this title, nor shall any vested interest in or to any mining water rights or ditches, or in or

to any water or water rights or reservoirs or dams now used by the owners or possessors thereof in connection with any mining industry, or by persons purchasing or renting the use thereof, or in or to any other property now used directly or indirectly in carrying on or promoting the mining industry, ever be affected by or taken under its provisions, save and except that rights of way may be acquired over the same. [1903, p. 150, § 42; reen. R.C. & C.L., § 2440; C.S., § 4443; I.C.A., § 42-1501.]

Cross ref. Dams and booms, sluiceways, locks or fixtures to permit timber to pass around, through or over required, § 38-806; abatement as nuisance, § 38-807.

43-1502. Publication of notices. — Whenever in this title any notice is required to be given by publication, it shall be satisfied by publishing the same in a weekly newspaper, the same number of times consecutively as the number of weeks mentioned in the requirement. A ten (10) days' notice shall be satisfied by two (2) such publications, a twenty (20) days' notice by three (3), and a thirty (30) days' notice by five (5) such publications. [1903, p. 150, § 60a, as added by 1907, p. 484, § 1; reen. R.C. & C.L., § 2441; C.S., § 4444; I.C.A., § 42-1502.]

Collateral References. 94 C.J.S., Waters, §§ 771-777.

43-1503. Other laws unaffected. — None of the provisions of this title shall be construed as repealing or in anywise modifying the provisions of any other act relating to the subject of irrigation or water distribution. Nothing herein contained shall be deemed to authorize any person or persons to divert the waters of any river, creek, stream, canal or ditch from its channel, to the detriment of any person or persons having any interest in such river, creek, stream, canal or ditch, or the water therein, unless previous compensation be ascertained and paid therefor, under the laws of this state authorizing the taking of private property for public uses. [1903, p. 150, § 43; am. R.C. & C.L., § 2442; C.S., § 4445; I.C.A., § 42-1503.]

43-1504. Existing districts to be governed by this title. — All irrigation districts heretofore organized under any of the laws of this state shall hereafter be governed in all respects by the provisions of this title. [1903, p. 150, § 60; reen. R.C. & C.L., § 2443; C.S., § 4446; I.C.A., § 42-1504.]

Collateral References. 94 C.J.S., Waters, §§ 786-793.

43-1505. Irrigation lateral districts. — For the purpose of constructing, operating, and managing water in distributing systems by means of laterals, sublaterals, ditches, flumes, and pipelines, an irrigation lateral district may be organized and created within the territory already organized as an irrigation district, in the same manner and by the same process required by the provisions of this title, for the creation of an irrigation district from unorganized territory, and such interior irrigation lateral

district, when organized shall through its board of directors, other officers and employees have all necessary powers for the purpose of its creation conferred by this title upon the original irrigation district, including the power to issue, negotiate and sell bonds payable and secured as is in this title provided; to build and construct new works and to levy assessments and taxes necessary for the purpose of conducting its affairs in the same manner and by the same process as are by this title provided in the case of irrigation districts; provided, however, it is distinctly understood that the negotiation and sale of coupons bonds and levying of assessments and taxes and incurring of debts and obligations by any such irrigation lateral district shall not in any way or manner affect any of the bonds, assessments, taxes, or obligations of the irrigation district of which it is a part and shall not in any way or manner limit the power of such original irrigation district to incur the indebtedness, levying of assessments and issue its bonds for any of the purposes for which such district is by this title entitled to levy or issue the same. [C.S., § 4446A, as added by 1925, ch. 50, § 1, p. 74; I.C.A., § 42-1505.]

Compiler's notes. The words "levying of" near the end of the section, apparently should read "levy."

Section 2 of S.L. 1925, ch. 50 declared an emergency. Approved February 21, 1925.

Collateral References. 45 Am. Jur. 2d, Irrigation, § 64.

43-1506. Change of name of irrigation districts. — The board of directors of any irrigation district of the state of Idaho may petition the district court of the county in which the lands of said irrigation district or the greater portion thereof are situated for a change of the name of such irrigation district. Such petition must specify the date of organization of the district, its present name, the name proposed, and that the board of directors deems it for the best interests of said district that the name of the district be changed, and must be signed by the directors of the district or by a majority of them. Upon filing such petition the same proceedings shall be had for effecting such change of name as are prescribed in chapter 8 of title 7 of the Idaho Code, and a certified copy of any order of the district court changing the name of such irrigation district shall be forthwith filed with the department of water resources. Any change of name under the provisions of this section shall not affect any of the rights, property or obligations of said irrigation district. [1929, ch. 191, § 1, p. 353; I.C.A., § 42-1506.]

Compiler's notes. The name of the department of water administration (formerly the department of reclamation) has been

changed to the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

43-1507. Investment of certain funds authorized. — In addition to the authority conferred upon the board of directors of an irrigation district by section 57-127, Idaho Code, such board shall have the authority to invest the surplus funds of such district, in the negotiable, general obligation bonds or other evidences of indebtedness of the United States or of this state or in local improvement district bonds or warrants authorized by chapter 17, title

50, or chapter 25, title 43, Idaho Code, in lieu of depositing the same in designated depositories as provided by the public depository law and to dispose of such bonds, warrants, or evidences of indebtedness as and when said board may direct. [1943, ch. 153, § 1, p. 309; am. 2003, ch. 82, § 1, p. 257.]

Compiler's notes. The "Public Depository Law" referred to in this section is compiled as §§ 57-101 — 57-145.

Section 2 of S.L. 1943, ch. 153 declared an emergency. Approved March 5, 1943.

43-1508. Disposition of lands acquired by tax title — Perfection of title by district — Ratification of prior acts. — Any irrigation district, as the purchaser of any lands at any delinquent tax sale or holding tax deed issued in consequence of any delinquency entry for taxes or assessments, or as the owner of lands in any other manner acquired, and which are not necessary for the use of the district, shall be entitled to the same rights as a private purchaser, and the title so acquired by the district may be conveyed by deed executed and acknowledged by the president and secretary of the board of directors, and in like manner the district may also contract to convey or lease the same; provided that authority so to convey, contract or lease must be conferred by resolution of said board entered upon its minutes. Any deeds executed on behalf of a county by its board of county commissioners or the officers thereof, to an irrigation district holding tax title or delinquency entry against lands within its boundaries prior to the date this act goes into effect, and any deeds, contracts, or leases executed by irrigation districts prior to the date this act goes into effect conveying, contracting to convey, or leasing lands acquired under the conditions set forth in this act are hereby declared to be good, valid and legal, and are hereby validated, approved, authorized and confirmed. [1935, (1st E.S.), ch. 53, § 1, p. 141; am. 1937, ch. 39, § 1, p. 49.]

Compiler's notes. The words "this act" refer to this section and § 43-1509.

Section 2 of S.L. 1937, ch. 39 is compiled as § 43-1601.

Sec. to sec. ref. This section is referred to in § 43-2541.

43-1509. Right to purchase lands when holding tax title. — Any irrigation district holding tax title to, or a delinquency entry against, lands within its boundaries to which a county has heretofore taken or may hereafter take tax deed, may become the purchaser of such lands when the same are sold by such county, and the district may convey, contract to convey or lease any land so acquired, in the manner provided in section 43-1508. [1935 (1st E.S.), ch. 53, § 2, p. 141.]

Compiler's notes. Section 3 of S.L. 1935 (1st E.S.), ch. 53, p. 141, is duplicated in the final sentence of § 43-1508, added by the 1937 amendatory act. For that reason, § 3 of S.L. 1935 (1st E.S.), ch. 53 is omitted.

Section 4 of S.L. 1935 (1st E.S.), ch. 53

repealed all laws and parts of laws in conflict therewith.

Section 3 of S.L. 1937, ch. 39 repealed § 42-321, Idaho Code Annotated.

Section 4 of S.L. 1937, ch. 39 repealed all laws or parts of laws in conflict therewith.

Section 5 of S.L. 1935 (1st E.S.), ch. 53 declared an emergency. Approved April 1, 1935.

Sec. to sec. ref. This section is referred to in § 43-2541.

Collateral References. 94 C.J.S., Waters, §§ 826-834.

CHAPTER 16

PURCHASE OF STATE LANDS BY IRRIGATION DISTRICTS

SECTION.

43-1601. Power to purchase.

43-1602. Resolution to purchase — Payment.

43-1603. Appraisement — Sale — Construction work defined — Assessment of initial costs.

SECTION.

43-1604. Appraisal of improvements.

43-1605. Contracts pledged for construction work.

43-1606. Elections.

43-1607. Application of general laws.

43-1601. Power to purchase. — Any irrigation district organized or hereafter organized under the laws of the state of Idaho is hereby authorized and empowered to purchase state lands within the boundaries of such irrigation district from the state at the state sale of said lands and may sell and dispose of the lands so purchased at a price and upon terms to be determined by the board of directors of such district. Any irrigation district, as a purchaser of any state lands within the boundaries of such district, shall be entitled to the same rights as a private purchaser and a title so acquired by the district may be conveyed by deed executed and acknowledged by the president and secretary of the board of directors: provided, that authority to so convey must be conferred by resolution of the board entered on its minutes: provided further, that in the sale by the state of state lands within an irrigation district under this chapter the lands shall be offered in tracts or parcels of not more than six hundred forty (640) acres. [1917, ch. 40, § 1, p. 90; reen. C.L. 165:1; C.S., § 4447; I.C.A., § 42-1601; am. 1937, ch. 39, § 2, p. 49.]

Compiler's notes. Section 1 of S.L. 1937, ch. 39 is compiled as § 43-1508.

Collateral References. 94 C.J.S., Waters, §§ 786-793.

43-1602. Resolution to purchase — Payment. — Whenever a board of directors of any irrigation district deems it for the best interest of the district to purchase any state lands within such district the said board shall determine what, if any, state land it desires to purchase and shall pass a resolution to that effect, which resolution shall describe the lands the district desires to purchase and the amount of money required to be available for the purchase of the same, and the said board of directors is hereby authorized to issue bonds the proceeds of which are to be used in the purchase of said lands whenever authorized to do so by a two thirds ($\frac{2}{3}$) vote of the qualified electors voting at an election held for such purpose: provided, however, that in case an appropriation is made by the state to any district the proceeds of which appropriation are to be used by such district in the purchasing of state lands within said district the submitting of said question to the qualified electors is not necessary and the board of directors of such district shall have authority to apply the appropriation so made to the

purchase of such state lands. [1917, ch. 40, § 2, p. 90; reen. C.L. 165:2; C.S., § 4448; I.C.A., § 42-1602.]

43-1603. Appraisement — Sale — Construction work defined — Assessment of initial costs. — Before any state lands shall be offered for sale within an irrigation district the state board of land commissioners shall cause said lands to be appraised, showing the value of the lands exclusive of all benefits accruing to such lands by reason of the water rights and irrigation works acquired by the irrigation district, which appraisement shall not be less than ten dollars (\$10.00) per acre. And when lands are sold to other purchasers than the irrigation district, the purchasers shall pay to the irrigation district within which said lands are situated the initial cost of all construction work to the same extent as though said lands had been held in private ownership at the time the construction work was done. But no maintenance or other assessments shall accrue against such land until such time as the land is actually sold. The term "construction work" as herein used shall include the erection of pump houses and electrical and other pumps or appliances for raising water to the lands, as well as dams, headgates, ditches, laterals, drainage canals and other irrigation works. These initial costs shall be assessed against purchasers of the land on such terms of payment as may be agreed upon between the state board of land commissioners and the directors of the irrigation district, and such terms shall be stated in the advertisement of such sale. Any adjustments or reductions of such initial construction charges, as may have been granted or that thereafter may be granted to any of the lands within the irrigation district, shall also be granted to the state lands. [1917, ch. 40, § 3, p. 90; reen. C.L. 165:3; C.S., § 4449; am. 1927, ch. 142, § 1, p. 184; I.C.A., § 42-1603.]

Compiler's notes. Section 2 of S.L. 1927, ch. 142 declared an emergency. Approved March 3, 1927.

Lien Not Impaired.

Lien given under this section was not impaired by agreement of district with state to

satisfy all demands against state on account of reclamation of state lands within district. *Gem. Irrigation Dist. v. Gallet*, 43 Idaho 519, 253 P. 128 (1927), overruled on other grounds, *Jewett v. Williams*, 84 Idaho 93, 369 P.2d 590 (1962).

43-1604. Appraisal of improvements. — In case an irrigation district shall become the purchaser of any state lands, as in this chapter provided, which lands or any portion thereof are held by a lessee, the district shall take the title to said lands subject to said lease, and the district shall not pay for the surface improvements made by such lessee, but whenever the district shall sell and dispose of said lands the said improvements shall be appraised and paid for in the same manner as provided by law and the rules and regulations governing the state board of land commissioners were the said state board of land commissioners acting instead of the board of directors of said district. [1917, ch. 40, § 4, p. 90; reen. C.L. 165:4; C.S., § 4450; I.C.A., § 42-1604.]

43-1605. Contracts pledged for construction work. — The board of directors of any irrigation district, after a sale and disposal of any lands

purchased under this chapter, having contracts or evidence of lien on the lands so sold for the purchase price or any part thereof may use such contracts or evidence of lien and pledge the same to the United States or any contractor for the construction of any works necessary for the operation of the irrigation works of such district. And the board of directors of any irrigation district having such contracts or evidence of lien, may borrow money to be used for the construction of any irrigation or drainage works necessary for the use of said district, and may pledge such contracts or evidence of lien as security for such loan: provided, that no such loan shall exceed the face value exclusive of interest of the contracts or evidences of lien so pledged: and provided further, that any money so borrowed shall be placed in a special fund and used only for the construction of such works. [1917, ch. 40, § 5, p. 90; reen. C.L. 165:5; C.S., § 4451; am. 1929, ch. 59, § 1, p. 85; I.C.A., § 42-1605.]

43-1606. Elections. — All elections held under the provisions of this chapter shall be in accordance with the laws governing elections authorizing the issuing of bonds by an irrigation district. [1917, ch. 40, § 6, p. 90; reen. C.L. 165:6; C.S., § 4452; I.C.A., § 42-1606.]

Cross ref. Elections authorizing issuance of bonds, § 43-401.

43-1607. Application of general laws. — All provisions of the law with reference to the sale and disposal of state lands under the general laws of the state not in conflict herewith shall apply to the sale of state lands under the provisions of this chapter. [1917, ch. 40, § 7, p. 90; reen. C.L. 165:7; C.S., § 4453; I.C.A., § 42-1607.]

Cross ref. Appraisalment, lease, and sale of state lands, §§ 58-301 — 58-337.

CHAPTER 17

COOPERATION WITH STATE UNDER CAREY ACT

SECTION.

- 43-1701. Irrigation districts may submit reclamation proposals under Carey Act.
- 43-1702. Certified check to accompany proposal.
- 43-1703. Contract for construction.
- 43-1704. Application to enter land.
- 43-1705. Proof of reclamation and settlement — Patent.

SECTION.

- 43-1706. Issuance of patent.
- 43-1707. Appurtenancy of water rights.
- 43-1708. Lien of cost of works and assessments.
- 43-1709. Effect of tax deed.
- 43-1710. Reentry and sale.
- 43-1711. Application of Carey Act law.
- 43-1712. Application of chapter.

43-1701. Irrigation districts may submit reclamation proposals under Carey Act. — In case there are within the boundaries of an irrigation district organized under the laws of this state lands which are in a condition to be selected under the Carey Act laws of the United States of America, the board of directors of an irrigation district may, and it is hereby

authorized and empowered to file with the department of water resources a request for the selection, on behalf of the state, by the department, of the lands to be reclaimed, designating said lands by legal subdivisions.

This request shall be accompanied by a proposal to construct the ditch, canal or other irrigation works necessary for the complete reclamation of the lands asked to be selected and the lands within the district. The proposal shall be prepared in accordance with the rules of the department of water resources of the state of Idaho and with the regulations of the department of the interior, and shall be accompanied by a certificate that application for permit to appropriate water has been filed, together with the department's report thereon. It shall state the source of the water supply, the location and dimensions of the proposed works and the estimated cost thereof. [R.C., § 2386; am. 1911, ch. 71, § 1, p. 194; am. 1911, ch. 154, § 5, p. 461; am. 1915, ch. 143, § 4, p. 304; reen. C.L. 166:1; C.S., § 4454; I.C.A., § 42-1701.]

Compiler's notes. The 1911 amendments to R.C., § 2386 were identical.

Session Laws 1919, ch. 8, § 37, p. 65, granted power to the department of reclamation (now department of water resources) "to exercise the rights, powers, and duties vested by law in the state board of land commissioners (so far as their duties relate to the administration of the Carey act)."

The name of the department of water administration (formerly the department of reclamation) has been changed to the department of water resources on the authority of

S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

For Carey Act, see 43 U.S.C. §§ 641-648.

Cross ref. Reclamation of Carey Act lands, § 42-2001.

Sec. to sec. ref. This chapter is referred to in § 42-2808.

Collateral References. 45 Am. Jur. 2d, Irrigation, §§ 100-107.

94 C.J.S., Waters, §§ 763-765.

Priority as between contract holders under a Carey Act project. 26 A.L.R. 296.

43-1702. Certified check to accompany proposal. — A certified check for a sum not less than fifty dollars (\$50.00), nor more than two hundred fifty (\$250), as the department of water resources may determine, shall accompany each requested proposal by an irrigation district, the same to be held as a guaranty of the execution of the contract with the state in accordance with its terms by the irrigation district submitting such proposal, in case of the approval of the same and the selection of the lands by the department, which check shall be forfeited to the state in case of failure of said irrigation district to enter into a contract with the state in accordance with the terms of the request. [R.C., § 2386a, as added by 1911, ch. 71, § 2, p. 194, and 1911, ch. 154, § 6, p. 461; reen. C.L. 166:2; C.S., § 4455; I.C.A., § 42-1702.]

Compiler's notes. The 1911 amendments adding R.C., § 2386a were identical.

The name of the department of water administration (formerly the department of reclamation) has been changed to the depart-

ment of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

Cross ref. Analogous provision, § 42-2004.

43-1703. Contract for construction. — Upon the withdrawal of the land by the department of the interior it shall be the duty of the department of water resources to enter into a contract for the construction of irrigation works with the district submitting the proposition, which contract shall contain complete specifications of the location, dimensions, character and

estimated cost of the proposed canal, ditch or other irrigation works. Said contract shall state the price and terms upon which the state will dispose of the lands to the settlers, but shall not state the cost of the water rights to the settlers; it shall further state that the board of directors of the district shall determine the benefits, and the cost of the proposed works shall be apportioned to the said lands by the said board of directors, as provided by section 43-404, and that the procedure with reference to the assessing and the levying of assessments on said lands and the sale for delinquent assessments so levied and assessed and the method of issuing tax deeds by the district shall conform in all particulars to that provided in the irrigation district laws for other lands within said district. The aforesaid contract shall not be entered into on the part of the department of water resources until the withdrawal of such lands by the department of the interior, and the irrigation district shall not at any time be required to file a bond. [R.C., § 2386b, as added by 1911, ch. 71, § 2, p. 194, and 1911, ch. 154, § 6, p. 461; reen. C.L. 166:3; C.S., § 4456; I.C.A., § 42-1703.]

Compiler's notes. The 1911 amendments adding R.C., § 2386b were identical.

The name of the department of water administration (formerly the department of reclamation) has been changed to the depart-

ment of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

Cross ref. Analogous provision, § 42-2009.

43-1704. Application to enter land. — Any citizen of the United States, or any person having declared his intention to become a citizen of the United States (excepting married women), over the age of twenty-one (21) years, may make application under oath to the department of water resources to enter any of said land in an amount not to exceed one hundred sixty (160) acres for any one (1) person; and such application shall set forth that the person desiring to make such entry does so for the purpose of actual reclamation, cultivation and settlement in accordance with the act of congress and the laws of this state relating thereto, and that the applicant has never received the benefit of the provisions of any Carey Act law to an amount greater than one hundred sixty (160) acres, including the number of acres specified in the application under consideration. Such application must be accompanied by a certified copy of a contract for the water rights, made and entered into by the person making the application with the district, which has been authorized by the department to furnish water for the reclamation of said lands; and if said applicant has at any previous time entered lands under the provisions of any Carey Act law, he shall so state in the application, together with description, date of entry and location of said land. The department shall thereupon file in its office the application and papers relating thereto, and, if allowed, issue a certificate of location to the applicant.

All applications for entry shall be accompanied by a payment of twenty-five cents (25¢) per acre, which shall be paid as a partial payment on the land if the application is allowed; and all certificates when issued shall be recorded in a book to be kept for that purpose. If the application is not allowed, the twenty-five cents (25¢) per acre accompanying it shall be refunded to the applicant. The department of water resources shall dispose

of all lands accepted by the state under the provisions of this chapter at a uniform price of fifty cents (50¢) per acre, half to be paid at the time of entry and the remainder at the time of making final proof by the settler. [R.C., § 2386c, as added by 1911, ch. 71, § 2, p. 194, and 1911, ch. 154, § 6, p. 461; compiled and reen. C.L. 166:4; C.S., § 4457; I.C.A., § 42-1704.]

Compiler's notes. Both 1911 enactments were practically identical.

The name of the department of water administration (formerly the department of reclamation) has been changed to the depart-

ment of water resources on the authority of S.L. 1974, ch. 286, §. 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

Cross ref. Analogous provision, § 42-2014.

43-1705. Proof of reclamation and settlement — Patent. — Within one (1) year after the district authorized to construct irrigation works under the provisions of this title shall have notified the settlers under such works that it is prepared to furnish water under the terms of the contract with the state, said settlers shall cultivate and reclaim not less than one sixteenth ($\frac{1}{16}$) part of the land filed upon, and within two (2) years after said notice, the settler shall have irrigated and cultivated not less than one eighth ($\frac{1}{8}$) of the land filed upon, and within three (3) years after the date of said notice the settler shall appear before the director of the department of water resources, a judge or clerk of any court of record within the state, or a commissioner appointed by the department of water resources, and make final proof of the reclamation, settlement and occupation, which proof shall embrace evidence that he has paid all of the assessments levied and assessed against said land by the district, or he shall present a tax deed issued by the treasurer of said district and also prove that all assessments levied and assessed by the district against said land have been paid; that he has been an actual settler thereon and has cultivated and irrigated not less than one eighth ($\frac{1}{8}$) part of said tract; and such further proof, if any, as may be required by the regulations of the department of the interior and the department of water resources.

The officer taking this proof shall be entitled to receive a fee of two dollars (\$2.00), which fee shall be paid by the settler and shall be in addition to the price paid to the state for the land: provided, that when the director of the department of water resources takes final proof, all fees received by him shall be turned into the state treasury. The commissioners appointed by the department of water resources are hereby authorized to administer oaths.

All proofs so received shall be submitted to the department of water resources accompanied by the final payment for the said land, and upon approval of the same by said department, the settler shall be entitled to his patent. If the land shall not be embraced in any patent theretofore issued to the state by the United States, the proof shall be forwarded to the secretary of the interior with the request that a patent to said lands be issued to the state.

When the works designed for the irrigation of lands under the provisions of this chapter shall be so far completed as to actually furnish an ample supply of water in a substantial ditch or canal to reclaim any particular tract or tracts of such lands, the state of Idaho shall, through the depart-

ment of water resources, make proof of such fact, and shall apply for a patent to such lands in the manner provided in the regulations of the department of the interior. [R.C., § 2386d, as added by 1911, ch. 71, § 2, p. 194, and 1911, ch. 154, § 6, p. 461; reen. C.L. 166:5; C.S., § 4458; I.C.A., § 42-1705.]

Compiler's notes. Both 1911 enactments were identical.

The names of the department of water administration and the director of the department of water administration (formerly the department of reclamation and the commissioner of reclamation) have been changed to

the department of water resources and the director of the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, §§ 28 and 31 (§§ 42-1801a and 42-1804).

Cross ref. Analogous provision, § 42-2019.

43-1706. Issuance of patent. — Upon the issuance of a patent to any lands by the United States to the state, notice shall be forwarded to the settler upon such land. It shall be the duty of the department of water resources to issue a patent to said lands from the state to the settler. [R.C., § 2386e, as added by 1911, ch. 71, § 2, p. 194, and 1911, ch. 154, § 6, p. 461; reen. C.L. 166:6; C.S., § 4459; I.C.A., § 42-1706.]

Compiler's notes. Both 1911 enactments were identical.

The name of the department of water administration (formerly the department of reclamation) has been changed to the depart-

ment of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

Cross ref. Analogous provision, § 42-2022.

43-1707. Appurtenancy of water rights. — The water rights to all lands acquired under the provisions of this chapter shall attach to and become appurtenant to the land as soon as title passes from the United States to the state. [R.C., § 2386e, as added by 1911, ch. 71, § 2, p. 194, and 1911, ch. 154, § 6, p. 461; reen. C.L. 166:7; C.S., § 4460; I.C.A., § 42-1707.]

Compiler's notes. Both 1911 enactments were identical.

Cross ref. Analogous provision, § 42-2025.

43-1708. Lien of cost of works and assessments. — The apportionment of the cost of the irrigation works made by the board of directors of the irrigation district under section 43-404, and all assessments and taxes levied and assessed against said land by the district shall be a first and prior lien on said water right and land, said lien to be in all respects prior to any and all other liens created or attempted to be created by the owner and holder of said land, and said land shall be sold as other lands in the district are sold for like assessments, and a sale of the lands shall work an assignment of the contract to the purchaser. [R.C., § 2386e, as added by 1911, ch. 71, § 2, p. 194, and 1911, ch. 154, § 6, p. 461; reen. C.L. 166:8; C.S., § 4461; I.C.A., § 42-1708.]

Compiler's notes. Both 1911 enactments were identical.

Cross ref. Apportionment of benefits, § 43-404.

43-1709. Effect of tax deed. — A tax deed from the treasurer of the district shall be conclusive proof to the department of water resources that the assessments have been regularly and legally made on said land, and no irregularity with reference to any assessment can be raised after a deed has been issued by the district, except an error in the description of the land in said deed. [R.C., § 2386e, as added by 1911, ch. 71, § 2, p. 194, and 1911, ch. 154, § 6, p. 461; reen. C.L. 166:9; C.S., § 4462; I.C.A., § 42-1709.]

Compiler's notes. Both 1911 enactments were identical.

The name of the department of water administration (formerly the department of rec-

lamation) has been changed to the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

43-1710. Reentry and sale. — In case the district is a purchaser at the sale for delinquent assessments levied and assessed against such lands, said district may, and it is hereby authorized and empowered to, after the expiration of the one (1) year's redemption period, enter into a contract with any party to furnish water to said lands, and the person so entering into a contract with said district may make application for the patent to the lands described in said contract upon his making proof, as hereinbefore required, and said contract, together with the certificate from the irrigation district that all taxes and assessments levied and assessed against said lands have been paid, together with a statement showing the facts whereby said district is authorized to enter into the second contract, certified by the secretary of the district, with the seal of said district attached shall be sufficient evidence to the department of water resources on which to issue to said applicant a patent to said land. [R.C., § 2386e, as added by 1911, ch. 71, § 2, p. 194, and 1911, ch. 154, § 6, p. 461; reen. C.L. 166:10; C.S., § 4463; I.C.A., § 42-1710.]

Compiler's notes. Both 1911 enactments were identical.

The name of the department of water administration (formerly the department of rec-

lamation) has been changed to the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

43-1711. Application of Carey Act law. — The state laws with reference to the Carey Act lands and requests for selection, etc., and the procedure with reference to the same shall apply to the applications of an irrigation district where the same are not particularly provided for in this chapter, where said state laws are in accord with the provisions hereof. [R.C., § 2386f, as added by 1911, ch. 71, § 2, p. 194, and 1911, ch. 154, § 6, p. 461; reen. C.L. 166:11; C.S., § 4464; I.C.A., § 42-1711.]

Compiler's notes. Both 1911 enactments were identical.

Cross ref. Carey Act lands, §§ 42-2001 — 42-2044.

43-1712. Application of chapter. — The provisions of this chapter shall apply only to irrigation districts. [R.C., § 2386g, as added by 1911, ch. 71, § 2, p. 194, and 1911, ch. 154, § 6, p. 461; reen. C.L. 166:12; C.S., § 4465; I.C.A., § 42-1712.]

Compiler's notes. Both 1911 enactments were identical.

CHAPTER 18

COOPERATION WITH FEDERAL GOVERNMENT

SECTION.

- 43-1801. Cooperation with government under Act of August 11, 1916.
- 43-1802. Procedure for inclusion of public land in irrigation district.
- 43-1803. Contracts with federal government under reclamation act.
- 43-1804. General powers of board contracting with government.
- 43-1805. Federal government contracts not subject to safeguards required in private contracts.
- 43-1806. Various contractual options — Ratification by electors.
- 43-1807. Substitution of district liability for individual liability to government.
- 43-1808. Election to determine whether district shall contract with government.
- 43-1809. Optional procedure following election.
- 43-1810. Deposit of bonds with government.
- 43-1811. Terms of bonds.
- 43-1812. District may act as fiscal agent of government.
- 43-1813. District acting as fiscal agent — Government's remedies preserved.
- 43-1814. Directors' additional official bonds.
- 43-1815. Treasurer's additional official bond.
- 43-1816. Assessments for construction costs — Repayment of money advanced by government.
- 43-1817. Levy of assessment to meet payments to government.

SECTION.

- 43-1818. Lien of assessments.
- 43-1819. Payment of assessments — When delinquent.
- 43-1820. Maintenance of constructed works.
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- 43-1822. Resolution concerning maintenance assessments.
- 43-1823. Annual maintenance assessment.
- 43-1824. Basis of assessment.
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- 43-1826. Payment of assessment.
- 43-1827. Cancellation of operation and maintenance assessments.
- 43-1828. Discount for prompt payment — Penalties for delinquency.
- 43-1829. Reservoirs constructed by government — Power of district to acquire and dispose of rights therein.
- 43-1830. District rights in government reservoir — Allotment or sale — Terms of sale — Election.
- 43-1831. Districts embracing lands subject to federal liens — New and amended contracts with United States.
- 43-1832. Apportionment of benefits under new contract.
- 43-1833. Determination of annual levies under new contract.
- 43-1834. Levies or assessments on different classes of land.

43-1801. Cooperation with government under Act of August 11, 1916. — The board of directors of any irrigation district organized under the laws of this state may make such investigations and based thereon, such representations and assurances to the secretary of the interior as may be requisite under the Act of Congress of August 11, 1916, entitled, "An Act to Promote Reclamation of Arid Lands," 39 U.S. St. L., ch. 319, p. 506. [1917, ch. 83, § 4, p. 298; reen. C.L. 167:1; C.S., § 4466; I.C.A., § 42-1801.]

Compiler's notes. For the Act of August 11, 1916 referred to in the section, see 43 U.S.C., §§ 621-630.

Cross ref. Cancellation or adjustment of taxes when county commissioners cooperate with federal department or agency, §§ 31-901 — 31-906.

Safety fund for payment of contract obligations, § 43-413.

Sec. to sec. ref. This chapter is referred to in §§ 42-2810, 43-732.

Sections 43-1801 — 43-1822 are referred to in § 42-2810.

This section is referred to in § 42-2809.

Cited in: Oregon S.L.R.R. v. Minidoka Irrigation Dist., 48 Idaho 584, 283 P. 614 (1929); Board of Dir. v. Jorgensen, 64 Idaho 538, 136 P.2d 461 (1943).

ANALYSIS

All lands in irrigation district remain liable for debts.

No lien before assessment.

All Lands in Irrigation District Remain Liable for Debts.

The indebtedness to the federal government is a general obligation of an irrigation district and no tract of land embraced therein

can be freed from it by the payment of a portion thereof. *Van Hollebeke v. Wheeler*, 55 Idaho 268, 41 P.2d 603 (1935).

No Lien Before Assessment.

The right to tax land under this and subsequent sections is not an encumbrance nor will it become such, in whole or in part, unless and until the land is actually assessed for that purpose. *Van Hollebeke v. Wheeler*, 55 Idaho 268, 41 P.2d 603 (1935).

43-1802. Procedure for inclusion of public land in irrigation district. — The secretary of the interior, or his duly authorized representative, may on behalf of the United States, sign a petition for the annexation of adjacent unentered public lands of the United States to the district, or to annex such lands to or exclude such unentered lands from any irrigation district; the secretary of the interior, or his duly authorized representative shall be deemed to be the owner thereof for the purposes of signing any petition with like effect as the owner of private lands. [1917, ch. 83, § 5, p. 298; reen. C.L. 167:2; C.S., § 4467; I.C.A., § 42-1802.]

43-1803. Contracts with federal government under reclamation act. — The board of directors of an irrigation district organized under the laws of the state of Idaho may enter into any obligation or contract with the United States for the construction, operation and maintenance of the necessary works for the delivery and distribution of water therefrom under the provisions of the federal reclamation act and all acts amendatory thereof or supplementary thereto and the rules and regulations established thereunder; or the board may contract with the United States for a water supply under any act of congress providing for or permitting such contract. [Part of R.C., § 2386, as added by 1915, ch. 143, § 4, p. 304; compiled and reen. C.L. 167:3; C.S., § 4468; I.C.A., § 42-1803.]

Reclamation Acts.

Act of February 21, 1911 (Warren Act), see 43 U.S.C., §§ 523-525.

Act of August 9, 1912, see 43 U.S.C., §§ 541-546.

Sec. to sec. ref. Sections 43-1803 — 43-1828 are referred to in § 42-2810.

Cross ref. Act of August 13, 1914 (reclamation extension act), see 43 U.S.C., §§ 373, 414, 418, 435-437, 440, 443, 464, 465, 469, 471, 472, 475, 477-481, 492-497, 499.

Cited in: Board of Dir. v. Jorgensen, 64 Idaho 538, 136 P.2d 461 (1943); Little v. Nampa-Meridian Irrigation Dist., 82 Idaho 167, 350 P.2d 740 (1960).

ANALYSIS

Drainage.

Irrigation district boundary changes.

Legislation upheld.

Drainage.

This contractual power extends to drainage as well as irrigation. *Pioneer Irrigation Dist.*

v. Stone, 23 Idaho 344, 130 P. 382 (1913); *Nampa & Meridian Irrigation Dist. v. Petrie*, 28 Idaho 227, 153 P. 425 (1915).

Irrigation District Boundary Changes.

Where the owners of a tract of land were entitled to have it excluded from the irrigation district under state law but, under the contract of the district with the U.S. department of the interior, the consent of the department was required for any changes in the boundaries of the district, the district board should have ordered the exclusion subject to approval of the secretary of the interior and submitted the petition, its findings, and its order of exclusion to the secretary with the recommendation that it be approved. *Lodge v. Miller*, 91 Idaho 662, 429 P.2d 394 (1967).

Legislation Upheld.

Statutory power of irrigation district and secretary of interior on behalf of United States to enter into reclamation contracts has been upheld. *Pioneer Irrigation Dist. v. Stone*,

23 Idaho 344, 130 P. 382 (1913); Hillcrest Irrigation Dist. v. Brose, 24 Idaho 376, 133 P. 663 (1913); Nampa & Meridian Irrigation Dist. v. Petrie, 28 Idaho 227, 153 P. 425 (1915). See also *Burley v. United States*, 179 F. 1 (9th Cir. 1910).
Collateral References. 45 Am. Jur. 2d, Irrigation, § 63.

43-1804. General powers of board contracting with government.

— The said board shall have full power to do any and all things required by the federal statutes now or hereafter enacted in connection with such contracts, and all things required by the rules and regulations now or that may hereafter be established by any department of the federal government in regard thereto; and in the purchase of any property or property rights, or in acquiring or contracting for the water supply of the district, the bonds of the district may be used by the board at not less than ninety per cent (90%) of their par value, in payment. [Part of R.C., § 2386, as added by 1915, ch. 143, § 4, p. 304; compiled and reen. C.L. 167:4; C.S., § 4469; I.C.A., § 42-1804.]

Cited in: Board of Dirs. v. Jorgensen, 64 Idaho 538, 136 P.2d 461 (1943).

43-1805. Federal government contracts not subject to safeguards required in private contracts.

— As to any work or supplies covered by or to be covered by contract between the district and the United States the provisions of section 43-901 shall not apply. [R.C., § 2416; am. 1915, ch. 143, § 10, p. 304; reen. C.L. 167:5; C.S., § 4470; I.C.A., § 42-1805.]

Compiler's notes. The title of 1915, ch. 143 is defective in not specifying § 2416 as amended.

43-1806. Various contractual options — Ratification by electors.

— In case the district has its works partially completed and bonds authorized and outstanding, the proceeds of which have been used for the construction of said works, the said district may enter into a contract with the United States for the completion of the works of the district, and shall have power to transfer title to the works already completed, or any portion thereof, to the government, and shall have power to redeem its outstanding bonds on any such terms as may be agreed upon, with funds advanced by the United States, and contract with the United States to repay any such funds, as well as additional cost of construction for the completion of the works, on such terms as may be agreed upon by contract between the district and the United States: provided, that no contract with the United States embodying any of the provisions herein contained shall be binding unless ratified by two thirds ($\frac{2}{3}$) of the voters voting at an election to be held for that purpose in the manner provided for the ratification of a bond issue: except, that the board of directors of an irrigation district, on behalf of the district, may make a temporary contract with the United States for a period of not to exceed one (1) year for the purpose of securing a water supply for the district out of the reservoirs or other irrigation works of the United States during said period, or a portion thereof, or providing for the distribution and delivery thereof and may provide for the payment therefor and pay for the

same by means of a toll charge or by means of an assessment as a part of the annual operation and maintenance cost of the district. [1903, p. 150, § 15f, as added by 1907, p. 484, § 1; reen. R.C., § 2398; am. 1915, ch. 143, § 1, p. 304; reen. C.L. 167:6; C.S., § 4471; I.C.A., § 42-1806.]

Cited in: Pioneer Irrigation Dist. v. Stone,
23 Idaho 344, 130 P. 382 (1913).

43-1807. Substitution of district liability for individual liability to government. — Irrigation districts which embrace lands for which works have been constructed by the United States and water right applications or contracts made and accepted under public notice issued by the secretary of the interior, may provide by contract with the United States for the release of mortgages or liens given or reserved to the United States upon district lands and for the assumption by the district as principal or guarantor of the indebtedness to the United States on account of district land and in that event shall apportion the benefits of such contract and release to the lands benefited thereby in the same manner provided by statute for the apportionment of the benefits of a bond issue or other contract: provided, such contract with the United States be authorized by the electors of the district in like manner and by the same majority as required to authorize a bond issue or contract with the United States for construction of works. [1917, ch. 83, § 2, p. 297; reen. C.L. 167:7; C.S., § 4472; I.C.A., § 42-1807.]

43-1808. Election to determine whether district shall contract with government. — (a) At any election under the provisions of section 43-401, Idaho Code, when the question of a contract between the district and the United States is to be voted upon, the notice of such election may state generally the terms of such contract and the ballots may contain the words "Contract—yes" or "Contract—no," or other words equivalent thereto, instead of the words "Bonds—yes" or "Bonds—no," and the procedure in connection with such vote upon such contract, and the confirmation thereof by the court shall otherwise be the same as provided in connection with a bond issue.

(b) Any election where the question of a contract between an irrigation district and the United States providing for the payment by the United States of the irrigation district's proportionate share of the capital costs of reconstructing, rehabilitating, replacing or improving dams, structures or works, whether or not legal title thereto is owned by the district, necessary to the storage, diversion or delivery of water necessary and appurtenant to the purposes for which such district was organized is to be voted upon, shall be conducted in accordance with the provisions of section 43-401, Idaho Code, insofar as possible. The question shall be submitted to a vote of all qualified electors of the district as defined in section 43-111, Idaho Code, except that any person residing within the boundaries of the irrigation district and meeting the qualifications of section 34-104, Idaho Code, shall also be permitted to vote. No report need be obtained from the department of water resources and the notice of election need not contain any recital

concerning a report from the department of water resources. The contract between an irrigation district and the United States providing for the payment by the United States of the irrigation district's proportionate share of the capital costs of reconstructing, rehabilitating, replacing or improving dams, structures or works, the election approving the contract and all proceedings taken by an irrigation district in connection with the contract and election need not be confirmed by the district court. [1903, p. 150, part of § 15; reen. 1907, p. 484, § 1, part of subd. 15; reen. R.C., § 2396; am. 1915, ch. 143, proviso in § 5, p. 304; compiled and reen. C.L., 167:8; C.S., § 4473; I.C.A., § 42-1808; am. 1980, ch. 329, § 1, p. 851.]

Compiler's notes. Section 2 of S.L. 1980, ch. 329 declared an emergency. Approved April 2, 1980.

Sec. to sec. ref. This section is referred to in §§ 42-5116, 42-5235 and 43-2204.

43-1809. Optional procedure following election. — After authorization of indebtedness shall have been made by the voters, evidenced by an election as provided in section 43-401, the board of directors may enter into a contract or obligation with the United States as provided in this chapter and issue or not issue bonds, depending on whether bonds shall be deposited with said contract; or the board of directors may issue bonds for a portion of the amount of indebtedness authorized by said bond election and enter into any obligation or contract with the United States as aforesaid to the extent of the remainder of said amount. [1903, p. 150, § 15a, as added by 1907, p. 484, § 1; reen. R.C., part of § 2397; am. 1915, ch. 143, § 6, last part of subd. 2397, p. 304; compiled and reen. C.L. 167:9; C.S., § 4474; I.C.A., § 42-1809.]

Cited in: Emmett Irrigation Dist. v. Seymour, 270 F. 473 (9th Cir. 1921); Pioneer Irrigation Dist. v. Stone, 23 Idaho 344, 130 P. 382 (1913).

the issuance of bonds, as the contracting parties may agree. Van Hollebeke v. Wheeler, 55 Idaho 268, 41 P.2d 603 (1935).

Choice of Methods.

Contract with government of the United States may be entered into, with or without

43-1810. Deposit of bonds with government. — In case contract has been or may hereafter be made with the United States as herein provided, in lieu of the sale of bonds provided in section 43-409, bonds of the district may be deposited with the United States at ninety per cent (90%) of their par value, to the amount to be paid by the district to the United States under any such contract, the interest on said bonds to be provided for by assessment and levy as in the case of other bonds of the district, and regularly paid to the United States to be applied as provided in such contracts. [R.C., part of §§ 2386, 2404; am. 1915, ch. 143, §§ 4, 7; reen. C.L. 167:10; C.S., § 4475; I.C.A., § 42-1810.]

43-1811. Terms of bonds. — Irrigation district bonds deposited with the United States pursuant to the provisions of this chapter may call for the payment of principal without interest if so provided in the contract with the United States, or for the payment of interest, may be of such denomination and may call for the repayment of the principal at such times as may be

agreed upon between the district and the secretary of the interior. [1917, ch. 83, § 3, p. 298; compiled and reen. C.L., 167:11; C.S., § 4476; I.C.A., § 42-1811; am. 1970, ch. 133, § 12, p. 309.]

Compiler's notes. Sections 11 and 13 of S.L. 1970, ch. 133 are compiled herein as §§ 43-603, 50-1036 respectively.

43-1812. District may act as fiscal agent of government. — The board may accept on behalf of the district, appointment of the district as fiscal agent of the United States, or authorization of the district by the United States to make collection of moneys for or on behalf of the United States in connection with any federal reclamation project, whereupon the district shall be authorized to so act and to assume the duties and liabilities incident to such action. But the amounts due the United States for construction shall be carried in separate accounts from the other assessments levied by the said district. [R.C., §§ 2386, 2398, as added by 1915, ch. 143, §§ 1, 4, p. 304; compiled and reen. C.L. 167:12; C.S., § 4477; I.C.A., § 42-1812.]

Cited in: Little v. Nampa-Meridian Irrigation Dist., 82 Idaho 167, 350 P.2d 740 (1960).

Delinquent Maintenance Charges — Shutting Off Water.

Manager of government project may with-

hold water from land within project, where owner was in arrears for maintenance charges for a year. Mower v. Bond, 8 F.2d 518 (D. Idaho 1925).

43-1813. District acting as fiscal agent — Government's remedies preserved. — Such agency on the part of the district shall not in any way impair the lien reserved to the United States on any tract of land for the cost of such construction, or the rights of the United States to any action so reserved by the United States for the enforcement of such lien, and as such agent of the United States the district shall have the right to refuse the delivery of water to any person who has not made the payments and complied with the conditions required by said acts of congress and the public notices and rules and regulations duly issued thereunder. [R.C., part of § 2398, as added by 1915, ch. 143, § 1, p. 304; reen. C.L. 167:13; C.S., § 4478; I.C.A., § 42-1813.]

Cross ref. See note, § 43-1812. Mower v. Bond, 8 F.2d 518 (D. Idaho 1925).

43-1814. Directors' additional official bonds. — In case any district organized under the provisions of this title is appointed fiscal agent of the United States or by the United States is authorized to make collections of moneys for and on behalf of the United States in connection with any federal reclamation project, each such director shall execute a further and additional official bond in such sum as the secretary of the interior may require, conditioned for the faithful discharge of the duties of his office and the faithful discharge by the district of its duties as fiscal or other agent of the United States under any such appointment or authorization, and any such

bond may be sued upon by the United States or any person injured by the failure of such director or the district to fully, promptly and completely perform their respective duties. [R.C., § 2387; am. 1915, ch. 143, § 3, p. 304; reen. C.L. 167:14; C.S., § 4479; I.C.A., § 42-1814.]

Cross ref. Directors' bonds, § 43-202.

43-1815. Treasurer's additional official bond. — In case any district organized under this title is appointed fiscal agent of the United States, or by the United States is authorized to make collections of moneys for and on behalf of the United States in connection with any federal reclamation project, the treasurer of the district shall execute a further and additional official bond in such sum as the secretary of the interior may require, conditioned for the faithful discharge of the duties of his office, and the faithful discharge by the district of its duties as fiscal or other agent of the United States under any such appointment or authorization, and such further additional bond may be sued upon by the United States or any person injured by the failure of the said treasurer or of the district to fully, promptly and completely perform their respective duties. [R.C., § 2377; am. 1915, ch. 143, § 2, p. 304; compiled and reen. C.L. 167:15; C.S., 4480; I.C.A., § 42-1815.]

Cross ref. Treasurer's official bond, § 43-117.

43-1816. Assessments for construction costs — Repayment of money advanced by government. — Whenever any amount of money shall have been advanced by the United States for the construction of irrigation works, contemplated under the provisions of this title, by the authority of act of congress hereinbefore referred to, the taxing powers of the district, as provided in this title, shall be used to repay into the treasury of the United States the amount of money so advanced in the manner contemplated in this title, and as may be provided in such contract between the directors of said district and the United States; and such levies and assessments shall be made each year under the authority of the district as will return to the treasury of the United States the amount or proportion of such money advanced as may have been agreed to in such contract. [1903, p. 150, § 15, as added by 1907, p. 484, § 1, subd. 15b; reen. R.C., § 2398; am. 1915, ch. 143, § 1, p. 304; compiled and reen. C.L. 167:16; C.S., § 4481; I.C.A., § 42-1816.]

ANALYSIS

All lands liable for indebtedness.
Assessments based on benefits.
Final determination.

All Lands Liable for Indebtedness.

This and sections 43-1817 and 43-1818 do not contemplate that any tract of land shall become separately liable for any portion of the indebtedness, nor that any specific lien be

created against such tract other than by assessment for taxation. *Van Hollebeke v. Wheeler*, 55 Idaho 268, 41 P.2d 603 (1935).

Assessments Based on Benefits.

Where any lands in irrigation district under contract with the United States had a water right in whole or in part, or would not be benefited by reason of the contract, such lands would not be subject to assessment in excess of benefits. *Nampa & Meridian Irrigation*

Dist. v. Petrie, 28 Idaho 227, 153 P. 425 (1915).

tion by district court. Nampa & Meridian Irrigation Dist. v. Petrie, 28 Idaho 227, 153 P. 425 (1915).

Final Determination.

Assessment was subject to final determina-

43-1817. Levy of assessment to meet payments to government. — If the bonds of the district are not deposited with the United States as authorized in this chapter, it shall be the duty of the board at its regular meeting in September of each year to include as part of any levy or assessment authorized under section 43-704 an amount sufficient for all payments each year due or to become due the ensuing year to the United States under the terms of any such contract with the United States. When collected the assessment shall be paid into the district treasury and shall constitute a special fund to be called "U. S. contract fund of irrigation district."

Provided, however, that the board of directors of any irrigation district which shall have entered into a contract providing for payments to the United States under any of the Federal reclamation laws, at its option, at any meeting of said board of directors held prior to the first day of December of each year, may include such amount as part of any such levy or assessment, instead of at its said regular meeting in September; and, provided further, that said board of directors, at said meeting, at its option, may also adopt and enter a resolution authorizing a discount of not to exceed ten per cent (10%) for payment of such assessments in full on or before the third Monday of December of each year, and authorizing the levy of assessment in such an amount that said discount can be allowed without reducing collections below the required amount, in which case notice of such assessment or levy or resolution as to discount shall be promptly published once a week for two (2) consecutive weeks in a newspaper published in the county or counties in which the district is located. [R.C., §§ 2386, 2410; am. 1915, ch. 143, §§ 4, 8, p. 304; reen. C.L., § 167:17; C.S., § 4482; I.C.A., § 42-1817; am. 1941, ch. 152, § 1, p. 306; am. 1949, ch. 192, § 1, p. 409.]

ANALYSIS

Construction.

Nature of burden of government lien.

Construction.

Assessments under this section are not for maintenance and operation. Oregon S.L.R.R. v. Minidoka Irrigation Dist., 48 Idaho 584, 283 P. 614 (1929).

Nature of Burden of Government Lien.

No one tract of land becomes separately liable for any portion of the indebtedness, but the obligation is one of the irrigation district and is paid by assessment to be levied against all the land of the district. Van Hollebeke v. Wheeler, 55 Idaho 268, 41 P.2d 603 (1935).

43-1818. Lien of assessments. — All assessments shall be liens against the property assessed from and after the first Monday in March of any year. The lien for the payments due the United States under any contract between the district and the United States, accompanying which bonds have not been deposited with the United States, shall be a preferred lien to that of any issue of bonds or any series of any issue, subsequent to the date of such contract, and such lien shall not be removed until the assessments are paid or the property sold for the payment thereof. [R.C.,

§ 2411; am. 1915, ch. 143, § 9, p. 304; reen. C.L. 167:18; C.S., § 4483; I.C.A., § 42-1818.]

Cross ref. Lien of assessments generally, § 43-706.

Nature of Lien.

The authorization of an irrigation district to incur indebtedness to the United States for

improving the irrigation system did not contemplate the creation of a specific lien against any land within the district except by statutory assessment. *Van Hollebeke v. Wheeler*, 55 Idaho 268, 41 P.2d 603 (1935).

43-1819. Payment of assessments — When delinquent. — In districts which have prior to such assessment entered into contracts with the United States requiring payments to the United States on or before December first of that year, on or before the first day of November the secretary must deliver the assessment book to the treasurer of the district, who shall within ten (10) days publish a notice in a newspaper published in each county in which any portion of the district may lie, that said assessments are due and payable and will become delinquent at six o'clock p. m. on the last Monday of November next thereafter, and also the time and places at which the payments of the assessments may be made, which notice shall be published for the period of two (2) weeks. The treasurer must attend at the times and places specified in the notice, to receive assessments, which must be paid in lawful money of the United States; he must mark the date of payment of any assessment in the assessment book opposite the name of the person paying and give a receipt to such person specifying the amount of the assessment and the amount paid with a description of the property assessed. On the last Monday of November at six o'clock p. m., of each year, all unpaid assessments for the preceding year are delinquent. [R.C., § 2412; am. 1915, ch. 88, p. 206; compiled and reen. C.L. 167:19; C.S., § 4484; I.C.A., § 42-1819.]

43-1820. Maintenance of constructed works. — The works constructed under the provisions of such contract with the United States shall be controlled and administered by the district in accordance with the provisions of said act of congress and the regulations thereunder. [1903, p. 150, § 15, as added by 1907, p. 484, § 1; reen. R.C., § 2398; reen. 1915, ch. 143, § 1, part of subd. 2398, p. 304; reen. C.L. 167:20; C.S., § 4485; I.C.A., § 42-1820.]

Cited in: *Little v. Nampa-Meridian Irrigation Dist.*, 82 Idaho 167, 350 P.2d 740 (1960).

Assessments.

Maintenance and operation assessments do

not depend upon confirmation of district court for their validity. *Haga v. Nampa & Meridian Irrigation Dist.*, 38 Idaho 333, 221 P. 147 (1923).

43-1821. Contract of maintenance — Levy of assessments. — In cases where the United States has constructed irrigation works, canals and laterals under the provision of the Act of Congress of June 17, 1902, known as the reclamation act, or acts amendatory and supplementary thereto, within the boundaries of an irrigation district, or for the irrigation of lands within an irrigation district organized either before or after the construction

of said works, the board of directors of said irrigation district may enter into a contract with the United States to care for, operate and maintain the said works, or parts thereof, and may levy assessments for the purpose of such operation and maintenance of said works, and collect the same in the same manner as in this chapter provided. [Part of R.C., § 2398; am. 1915, ch. 143, § 1, p. 304; reen. C.L. 167:21; C.S., § 4486; I.C.A., § 42-1821.]

Cross ref. Reclamation acts, see note, § 43-1803.

See notes, § 43-1824. Oregon Short Line R. v. Minidoka Irrigation Dist., 48 Idaho 584, 283 P. 614 (1929).

Authority of Directors.

The board of directors of a district had the

duty and authority to determine annually the amount of assessment necessary for the operation and maintenance of a canal system which was under its sole jurisdiction and control. *Little v. Nampa-Meridian Irrigation Dist.*, 82 Idaho 167, 350 P.2d 740 (1960).

43-1822. Resolution concerning maintenance assessments. — The board of directors of any irrigation district which shall have entered into a contract or contracts with the United States may, by passing a resolution to that effect and the publication thereof for at least two (2) weeks in a newspaper published in the county in which the greater portion of the lands of the district are located, provide for the levy and collection of assessments for operation and maintenance purposes as hereinafter provided and so fix the dates of such levy, assessment and delinquency that such separate operation and maintenance charge and the assessment therefor will become delinquent on the first day of March next following such levy and assessment. [1917, ch. 83, part of § 1, p. 296; reen. C.L. 167:22; C.S., § 4487; am. 1921, ch. 87, § 1, p. 164; I.C.A., § 42-1822.]

Cited in: *Little v. Nampa-Meridian Irrigation Dist.*, 82 Idaho 167, 350 P.2d 740 (1960).

43-1823. Annual maintenance assessment. — Each year thereafter, unless such resolution be revoked by a later resolution duly passed and published in like manner, the board of directors of such district shall at the regular meeting of such board on the first Tuesday in December levy and apportion the operation and maintenance assessments as hereinafter provided. [1917, ch. 83, part of § 1, p. 296; reen. C.L. 167:23; C.S., § 4488; am. 1921, ch. 87, § 2, p. 164; I.C.A., § 42-1823.]

Uniformity Not Required.

The assessments made by the board of directors of an irrigation district need not be

uniform upon all lands in the district. *Little v. Nampa-Meridian Irrigation Dist.*, 82 Idaho 167, 350 P.2d 740 (1960).

43-1824. Basis of assessment. — Such operation and maintenance assessment shall be apportioned pursuant to the provisions of section five of the Act of Congress of August 13, 1914, known as the reclamation extension act, upon the basis of the number of acre-feet of water delivered during the preceding irrigation season but with a minimum charge upon each acre of irrigable land whether irrigated or not for delivery of not less than one (1) acre-foot of water. [1917, ch. 83, part of § 1, p. 296; reen. C.L. 167:24; C.S., § 4489; I.C.A., § 42-1824.]

Compiler's notes. For the reclamation extension act, see 43 U. S. C., §§ 373, 414, 418, 435-437, 440, 443, 464, 465, 469, 471, 472, 475, 477-481, 492-497, 499.

Sec. to sec. ref. This section is referred to in § 43-732.

Application.

This section applies only to districts cooperating with federal government. *Oregon S.L.R.R. v. Minidoka Irrigation Dist.*, 48 Idaho 584, 283 P. 614 (1929).

Railroad right of way held not chargeable with maintenance assessments, since the act of Congress referred to in this section restricts such assessments to whenever water

service is available for irrigation of owner's or entryman's land. *Oregon S.L.R.R. v. Minidoka Irrigation Dist.*, 48 Idaho 584, 283 P. 614 (1929).

To the extent there is any conflict between the provisions of § 43-711 providing for uniform assessment upon lands for the operation and maintenance of a water distribution system and the provision of this section providing that assessment upon lands for such operation and maintenance be apportioned pursuant to the provision of an act of congress, the latter must prevail. *Little v. Nampa-Meridian Irrigation Dist.*, 82 Idaho 167, 350 P.2d 740 (1960).

43-1825. Notice of assessment. — The secretary of the district must, on or before the first day of February, deliver the assessment book or books containing the record of such separate operation and maintenance assessment to the treasurer of the district who shall, within ten (10) days, forward by mail to each landowner or entryman, at his last known post-office address as shown by the records of such district, a notice stating the amount assessed against his lands, and that said assessment is due and payable and will become delinquent at six o'clock p. m., on the first day of the following March and also the times and places when and at which assessments will be received. [1917, ch. 83, part of § 1, p. 296; reen. C.L. 167:25; C.S., § 4490; am. 1921, ch. 87, § 3, p. 164; I.C.A., § 42-1825.]

Cited in: *Little v. Nampa-Meridian Irrigation Dist.*, 82 Idaho 167, 350 P.2d 740 (1960).

43-1826. Payment of assessment. — The treasurer of the district must attend at the times and places specified in the notice to receive assessments which must be paid in lawful money of the United States. He must mark the date of payment of any assessment in the assessment book opposite the name of the person paying and give a receipt to such person specifying the amount of the assessment and the amount paid with a description of the property assessed. [1917, ch. 83, part of § 1, p. 297; reen. C.L. 167:26; C.S., § 4491; am. 1921, ch. 87, § 4, p. 164; I.C.A., § 42-1826.]

Compiler's notes. Section 5 of S.L. 1921, ch. 87 declared an emergency. Approved March 14, 1921.

Cited in: *Little v. Nampa-Meridian Irrigation Dist.*, 82 Idaho 167, 350 P.2d 740 (1960).

43-1827. Cancellation of operation and maintenance assessments. — The board of directors of any irrigation district which has entered, or may hereafter enter, into a contract with the United States for the operation of the irrigation works of any federal reclamation project, may cancel any operation or maintenance assessment levied against any land where the appurtenant water right has been or may hereafter be canceled by the United States for nonpayment of construction charges. [C.S., § 4491A, as added by 1931, ch. 37, § 1, p. 71; I.C.A., § 42-1827.]

Cited in: Little v. Nampa-Meridian Irrigation Dist., 82 Idaho 167, 350 P.2d 740 (1960).

43-1828. Discount for prompt payment — Penalties for delinquency. — Pursuant to the provisions of section 6 of said reclamation extension act, if said operation and maintenance charge or assessment is paid on or before the date when due there shall be a discount of five per cent (5%) of such charge, but if such charge is unpaid on the first day of the third calendar month thereafter a penalty of one per cent (1%) of the amount unpaid shall be added thereto, and thereafter an additional penalty of one per cent (1%) of the amount unpaid shall be added on the first day of each calendar month if such charge and penalties shall remain unpaid and no water shall be delivered to the land of any landowner or entryman who shall be in arrears for more than one (1) calendar year for the payment of any charge for operation and maintenance, or any annual construction charge and penalties. In districts coming under this act the penalties herein provided shall, in the matter of such district operation and maintenance assessments, be a substitute for and take the place of the penalties and interest provided in section 4401 of Idaho Compiled Statutes. [1917, ch. 83, part of § 1, p. 297; reen. C.L. 167:27; C.S., § 4492; I.C.A., § 42-1828.]

Compiler's notes. For C.S., § 4401, see *tation Dist., 82 Idaho 167, 350 P.2d 740 (1960).*
 Compiler's note to § 43-723.

Section 6 of reclamation extension act, see 43 U. S. C., §§ 479, 493-497.

Section 2 of S.L. 1931, ch. 37 declared an emergency and provided that the act should be in force and effect from and after its passage.

Cited in: Little v. Nampa-Meridian Irriga-

Shutting Off Water.

Manager of government project could withhold water from lands within project, where owner was in arrears for maintenance charges for a year. *Mower v. Bond*, 8 F.2d 518 (D. Idaho 1925).

43-1829. Reservoirs constructed by government — Power of district to acquire and dispose of rights therein. — The board of directors of an irrigation district organized under the laws of the state of Idaho may, when authorized by the qualified electors of the district, who are residents of the district and holders of title, or evidence of title, to the land in the district, at an election held for that purpose, after notice, as provided in section 43-1830, acquire, hold and own on behalf of the irrigation district storage rights, capacity, water and water rights in reservoirs constructed by the United States government in cooperation with the district to be disposed of as hereinafter provided. [1925, ch. 72, § 1, p. 106; I.C.A., § 42-1829.]

43-1830. District rights in government reservoir — Allotment or sale — Terms of sale — Election. — The rights referred to in section 43-1829 may be disposed of by the board of directors by pro rata allotment to the lands in the district, or by sale for use within or outside of the district: provided, however, that the price at which such water or water rights are sold shall not exceed the actual cost at which the same was acquired by the vendor district together with interest, at not to exceed seven per cent (7%) per annum, on such cost for the period of time between district's investment in such water or water rights and the date of sale: and, provided further,

that the qualified electors of the district who are residents of the district and holders of title or evidence of title to land in the district shall first authorize the disposal thereof at an election called for that purpose which may be held on the date of the annual election of directors, or on such other date as shall be determined by the board of directors.

Notice of such election must be given by posting a notice in three (3) public places in each election precinct in said district, at least four (4) weeks before the date of said election, and the publication thereof for the same length of time in some newspaper published in the district, and in case no paper is published in the district, then in a paper published in each of the counties in which the district or any part thereof is located. Such notice must specify the time for holding said election and the manner in which it is proposed to dispose of the rights. Said election must be held and the results thereof determined and declared in all respects as nearly as practicable in conformity with chapter 4 of this title, governing bond elections: provided, that no informality in conducting such election shall invalidate the same, if the election shall have been otherwise correctly conducted. At such election the ballot shall contain the words: "Disposal of Rights — Yes"; "Disposal of Rights — No," or other words equivalent thereto. If a majority of the votes cast are "Disposal of Rights — Yes," the board of directors shall dispose of said rights according to the proposal submitted. If more than a majority of the votes cast are "Disposal of Rights — No," the result shall be so declared and entered of record. [1925, ch. 72, § 2, p. 106; I.C.A., § 42-1830.]

Compiler's notes. Section 3 of S.L. 1925, ch. 72 repealed all laws and parts of laws in conflict therewith.

43-1831. Districts embracing lands subject to federal liens — New and amended contracts with United States. — Any irrigation district now or hereafter organized under the laws of the state of Idaho and embracing lands subject to liens, charges or assessments for money owing the United States for water made available therefor through the construction of irrigation works, or otherwise, by the United States reclamation service, shall have power, through its board of directors, to extend the time for the payment of such indebtedness and to otherwise change and modify the time and manner of payment and the amount to be paid to the extent permitted under acts of congress and under any rule, regulation or contract of the department of the interior appertaining thereto and to that end the board of directors of any such district may amend or modify any existing contract with the United States or may enter into a new contract and may change, adjust, readjust and otherwise modify the liens, charges and assessments theretofore made against such lands and may cancel taxes theretofore levied by said irrigation district, including delinquent tax certificates still held by the district, and may do any and all things necessary to carry out such amended or new contract in accordance with such acts of congress: provided, that no contract with the United States for any of the purposes herein set forth shall be binding unless ratified by two thirds ($\frac{2}{3}$) of the voters voting at an election to be held for that purpose in the manner

provided by law for the ratification of contracts between irrigation districts and the United States. [1925, ch. 147, § 1, p. 257; I.C.A., § 42-1831.]

Cross ref. Ratification of contracts with United States, § 43-1806.

43-1832. Apportionment of benefits under new contract. — The board of directors of any such irrigation district shall apportion the amount owing the United States to the lands of the district under such amended or new contract, and such apportionment of benefits shall be made by the board and such amended or new contract and the apportionment of benefits thereunder shall be confirmed by the district court in the manner provided by statute for the apportionment of benefits under a bond issue and for the confirmation of such contracts and apportionments of benefits. [1925, ch. 147, § 2, p. 257; I.C.A., § 42-1832.]

Cross ref. Apportionment and confirmation of benefits under bond issue, §§ 43-404 — 43-408.

43-1833. Determination of annual levies under new contract. — Annual levies under such amended or new contract for the purpose of making payments due the United States may be made by the board of directors either before or after judicial confirmation of such apportionment of benefits upon the basis of the gross annual acre income of the lands of the district or divisions thereof, or the classes of lands therein, as such gross average annual acre income is determined by the secretary of the interior, until the amount apportioned against each tract has been fully paid and such annual levies shall include an amount sufficient to meet estimated delinquencies and any deficiency in collections arising from delinquencies in the assessments of the previous year or years for such purpose: provided, that no annual levies in excess of the levies which would have been required under prior contracts and apportionments shall be made prior to judicial confirmation of such new apportionment. [1925, ch. 147, § 3, p. 257; I.C.A., § 42-1833.]

43-1834. Levies or assessments on different classes of land. — Annual levies for the purpose of making payments due or to come due to the United States in irrigation districts for which water is furnished by the United States under a contract or contracts made pursuant to acts of congress which authorize longer terms of payment for one (1) class of lands than for others, may be made by the board of directors in a manner to conform to the terms of payment authorized by such act or acts of congress and the contract or contracts made thereunder, and the annual levies or assessments on different classes of lands having different periods for completion of payment of construction costs in such districts may be on the basis of a different proportion of the list and apportionment of benefits, for each class having a different period for completion of payment and in harmony with the requirements of such acts of congress and the contract or

contracts made by the district thereunder. [1925, ch. 147, § 3-A, as added by 1929, ch. 9, § 1, p. 11; I.C.A., § 42-1834.]

Compiler's notes. Section 4 of S.L. 1925, ch. 147 declared an emergency. Approved March 5, 1925.

Section 2 of S.L. 1929, ch. 9 declared an emergency. Approved February 8, 1929.

CHAPTER 19

DOMESTIC WATER SYSTEMS — CONTRACTS WITH UNITED STATES

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- 43-1902. Method of making contract.
- 43-1903. Tolls and charges — Handling of funds.
- 43-1904. Liens for tolls and charges — Recording — Duration — Enforcement.
- 43-1905. Assessments and charges against benefited lands.
- 43-1906. Short title.
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SECTION.

- 43-1911. Works to be self-supporting.
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- 43-1917. Validity of bonds.
- 43-1918. Lien of bonds.
- 43-1919. District not liable on bonds.
- 43-1920. Works and bonds exempt from taxation.

43-1901. Authority conferred. — In addition to other powers and authorities any irrigation district now or hereafter organized under the laws of Idaho and having a contract or hereafter contracting with the United States under the Federal Reclamation Law (being the act of June 17, 1902 (32 Stat. 388) and acts amendatory thereof or supplemental thereto) may (a) contract with the United States or an agency of the state of Idaho for the construction, operation and maintenance of a domestic or irrigation water system, and (b) enter into such other obligations and do such other things as are incidental to the construction and operation and maintenance of such system and (c) make provisions for the operation and maintenance of a garbage disposal program for the benefit of the residents. The cost of operation and maintenance of such garbage disposal program shall be paid from the district's current expense fund. Service through such system may be provided both to lands within the district and to other lands that the district's board of directors determines can be served feasibly and economically. Any irrigation district contracting with an agency of the state of Idaho shall not be required to have a contract with the United States under the Federal Reclamation Law, as cited above. [1946 (1st E.S.), ch. 3, § 1, p. 4; am. 1953, ch. 108, § 1, p. 142; am. 1974, ch. 86, § 1, p. 1177.]

Compiler's notes. For the Reclamation Act of June 17, 1902, see 43 U. S. C., §§ 372, 373, 381, 383, 391, 392, 411, 416, 419, 421, 431, 432, 434, 439, 461, 491, 498.

The words enclosed in parentheses so appeared in the law as enacted.

Section 2 of S.L. 1974, ch. 86 provided that the act should take effect on and after July 1, 1974.

Collateral References. 45 Am. Jur. 2d, Irrigation, § 63.

94 C.J.S., Waters, §§ 786-793.

43-1902. Method of making contract. — The making of any contract under this act obligating a district to repay construction costs shall be authorized by the board of directors and the voters of the district in substantially the same manner as is provided with respect to contracts with the United States for repayment of the cost of irrigation works. [1946 (1st E. S.), ch. 3, § 2, p. 4.]

Compiler's notes. The words "this act" refer to §§ 43-1901 — 43-1904.

43-1903. Tolls and charges — Handling of funds. — A district, acting through its board of directors, shall have the power in connection with a domestic water system undertaken under this act: (a) to establish periodic tolls and charges for domestic water service adequate to meet its contract obligations, all other expenses incurred in the construction, operation and maintenance of such a system, and to maintain such reserves as are reasonable to assure continuous and efficient domestic water service; (b) to require the payment of such tolls and charges in advance of the delivery of water; (c) to fix the delinquency dates for tolls and charges and the penalties for failure to pay before delinquency, penalties not to exceed twelve per cent (12%) per annum of the delinquent amounts; and (d) to handle and account for the domestic water system funds in such manner as may be required by contract with the United States. [1946 (1st E. S.), ch. 3, § 3, p. 4.]

Compiler's notes. The words "this act" refer to §§ 43-1901 — 43-1904.

43-1904. Liens for tolls and charges — Recording — Duration — Enforcement. — (a) A district may establish liens for delinquent tolls and charges hereunder and penalties incidental thereto in the following manner: On or after the date of delinquency with respect to tolls or charges established with respect to a given parcel of land, the district may file with the county recorder of the county where the land is situated, a statement of the amounts delinquent and of the penalties accruing thereon. Such statement shall: describe in general terms the service for which the amounts are due, describe in terms sufficient for identification the lands for which the tolls or charges were established, give the name of the owner or reputed owner and name the district to which the amounts are due; and the statement shall be verified by the oath of the district through its attorney or agent to the effect that it is believed to be correct and just. From the filing of such statement the district shall have a lien for the delinquent amounts together with the accruing penalties thereon on the lands on account of which the tolls and charges in question were established.

(b) The county recorder must record such statements in a book kept by him for such purpose. The record must be indexed in the manner provided by law for the indexing of deeds and other conveyances. Fees for these services by the recorder shall be the same as are allowed by law for recording deeds and other instruments.

(c) No lien hereunder shall continue for two (2) years from the filing of the statement unless proceedings are commenced in a proper court within that time for the enforcement of such lien.

(d) District courts shall have jurisdiction of civil actions for the enforcement of the liens herein provided, and such actions may embrace one or more parcels of land and one or more landowners or reputed landowners. Allowable costs shall include the amounts paid for filing and recording the claim and reasonable attorney's fees. Except as otherwise provided in this act, the provisions of the Idaho laws relating to civil actions, new trials and appeals are applicable to and constitute the rules of practice in proceedings under this act.

(e) Nothing in this section 4 shall be construed to affect the right of a district to any other remedy available to it. [1946 (1st E. S.), ch. 3, § 4, p. 4.]

Compiler's notes. The words "this act" declared an emergency. Approved Mar. 6, 1946.
refer to §§ 43-1901 — 43-1904.

Section 5 of S.L. 1946 (1st E. S.), ch. 3

43-1905. Assessments and charges against benefited lands. — In addition to all other powers and authorities of any irrigation district now or hereafter organized under the laws of the state of Idaho, such irrigation district may, in connection with any contract with the United States under the Federal Reclamation Law (being the act of June 17, 1902 (32 Stat. 388) and acts amendatory thereof or supplemental thereto) for the construction, operation or maintenance of a domestic water system, together with an irrigation system, provide for the apportionment of benefits and make charges for either or both, including the levy of an annual assessment, on any bases permitted or required by the Federal Reclamation Law and by such contract, including, without limitation by reason of this enumeration, a plan in the case of a district embracing substantial areas devoted to suburban residences, under which such district is required to establish total annual assessments and charges against benefited lands for both construction payments and operation and maintenance costs, which are to be proportional, as nearly as practicable, to the relative repayment ability of the various sized operating units in single ownership, to which irrigation service is provided. [1946 (1st E. S.), ch. 4, § 1, p. 6.]

Compiler's notes. Section 2 of S.L. 1946 (1st E. S.), ch. 4 declared an emergency. Approved March 6, 1946.

Cross ref. Levy of assessments to meet payments to government, § 43-1817.

43-1906. Short title. — Sections 43-1907 through 43-1920, Idaho Code, may be cited as the "Irrigation District Domestic Water System Revenue Bond Act." [I.C., § 43-1906, as added by 1988, ch. 299, § 1, p. 944.]

Sec. to sec. ref. Sections 43-1906 — 43-1920 are referred to in § 43-1910.

43-1907. Grant of authority. — Any irrigation district acquiring, constructing, reconstructing, improving, bettering or extending any works

pursuant to this act, shall manage the works in the most efficient manner consistent with sound economy and public advantage, to the end that the services of the works shall be furnished at the lowest possible cost. No irrigation district shall operate any works primarily as a source of revenue to the district, but shall operate all such works for the use and benefit of those served by the works and for the promotion of the welfare and for the improvement of the health, safety, comfort and convenience of the inhabitants of the irrigation district. [I.C., § 43-1907, as added by 1988, ch. 299, § 2, p. 944.]

Compiler's notes. The words "this act" 1920 are referred to in §§ 43-1906 and 43- refer to S.L. 1988, ch. 299, §§ 1-15 which is 1908.
compiled as §§ 43-1906 — 43-1920.

Sec. to sec. ref. Sections 43-1907 — 43- This section is referred to in § 43-1909.

43-1908. Definitions. — For the purpose of sections 43-1907 through 43-1920, Idaho Code:

- (a) "District" means irrigation districts.
- (b) "Qualified elector" means any person, eighteen (18) years of age or older, possessing the qualifications required of electors under the general laws of this state, who at the time of the election has resided within the district for at least thirty (30) days.
- (c) "Water system" includes reservoirs, storage facilities, water mains, conduits, aqueducts, pipelines, pumping stations, filtration plants, and all appurtenances and machinery necessary or useful for obtaining, storing, treating, purifying or transporting water for domestic uses or purposes.
- (d) "Works" include water systems. [I.C., § 43-1908, as added by 1988, ch. 299, § 3, p. 944.]

43-1909. Powers. — In addition to the powers which it may now have, any district shall have power under and subject to the following provisions:

- (a) To acquire by gift or purchase and to construct, reconstruct, improve, better or extend any works within or without the district, or partially within or partially without the district, or within any part of the district, and acquire by gift or purchase lands or rights in lands or water rights in connection therewith, including easements, rights of way, contract rights, leases, franchises, approaches, dams and reservoirs; to lease any portion of the excess or surplus capacity of any such works to any party located within or without the district, subject to the following conditions: that the capacity shall be returned or replaced by the lessee when and as needed by the district for the purposes set forth in section 43-1907, Idaho Code, as determined by the district; that the district shall not be made subject to any debt or liability thereby; and the district shall not pledge any of its faith or credit in aid to such lessee;
- (b) To exercise the right of eminent domain for any of the works, purposes or use provided by this act, in like manner and to the same extent as provided in section 7-720, Idaho Code;
- (c) To operate and maintain any works within or without the boundaries of the district, or partially within or without the boundaries of the district, or within any part of the district;

(d) To issue its revenue bonds hereunder to finance, in whole or in part, the cost of the acquisition, construction, reconstruction, improvement, betterment or extension of any works;

(e) To prescribe and collect rates, fees, tolls or charges, including the levy or assessment of such rates, fees, tolls or charges against governmental units, departments or agencies, including the state of Idaho and its subdivisions, for the services, facilities and commodities furnished by works, and to provide methods of collections and penalties, including denial of service for nonpayment of the rates, fees, tolls or charges;

(f) To pledge an amount of revenue from works (including improvement, betterment or extensions thereto, thereafter constructed or acquired) sufficient to pay bonds and interest as the same shall become due, and to create and maintain reasonable reserves therefor. Such amount may consist of all or any part or portion of the revenues. In determining the cost, there may be included all costs and estimated costs of the issuance of bonds, all engineering, inspection, fiscal and legal expenses and interest which it is estimated will accrue during the construction period and for six (6) months thereafter on money borrowed or which it is estimated will be borrowed pursuant to the irrigation district domestic water system revenue bond act; and

(g) To issue bonds for the purpose of refunding any bonds theretofore issued under authority of the irrigation district domestic water system revenue bond act and to pay accrued interest and applicable redemption premiums on the bonds to be refunded, pursuant to and in the manner provided by section 57-504, Idaho Code. [I.C., § 43-1909, as added by 1988, ch. 299, § 4, p. 944.]

Compiler's notes. The words enclosed in parentheses so appeared in the law as enacted.

43-1910. Supervision of works. — The construction, acquisition, improvement, equipment, custody, operation and maintenance of any works under the provisions of sections 43-1906 through 43-1920, Idaho Code, and the collection of revenues therefrom for the service rendered thereby shall be under the supervision and control of the governing body of the district. [I.C., § 43-1910, as added by 1988, ch. 299, § 5, p. 944.]

43-1911. Works to be self-supporting. — The directors of the district issuing bonds pursuant to this act shall prescribe and collect reasonable rates, fees, tolls or charges for the services, facilities and commodities furnished by the works, and shall revise such rates, fees, tolls or charges from time to time, to provide that all works shall be and always remain self-supporting. The rates, fees, tolls or charges prescribed shall be such as will produce revenue at least sufficient (a) to pay when due, all bonds and interest thereon for the payment of which the revenue is or shall have been pledged, charged or otherwise encumbered including reserves therefor, and (b) to provide for all expenses of operation and maintenance of the works, including reserves therefor. [I.C., § 43-1911, as added by 1988, ch. 299, § 6, p. 944.]

Compiler's notes. For words "this act" see compiler's notes, § 43-1907.

43-1912. Use of works — Revenue. — Any district issuing bonds under this act for the acquisition, construction, reconstruction, improvement, betterment or extension of any works, shall have the right to appropriate, apply or expend the revenue of the works for the following purposes: (a) to pay when due all bonds and interest thereon, for the payment of which the revenue is or shall have been pledged, charged or otherwise encumbered, including reserves therefor; (b) to provide for all expenses of operation, maintenance, replacement and depreciation of the works, including reserves therefor; (c) to pay and discharge notes, bonds or other obligations and interest thereon, not issued under this act for the payment of which the revenue of the works may have been pledged, charged or encumbered; (d) to pay and discharge notes, bonds or other obligations and interest thereon which do not constitute a lien, charge or encumbrance on the revenue of such works, which may have been issued for the purpose of financing the acquisition, construction, reconstruction, improvement, betterment or extension of the works; and (e) provide a reserve for improvements to the works. Unless and until full and adequate provision has been made for the foregoing purposes, no district shall have the right to transfer the revenue of works to its general fund. [I.C., § 43-1912, as added by 1988, ch. 299, § 7, p. 944.]

Compiler's notes. For words "this act" see compiler's notes, § 43-1907.

43-1913. Preliminary expenses. — The district may provide for the payment of all necessary preliminary expenses actually incurred in the making of surveys, estimates of costs and revenues, employment of engineers and other employees, making of notices, taking of options, legal and clerical help and all other expenses necessary to be made and paid prior to the authorization for the issuance of revenue bonds, provided, that no such expenditures shall be made or paid unless an appropriation has been made therefor in the same manner as is required by law for district funds. Any funds so expended by the district shall be fully reimbursed and repaid to the district out of the sale of the revenue bonds before any other disbursements are made therefrom, and the amount so advanced by the district to pay the preliminary expenses shall be a first charge against the proceeds resulting from the sale of the revenue bonds until the same has been repaid as herein provided. [I.C., § 43-1913, as added by 1988, ch. 299, § 8, p. 944.]

43-1914. Resolution prior to construction — Election. — Before any district shall construct or acquire any works under this act, the directors of the district shall enact a resolution or resolutions which shall: (a) set forth a brief and general description of the works, and if the same are to be constructed, a reference to the preliminary report or plans and specifications which shall theretofore have been prepared and filed by an engineer chosen for that purpose; (b) set forth the cost thereof estimated by

the engineer chosen as aforesaid; (c) order the construction or acquisition of the works; (d) direct that revenue bonds of the district shall be issued pursuant to this act in an amount as may be necessary to pay the cost of the works; and (e) contain other provisions as may be necessary in the proposal.

The resolution shall be passed and approved as provided by law for the enactment of general resolutions, but the district shall not, without the assent of a majority of the qualified electors voting at an election to be held for that purpose, issue revenue bonds for the purpose of providing funds to own, purchase, construct, extend or equip, within and without the corporate limits of the district, any works, the principal and interest of which to be paid solely from the revenue derived from rates and charges for the use of, and the service rendered by the works.

The resolution shall provide for the holding of an election and the giving of notice thereof by publication in the official newspaper of the district, the publication to be once a week for two (2) successive weeks prior to the election. The notice of election shall set forth the purpose of the resolution, the amount of bonds authorized by it, the maturity dates of the bonds, the maximum rate of interest they shall draw, the voting places, the hours between which the polls will be open and the qualifications of voters who may vote thereat. The election shall be conducted as are other district elections, provided, that any qualified elector shall be entitled to vote in the election, the provisions of section 43-111, Idaho Code, notwithstanding. The voting at the election must be by ballot, and the ballots used shall be worded substantially as follows:

In favor of issuing revenue bonds for the purposes provided by Resolution No.

Against the issuance of revenue bonds for the purposes provided by Resolution No.

If, at the election, a majority of the qualified electors, voting at the election, vote in favor of issuing the revenue bonds, then the district may issue the bonds and create indebtedness or liability in the manner and for the purpose specified in the resolution. [I.C., § 43-1914, as added by 1988, ch. 299, § 9, p. 944.]

Compiler's notes. For words "this act" see compiler's notes, § 43-1907.

43-1915. Bonds — Form — Conditions. — All revenue bonds issued under authority of this act shall be sold, executed and delivered in the same manner as provided by the municipal bond law for the sale of general obligation bonds, except that the issues of revenue bonds may, in the discretion of the directors, be sold at a private sale without advertising the same at competitive bidding and at a price above, at, or below par. The resolution authorizing the issuance of bonds shall prescribe the form of bonds. The bonds shall bear interest at a rate or rates, payable annually, or at lesser intervals as may be prescribed by resolution; may be in one (1) or more series, bear the date or dates, mature at the time or times, and be redeemable before maturity at the option of the district; may be payable in the medium of payment, at the place or places, may carry registration

privileges, may be subject to the terms of redemption, may contain the terms, covenants and conditions, and may be in the form as the resolution may provide. Pending preparation of the bonds, interim certificates in the form and with the provisions as the directors may determine may be issued. Bonds and interim certificates shall be fully negotiable within the meaning of and for all the purposes of the negotiable instruments law.

Notwithstanding the provisions of the municipal bond law, the governing body in any proceedings authorizing bonds under this act may:

(a) Provide for the initial issuance of one (1) or more bonds aggregating the amount of the entire issue;

(b) Make such provision for installment payments of the principal amount of any bonds as it may consider desirable;

(c) Further make provision in any proceedings for the manner and circumstances in and under which any bond may in the future, at the request of the holder thereof, be converted into bonds of smaller denominations. [I.C., § 43-1915, as added by 1988, ch. 299, § 10, p. 944.]

Compiler's notes. For words "this act" see compiler's notes, § 43-1907.

43-1916. Bonds — Issuance — Terms and conditions. — Whenever revenue bonds are authorized to be issued, the district directors shall by resolution provide for the issuance thereof. The resolution authorizing the issuance of revenue bonds, for the purpose authorized, shall contain covenants as to:

(a) The purpose or purposes to which the proceeds of the sale of the bonds may be applied and the use and disposition thereof;

(b) The use and disposition of the revenue of the works for which the bonds are to be issued, including the creation and maintenance of reserves;

(c) The issuance of other or additional bonds payable from the revenue of the works;

(d) The operation and maintenance of works;

(e) The insurance to be carried thereon, the use and disposition of insurance moneys;

(f) Books of account and inspection and audit thereof; and

(g) The terms and conditions upon which the holders thereof or any trustee therefor shall be entitled to the appointment of a receiver which receiver may enter and take possession of works, operate and maintain the same, prescribe rates, fees, tolls or charges and collect, receive and apply all revenue thereafter arising therefrom in the same manner as the district itself might do. The provisions of this section and of any resolution shall be a contract with the holder of the bonds and the duties of the district and its commissioners under this section and under the resolution, shall be enforceable by the holder by mandamus or other appropriate suit, action or proceedings at law or in equity. [I.C., § 43-1916, as added by 1988, ch. 299, § 11, p. 944.]

43-1917. Validity of bonds. — Any resolution authorizing bonds may provide that the bonds shall contain a recital that they are issued pursuant

to the irrigation district domestic water system revenue bond act, which recital shall be conclusive evidence of their validity and of the regularity of their issuance. [I.C., § 43-1917, as added by 1988, ch. 299, § 12, p. 944.]

43-1918. Lien of bonds. — All bonds of the same issue shall, subject to the prior and superior rights of outstanding bonds, claims or obligations, have prior and paramount lien on the revenue of the works for which the bonds have been issued, except that where provision is made in the resolution authorizing any issue or series of bonds for the issuance of additional bonds in the future on a parity therewith pursuant to procedures or restrictions provided in the resolution, additional bonds may be issued in the future on a parity with the issue or series in the manner so provided in the resolution. All bonds of the same issue shall be equally and ratably secured without priority by reason of number, date of bonds, date of sale, date of execution, or date of delivery, by a lien on revenue in accordance with the provisions of the irrigation district domestic water system revenue bond act and the resolution authorizing bonds. [I.C., § 43-1918, as added by 1988, ch. 299, § 13, p. 944.]

43-1919. District not liable on bonds. — Bonds issued pursuant to the irrigation district domestic water system revenue bond act shall not be a debt of the district and the district shall not be liable thereon, nor shall they be payable out of any funds other than the revenue pledged to the payment thereof. Each bond issued under the irrigation district domestic water system revenue bond act shall recite, in substance, that the bond, including interest thereon, is payable solely from the revenue pledged to the payment thereof. Bonds may be issued under the irrigation district domestic water system revenue bond act notwithstanding and without regard to any limitation or restriction on the amount or percentage of indebtedness, or of outstanding obligations of a district. [I.C., § 43-1919, as added by 1988, ch. 299, § 14, p. 944.]

43-1920. Works and bonds exempt from taxation. — As long as a district shall own any works, the property and revenue of the works shall be exempt from taxation. Bonds issued under the irrigation district domestic water system revenue bond act and the income therefrom shall be exempt from taxation, except transfer and estate taxes. [I.C., § 43-1920, as added by 1988, ch. 299, § 15, p. 944.]

Compiler's notes. Section 16 of S.L. 1988, ch. 299 declared an emergency. Approved March 31, 1988.

CHAPTER 20

PROVISIONS APPLICABLE TO IRRIGATION DISTRICTS AND DRAINAGE DISTRICTS

SECTION.

- 43-2001. Release of first mortgages held by state upon dissolution of districts.
- 43-2002. Application for release of first mortgage — Contents.
- 43-2003. Investigation of application — Order for release.
- 43-2004. Execution of release.
- 43-2005. Delinquent district assessments — Canceling, compromising or

SECTION.

- extending time for payment — Refunding operations.
- 43-2006. Assessments — Canceling, compromising or extending time for payment — Refunding operations.
- 43-2007. Lands mortgaged to secure loan of state endowment funds — Report of assessments and liens — Penalty.

43-2001. Release of first mortgages held by state upon dissolution of districts. — The state board of land commissioners is hereby empowered, whenever in its judgment the necessity requires, to release first mortgages on farm lands within the state of Idaho, held as security for loans made by said state, and accept in lieu thereof and as security for the payment of said loans, second mortgages in the full amount due, owing and unpaid on said released mortgages, subject to the following terms and conditions:

(a) The lien prior to said second mortgage shall represent only retired general obligation bonds and warrant indebtedness and the interest due thereon of the irrigation or drainage districts within which said lands are located.

(b) Said prior lien shall constitute only the pro rata acreage proportion of the total amount necessary to retire said general obligation bonds and warrant indebtedness and the interest due thereon.

(c) Said prior lien shall not exceed an amount equal to 75 per cent of the pro rata acreage proportion of the face value of the outstanding general obligation bonds and warrant indebtedness and interest due thereon retired.

(d) The interest rate on said prior lien shall not exceed the rate of 6 per cent per annum.

(e) The release and acceptance of a second mortgage shall be for the purpose of winding up the affairs and dissolution of the district. [1933, ch. 194, § 1, p. 385.]

43-2002. Application for release of first mortgage — Contents. — Application for release of first mortgages owned by the state of Idaho shall be filed with the director of the department of finance of the state of Idaho and shall be in such form and shall contain such information as the state board of land commissioners shall by rule provide. Every application shall contain the following information:

(a) The name of the irrigation or drainage district, its general location and its officers.

(b) The total acreage in the district.

(c) The total outstanding obligations of the district including the following:

- (1) Bonds.
- (2) Warrants.
- (3) Interest on bond.
- (4) Interest on warrants.
- (5) Interest on bond coupons.
- (6) Obligations outstanding for which warrants have not been issued.
- (d) The assessment per acre for three (3) years prior to the date of the application itemized as follows:
 - (1) Current expense.
 - (2) Warrant redemption.
 - (3) Bond interest and sinking fund.
- (e) The complete plan for refinancing and dissolution of the district.
- (f) A description and the acreage of the property covered by the mortgage for which application for release is made, and a true and correct valuation thereof.
- (g) The amount due on the mortgage sought to be released.
- (h) The total amount and amount per acre required to retire the outstanding indebtedness of the district in which the land is situated.
- (i) The term for which said prior lien shall extend, the annual rate of interest and the basis for retirement.
- (j) Any other liens or encumbrances against said property and the amount of each.
- (k) The name of the applicant, his residence or place of business (if a corporation, its officers and managing agent).
- (l) Such other information as the board shall desire.
- (m) Said application shall be verified by the oath of the applicant. [1933, ch. 194, § 2, p. 385; am. 1969, ch. 466, § 7, p. 1326; am. 1974 ch. 24, § 90, p. 744.]

Compiler's notes. The words enclosed in parentheses so appeared in the law as enacted.

Section 6 of S.L. 1969, ch. 466 is compiled herein as § 42-2018.

Section 89 of S.L. 1974, ch. 24, has been repealed.

Section 91 of S.L. 1974, ch. 24 provided that the act should take effect on and after July 1, 1974.

Collateral References. 94 C.J.S., Waters, § 799.

43-2003. Investigation of application — Order for release. — The director of the department of finance shall make such investigation of the application as he shall deem necessary and shall submit the same, together with his recommendations to the state board of land commissioners. If, in the opinion of the state board of land commissioners, the release of the first mortgage held by the state of Idaho and acceptance in lieu thereof of a second mortgagee will increase the value of the loan and enhance the value of the real property mortgaged to secure the payment thereof, and that the terms and conditions of said application are equitable and will protect the security of the loan made by the state of Idaho, it shall enter an order directing the release of the said first mortgage held by the state of Idaho and the acceptance of a second mortgage by the director of the department of finance in lieu thereof in such amount as shall be due the state of Idaho on

said first mortgage. Said board may specify such terms and conditions to the release of said first mortgage and the acceptance of said second mortgage as it shall deem necessary. [1933, ch. 194, § 3, p. 385; am. 1969, ch. 466, § 8, p. 1326.]

Compiler's notes. The name of the commissioner of finance has been changed to the director of the department of finance on the authority of S.L. 1974, ch. 286, § 1 and S.L.

1974, ch. 40, § 3 (§ 67-2403).

Section 9 of S.L. 1969, ch. 466 is compiled herein as § 43-2007.

43-2004. Execution of release. — Release of first mortgages shall be signed by the chairman of the state board of land commissioners and countersigned by the secretary thereof. [1933, ch. 194, § 4, p. 385.]

Compiler's notes. Section 5 of S.L. 1933, ch. 194 repealed all laws and parts of laws in conflict therewith.

Section 6 of S.L. 1933, ch. 194 declared an emergency. Approved March 13, 1933.

43-2005. Delinquent district assessments — Canceling, compromising or extending time for payment — Refunding operations. — The board of commissioners of any drainage district, or the board of directors of any irrigation district, in the state of Idaho, shall have the power to cancel, compromise, and/or extend the time for the payment of delinquent district assessments levied on lands within the district, where such district is refunding and reducing its outstanding indebtedness by agreement, through any governmental agency of the United States, or otherwise. Said cancellation, compromise, and/or extension of time for the payment of such delinquent taxes shall take effect if and when the refunding and reduction of said indebtedness is completed, or at least ninety per cent (90%) completed. When the refunding and reduction of said indebtedness is completed, or at least ninety per cent (90%) completed, said board shall cause appropriate notation of said cancellation, compromise and/or extension of time for payment to be noted upon the proper records, and in the event said assessments are collected by county officers, said board shall transmit certified copies of the orders or resolutions providing for such cancellation, compromise, and/or extension of time for payment to the county auditor and the county tax collector, who shall make appropriate notation thereof upon the proper records. Provided, however, that the provisions of this section shall not be applicable in cases where such district has assigned its right to tax deed under the provisions of section 43-715, Idaho Code. [1935, ch. 146, § 1, p. 363.]

Compiler's notes. This section is worded in much the same language as § 43-2006 and it may be that only one of these sections will be given effect. Both were passed at the same

session of the legislature and both were approved on the same day.

Section 2 of S.L. 1935, ch. 146 declared an emergency. Approved Mar. 19, 1935.

43-2006. Assessments — Canceling, compromising or extending time for payment — Refunding operations. — The board of commissioners of any drainage district, or the board of directors of any irrigation district, in the state of Idaho, shall have the power to cancel, compromise,

and/or extend the time for the payment of delinquent assessments heretofore levied by such board on lands within the district, where such district is refunding its outstanding indebtedness through any governmental agency of the United States. Said cancellation, compromise, and/or extension of time for the payment of such delinquent taxes shall not take effect until said refunding of said indebtedness is consummated. When the refunding of said indebtedness is completed said board shall cause appropriate notation of said cancellation, compromise, and/or extension of time for payment to be noted upon the proper records. Provided, however, that the provisions of this section shall not be applicable in such cases where such district has assigned its right to tax deed under the provisions of section 43-715 Idaho Code. [1935, ch. 126, § 1, p. 298.]

Compiler's notes. This section is worded in much the same language as § 43-2005 and it may be that only one of these sections will be given effect. Both were passed at the same

session of the legislature and both were approved on the same day.

Section 2 of S.L. 1935, ch. 126 declared an emergency. Approved Mar. 19, 1935.

43-2007. Lands mortgaged to secure loan of state endowment funds — Report of assessments and liens — Penalty. — It shall be the duty of the treasurer of every irrigation district, drainage district, or any person or corporation engaged in the business of furnishing water for irrigation and having the power to make assessments for maintenance or for any other purpose, or having a lien for maintenance or otherwise, to report to the state department of finance any such assessments or such claim of lien on any lands mortgaged to the state to secure a loan of state endowment funds such report to be made within sixty (60) days after written request for such report by said department. Said report shall be made for all lands on which there is a loan of state endowment funds whether the assessments thereon are delinquent or not; provided, that such request shall contain a description of all the property upon which a report is desired and shall not be made more than once a year and that forms for such report shall be furnished by said department. A failure to comply with the provisions of this section shall subject the party guilty of such failure to a penalty of three hundred dollars (\$300) to be recovered by the state in an appropriate action and to be paid into the general fund in the state treasury. [1925, ch. 109, § 1, p. 156; am. 1929, ch. 249, § 1, p. 507; I. C. A., § 42-724; am. 1969, ch. 466, § 9, p. 1326.]

Compiler's notes. Sections 8, 10 of S.L. 1969, ch. 466 are compiled herein as §§ 43-2003, 67-2402, respectively.

CHAPTER 21

DEBT READJUSTMENT PLANS FOR IRRIGATION DISTRICTS, DRAINAGE DISTRICTS,
AND HIGHWAY DISTRICTS

SECTION.	SECTION.
43-2101. Bankrupt districts — Financial statement — Contents.	43-2107. Publication of notice — Contents.
43-2102. Certified copies of financial statement — Filing.	43-2108. Proof of publication — Default of nondissenting creditors — Notice of hearing to dissenting creditors.
43-2103. Rehabilitating or refinancing plans.	43-2109. Hearing — Procedure — Creditors — Proof of ownership of bonds.
43-2104. Approval of rehabilitation plan by creditors.	43-2110. Approval of plan by court — Rights of dissenting creditors.
43-2105. Majority of creditors consenting — Nonconsenting creditors — Constructive consent proceedings.	43-2111. Harmless error — Appeals.
43-2106. Nature of proceedings.	43-2112. Method of raising funds or issuing funds or other securities.

43-2101. Bankrupt districts — Financial statement — Contents. — Whenever any irrigation district, drainage district or highway district, organized under the laws of the state of Idaho, shall have made default in the payment of either principal or interest on any of its outstanding bonds, and if the board of directors of such district believes that it is impossible for the district to pay its outstanding bonds, warrants and other indebtedness either in full or within the time or in the manner in which such indebtedness becomes due or payable, it shall be the duty of the board to cause to be prepared by a certified public accountant a statement of the financial condition of the district, showing, among other things:

- (a) The amount of bonds, warrants and other indebtedness outstanding.
- (b) The amount of such indebtedness that is in default.
- (c) The total of the receipts and disbursements of the district for each of the three (3) preceding years.
- (d) The amount for each of such years of the uncollected or delinquent taxes (not including interest or penalty) levied by the district.
- (e) Such other information and data as the board may deem necessary or desirable to show the financial condition of the district and the amount which the district may be able to pay annually under the economic and other conditions then prevailing. [1933, ch. 174, § 1, p. 316.]

Collateral References. 94 C.J.S., Waters, §§ 786-793.

43-2102. Certified copies of financial statement — Filing. — Three (3) copies, duly certified, of the report so prepared shall be filed with the secretary of the district, one (1) of which shall be available for examination at the office of the secretary by all creditors of the district, and copies thereof shall be furnished to creditors at the actual cost of making such copies. [1933, ch. 174, § 2, p. 316.]

43-2103. Rehabilitating or refinancing plans. — The board of directors shall thereupon formulate a plan for rehabilitating the financial condition of the district and for refinancing or retiring the indebtedness of

the district, which plan may include:

(a) The scaling down of any one or more of the various kinds or classes of indebtedness outstanding, whether evidenced by bonds, warrants or otherwise.

(b) Extending the time for the payment thereof.

(c) Reducing the interest thereon.

(d) Whether the same shall be paid in cash or by refunding bonds, or otherwise, and the manner of effecting the exchange or retirement of the outstanding obligations or any of them for the consideration to be paid under such plan.

(e) The time within which the plan must be approved by a majority in amount of the creditors of the district directly affected by such plan. [1933, ch. 174, § 3, p. 316.]

43-2104. Approval of rehabilitation plan by creditors. — The plan so approved by the board of directors shall thereupon be submitted to the known creditors of the district directly affected thereby, in such manner as to the board may seem appropriate and practical under the circumstances. The approval of such plan by creditors shall be in writing filed with the secretary of the board, and such approval shall be irrevocable if approved by a majority in amount of each class of creditors directly affected thereby, within the time specified in such plan. [1933, ch. 174, § 4, p. 316.]

43-2105. Majority of creditors consenting — Nonconsenting creditors — Constructive consent proceedings. — If the written consent of all creditors directly affected by the proposed plan is not obtained within the time specified in the plan for the approval thereof by the creditors, but if a majority in amount of each class of creditors has approved such plan, the board of directors shall then proceed without delay to obtain the constructive consent of all holders of bonds, coupons and warrants and of other creditors of the district that will be directly affected by such plan, but who have not theretofore filed their consent in writing as hereinbefore provided. For the purpose of obtaining such constructive consent the district shall commence a proceeding in rem in the district court of the county in which the office of the district is situated, by filing a petition in writing which shall be duly verified by the oath of the president or secretary of the district, and shall set forth, among other things:

(a) The nature and amount of the indebtedness of the district and of each kind or class thereof.

(b) A brief statement of the financial condition of the district. One (1) of the certified copies filed with the secretary of the district, of the report of the certified public accountant, showing the financial condition of the district, shall be filed with the clerk of the court as an exhibit to said petition for the information of the court and the creditors of the district.

(c) A brief statement of the plan approved by the board for rehabilitating the financial condition of the district and for readjusting the indebtedness then outstanding. A full, true and correct copy of such plan, certified by the secretary of the district, shall be filed as an exhibit to said petition for the information of the court and the creditors of the district.

(d) A statement showing approximately by what percentage, in amount, said plan has been approved in writing by the holders of the indebtedness of the district and of each class and kind of such indebtedness.

(e) A statement of the steps that have been taken by the district to obtain the consent of all creditors of the district to the plan so approved and submitted by the board.

(f) A prayer that all proceedings had and taken under this act by the district may be examined, approved and confirmed by the court, and that the district may be authorized to publish a notice under this act to all creditors of the district that have not approved in writing said plan of settlement, and for such other relief as the court may be authorized to grant under this act. [1933, ch. 174, § 5, p. 316.]

43-2106. Nature of proceedings. — Said proceeding shall be in the nature of a proceeding in rem in which the district shall be plaintiff, and all holders of bonds, coupons and warrants, and other creditors of the district, without naming them, shall be defendants, except holders of securities and creditors not directly affected by said plan of settlement and those who have filed their written consent or approval thereof with the secretary of the district. [1933, ch. 174, § 6, p. 316.]

43-2107. Publication of notice — Contents. — The petition may be presented to the district court or the judge thereof, at chambers, and if it satisfactorily appears from said petition that the proceedings had and taken by the district have been substantially in accordance with the requirements of this act, the court or judge shall direct said district to publish a notice for at least four (4) consecutive weeks in three (3) newspapers published within the state of Idaho and by the court deemed most likely to give notice to the creditors of said district, one (1) of which shall be published in the county in which the office of the board of directors is situated, if there be a newspaper published in such county. The notice shall be directed to the holders (without naming them) of the bonds, coupons and warrants and other creditors (without naming them) of the district directly affected by such plan, and it shall set forth in substance:

(a) A description, sufficient for identification, of the bonds, coupons, warrants and other claims that it is proposed to scale down or to pay or refund or otherwise settle or adjust pursuant to such plan.

(b) The substance of the plan of settlement and when and how it is proposed to make payment to the various classes of creditors embraced in such plan.

(c) A statement showing the approximate amount of each class of indebtedness sought to be readjusted or settled that has by the holders thereof assented to and approved such plan of settlement.

(d) And it shall notify all holders of the bonds and warrants and other creditors of the district that will be directly affected by such plan, that have not theretofore filed their written approval of said plan with the secretary of the board, to file in said cause, within ninety (90) days from the first publication of said notice, their written dissent from or objection to said

proposed plan of settlement, and that the dissent or objection so filed must be verified under oath, and describe the securities sufficiently for identification held by the creditor filing such objection, and give the address at which he may be reached by mail.

The notice shall further state that if such dissent or objection be not filed with the clerk of said court within ninety (90) days from the date of the first publication of said notice, the owners and holders of such bonds, coupons and warrants, or other creditors of the district, who have failed to file such dissent or objection, will be deemed, adjudged and decreed to have assented to said plan of settlement. The notice so published shall be deemed and held to be notice to all creditors of the proceedings taken by the district and the court under this act. [1933, ch. 174, § 7, p. 316.]

Compiler's notes. The words enclosed in parentheses so appeared in the law as enacted.

Cross ref. Notice by mail, § 60-109A.
Publication of notice, § 60-109.

43-2108. Proof of publication — Default of nondissenting creditors — Notice of hearing to dissenting creditors. — Proof of publication of said notices by affidavit of the publishers shall be filed with the clerk, and upon the expiration of ninety (90) days from the date of the first publication of said notice the default of all creditors which have not filed their dissent as above provided, and which have not filed their written assent or approval of said plan with the secretary, shall be entered as in other cases, and thereupon the court or the judge thereof, at chambers, shall fix a time for hearing said cause, and notice of such hearing shall be given to the dissenting creditors by mailing such notice to the address given by them, respectively, in their objections filed as aforesaid, or such notice may be given to their attorneys of record, at least twenty (20) days before the hearing. [1933, ch. 174, § 8, p. 316.]

43-2109. Hearing — Procedure — Creditors — Proof of ownership of bonds. — At the hearing of the cause the court shall examine and consider all proceedings had and taken by the district, the financial condition of the district as shown by the report of the certified public accountant, and the proposed plan of settlement, and the objections, if any, filed thereto by creditors of the district. All creditors who have filed objections shall make proof of their ownership of the bonds or other securities held by them and described in their written objections theretofore filed, and for that purpose the court may require them to exhibit the securities so held. [1933, ch. 174, § 9, p. 316.]

43-2110. Approval of plan by court — Rights of dissenting creditors. — If, in the opinion of the court, the proceedings had and taken by the district are substantially in accordance with the provisions of this act, and the proposed plan of settlement is just and fair to the district and the creditors thereof, the court shall make and enter its decree confirming such proceedings, and adjudging and decreeing that all indebtedness of the district which it is sought to settle and adjust by said proposed plan shall be

bound by said plan and settled accordingly, and the owners and holders thereof shall be deemed to have approved and assented to such plan of settlement as effectually and to the same extent as if they had approved such plan in writing filed with the secretary of the board as provided in this act. Provided, however, that any bonds, coupons, warrants or other evidences of indebtedness embraced in such plan of settlement, held by creditors who have filed their dissent or objections with the clerk of the court as hereinbefore provided, and who have sustained their ownership thereof by satisfactory proof, shall not be bound or affected by such plan of settlement, and the owners thereof may retain such securities and enforce the payment thereof according to any remedy available to them under the laws of the state of Idaho. [1933, ch. 174, § 10, p. 316.]

43-2111. Harmless error — Appeals. — The court in all proceedings under this act shall disregard any error, irregularity or omission which does not substantially affect the rights of the parties. The district, and all parties filing objections to or who dissent from such plan, may appeal to the Supreme Court from any adverse decision within thirty (30) days after the entry of the decree of the district court. [1933, ch. 174, § 11, p. 316.]

43-2112. Method of raising funds or issuing funds or other securities. — Any funds, bonds or other securities which the district, under the plan of settlement, proposes to pay or deliver in satisfaction of any outstanding indebtedness, however evidenced, shall be raised, authorized and issued in the manner provided by the laws of the state of Idaho relating thereto, and this act shall not be construed as vesting in the board of directors of the district the power to provide money or authorize or issue bonds or securities in any other manner. [1933, ch. 174, § 12, p. 316.]

CHAPTER 22

RECONSTRUCTION, REHABILITATION, REPLACEMENT AND IMPROVEMENT OF DAMS BY IRRIGATION DISTRICTS — FINANCIAL AND OTHER ARRANGEMENTS

SECTION.

- 43-2201. Reconstruction of dams and related appurtenances — Execution of contracts — Assessments — Terms and conditions.
43-2202. Issuance of bonds or interim notes — Terms and conditions.

SECTION.

- 43-2203. Election for issuing bonds — Referendum petition.
43-2204. Judicial Examination.
43-2205. Judicial proceedings to test validity.
43-2206. Tax exemption.
43-2207. Liberal construction.

43-2201. Reconstruction of dams and related appurtenances — Execution of contracts — Assessments — Terms and conditions. — Any irrigation district organized and existing under the provisions of title 43, Idaho Code, in addition to any other powers which it might enjoy, for the purpose of preserving, restoring, protecting and maintaining rights of storage, diversion and delivery of water necessary and appurtenant to the purposes for which such district and other like similarly situated districts

were organized, is hereby granted the following additional powers:

(A) To reconstruct, rehabilitate, replace and improve dams and other related structures and works together with all necessary appurtenances related thereto, whether located within or without the boundaries of the district and whether or not legal title thereto is owned by the district, including without limitation as a part thereof the reconstruction and relocation of all roads, bridges and highways made necessary by reason of such reconstruction, rehabilitation, replacement and improvement, the construction of penstocks and other facilities related to hydroelectric production plant and made necessary pursuant to falling water contracts entered into pursuant to the provisions of paragraph (4) of subsection (D) hereof, and related facilities for flood control, public recreation and fish and wildlife mitigation and enhancement purposes made necessary in order to comply with applicable state and federal requirements;

(B) To enter into all necessary agreements, contracts and other legal arrangements with the United States of America and its agencies and departments, the state of Idaho and its agencies, departments and political subdivisions, and public and private persons, firms, corporations and associations in order to carry out the reconstruction, rehabilitation, replacement and improvement of any such dam and other related structures and works and appurtenances and the financing thereof pursuant to the provisions of this chapter;

(C) To issue bonds of the district in the manner provided in this chapter for the purpose of paying all or part of the cost of the reconstruction, rehabilitation, replacement and improvement of any such dam and other related structures and works and appurtenances as further described in subsections (A) and (B) above, and for the purpose of paying all expenses preliminary and incidental thereto, including all engineering, fiscal and legal expenses and costs of issuance, printing, advertising, establishment of necessary reserves and payment of interest during construction;

(D) To provide that any bonds issued and sold pursuant to the provisions of this chapter shall be payable solely out of a special fund into which the district shall be obligated to deposit as from time to time received the following:

(1) The proceeds of the collection of assessments to be levied by the irrigation district issuing the bonds, pursuant to the provisions of section 43-404, Idaho Code, representing the amount of benefits to accrue to each tract or subdivision in such district based upon the cost allocation to such district pursuant to subsection (E) hereof, from the reconstruction, rehabilitation, replacement and improvement of any such dam and other related structures and works and appurtenances, in the proportion that the right to the storage, diversion and delivery of water appurtenant to each such tract or subdivision bears to the total right to the storage, diversion and delivery of water appurtenant to such dam and other related structures and works and appurtenances, but only when there shall have been held in such irrigation district an election on the right of the district to impose such assessments and which assessments shall have been approved at said election, and which election shall have been called,

held and conducted in the manner now or hereafter provided in chapter 4, title 43, Idaho Code, the authority for the calling and holding of said election and the levying of such assessments being hereby given.

(2) Payments, pursuant to contracts entered into by such district with other irrigation districts, constituting the proceeds of the collection of assessments to be levied by such other districts, pursuant to the provisions of section 43-404, Idaho Code, representing the amount of benefits to accrue to each tract or subdivision in each such district based upon the cost allocation to each such district pursuant to subsection (E) hereof, from the reconstruction, rehabilitation, replacement and improvement of any such dam and other related structures and works and appurtenances, in the proportion that the right to the storage, diversion and delivery of water appurtenant to each such tract or subdivision bears to the total right to the storage, diversion and delivery of water appurtenant to such dam and other related structures and works and appurtenances, but only when there shall have been held in each such irrigation district contracting with the irrigation district issuing such bonds, an election on the right of the district to impose such assessments and to enter into an obligation or contract with the irrigation district issuing the bonds for such purpose, and which assessments and which obligation or contract shall have been approved at said election, and which election shall have been called, held and conducted in the manner now or hereafter provided in chapter 4, title 43, Idaho Code, the authority for the calling and holding of said election and the levying of such assessments and the entering into of such obligation or contract with such irrigation district being hereby given; and

(3) Payments pursuant to contracts with other public or private persons, firms, corporations and associations representing the portion of the cost of reconstructing, rehabilitating, replacing and improving any such dam and other related structures and works and appurtenances and allocated to each such public or private person, firm, corporation or association pursuant to subsection (E) hereof, in the proportion that the right to the storage, diversion and delivery of water appurtenant to each tract or subdivision represented by the contracting public or private person, firm, corporation or association bears to the total right to the storage, diversion and delivery of water appurtenant to such dam and other related structures and works and appurtenances;

(4) When so authorized by act of congress, the proceeds from the sale or use of falling water appurtenant to the dam and other related structures and works and appurtenances to be so reconstructed, rehabilitated, replaced and improved with the proceeds of bonds of the district, pursuant to falling water contracts for power generation to be entered into by the irrigation district issuing the bonds with a public or private person, firm, corporation or association, and which falling water contracts may contain such provisions as contemplated in the act of congress providing for the reconstruction, rehabilitation, replacement and improvement of any such dam and other related structures and works and appurtenances, the coordination of the construction of hydroelectric power facilities, the conditions under which the contracting party shall make payments to the

district issuing the bonds, the rights and remedies of the parties thereto in the event of the failure of the contracting party to make the required payments thereunder and the securing of all necessary permits and licenses required in connection therewith;

(E) To make a determination of the proportion of the cost of the reconstruction, rehabilitation, replacement and improvement of any such dam and other related structures and works and appurtenances which will be repaid pursuant to such falling water contracts entered into pursuant to the provisions of paragraph (4) of subsection (D) hereof, and to determine that only the balance of the cost shall be repaid from the proceeds of assessments and contracts pursuant to the provisions of paragraphs (1), (2) and (3) of subsection (D) hereof and to allocate the balance of the cost so determined in the proportion that the various rights to the storage, diversion and delivery of water bear to the total rights to the storage, diversion and delivery of water appurtenant to such dam and other related structures and works and appurtenances, and in the event that any public or private person, firm, corporation or association shall fail to execute a contract or to levy assessments as contemplated in paragraphs (2) and (3) of subsection (D) hereof, to reallocate the balance of the original cost as in this subsection determined, provided, however, that if the result of any such reallocation increases the obligation of any irrigation district under any contract or increases any assessment, any such increase must be approved in the same manner as hereinabove required for the approval of the original contract or assessment, or both; and

(F) To enter into a trust indenture securing the bonds issued pursuant to the provisions hereof with a bank or trust company doing business either within or without the state of Idaho, and to assign the rights of the district to receive the payments provided for in paragraphs (1), (2), (3) and (4) subsection (D) hereof to such bank or trust company as trustee for and on behalf of the bondholders. [I.C., § 43-2201, as added by 1974, ch. 1, § 1, p. 3.]

Sec. to sec. ref. This section is referred to in §§ 43-2203, 43-2204.

ANALYSIS

Approval of contracts.
Authority of districts.
Constitutionality.

Approval of Contracts.

Where additions made to spaceholder's contracts after election approving such contracts were merely procedural, clarifying the manner in which reimbursements, if any, would be made and did not impose any obligations on the spaceholders or landowners which were not already present under prior drafts, it was not necessary to submit such contracts to the voters in another election for approval. *Kerner v. Johnson*, 99 Idaho 433, 583 P.2d 360 (1978).

The contracts actually executed by the districts need not be identical in every respect to

the contracts approved by the voters in the election, rather the districts may make minor changes in the details of the contracts without submitting them to the voters provided such changes do not increase the obligation of any irrigation district, but if the district's obligation is increased, the modified contracts would have to be resubmitted to the voters for approval. *Kerner v. Johnson*, 99 Idaho 433, 583 P.2d 360 (1978).

Authority of Districts.

This chapter does not require other irrigation districts to enter into contracts with the reservoir district; it merely empowers the districts to do so, and neither this chapter nor Public Law 93-206 require the reservoir district to act as the constructing agency and to issue the bonds. *Kerner v. Johnson*, 99 Idaho 433, 583 P.2d 360 (1978).

This chapter does not impose an agency relationship between the reservoir district

and other irrigation districts and does not establish a new entity with authority over the spaceholders in the present dam; this section merely extends the authority of an irrigation district to include the power to improve or replace dams and related structures and it is apparent from this section that where the proposed improvements would inure to the benefit of several irrigation districts or other entities, the legislature intended to authorize an irrigation district to execute contracts for the construction of the entire project and issue bonds to finance the construction and then to enter into repayment contracts with other irrigation districts or other entities benefitting from the improvements and willing to participate in their construction. *Kerner v. Johnson*, 99 Idaho 433, 583 P.2d 360 (1978).

Constitutionality.

Session Laws 1974, ch. 1 (§§ 43-2201 — 43-2207) was not an amendment or revision of an "act" or "section" within the meaning of Const., Art. III, § 18, but was an entirely new and independent addition to Title 43 and thus was not enacted in violation of Const., Art. III, § 18. *Kerner v. Johnson*, 99 Idaho 433, 583 P.2d 360 (1978).

The title to Laws 1974, ch. 1 (§§ 43-2201 — 43-2207) provides general notice of the sub-

ject matter contained in the act and the body of the act is not broader than the title and does not encompass subjects which are not germane to or which are incongruous with the title and thus said act does not violate Const., Art. III, §§ 16 and 18. *Kerner v. Johnson*, 99 Idaho 433, 583 P.2d 360 (1978).

Where a replacement dam was to be built under §§ 43-2201 — 43-2207 and the Federal Reclamation Act and a bond issue had been approved to finance it, and where the relevant portions of this section, the various contracts and the trust indenture clearly provided that the bond payments could be made only from a special fund and the only obligation that the participating irrigation districts had with respect to the special fund and the bonds payments as provided by this section and their respective spaceholder contracts was to pay their respective portions of the principal and interest on the bonds, and where such districts were not obligated to pay the share of bond payments which had been apportioned to other participating irrigation districts, the proposed bond issue did not constitute an unlawful loaning of the credit irrigation districts in violation of either Const., Art. VIII, § 4 or Art. XII, § 4. *Kerner v. Johnson*, 99 Idaho 433, 583 P.2d 360 (1978).

Collateral References. 94 C.J.S., Waters, §§ 865-870.

43-2202. Issuance of bonds or interim notes — Terms and conditions. — The board of directors is authorized to issue the bonds of the district in the manner for which provision is made in this chapter, which bonds shall be fully negotiable for all purposes of the Uniform Commercial Code of the state of Idaho as the same may be in force from time to time.

Bonds issued hereunder shall be authorized by resolution or resolutions of the board. They shall be in coupon form but may be made registrable as to principal if so provided in the resolution authorizing their issuance. Such bonds shall be in denominations of one hundred dollars (\$100) or a multiple thereof, shall bear interest at such rate or rates, payable annually or semiannually as the board shall elect, shall mature serially or otherwise at any time or times, shall be payable at such place or places within or without the state, may be made redeemable prior to maturity in such manner and at such premiums, shall be executed in such manner, and shall be sold in such manner and at such price or prices as may be determined by resolution of the board.

Bonds may be issued hereunder at one (1) time or from time to time. If more than one (1) issue or series of bonds is delivered hereunder the bonds of the respective issues or series shall have such priorities of payment as may be provided in the proceedings authorizing the bonds.

Any resolution authorizing the issuance of bonds hereunder shall provide for the creation of a sinking fund into which shall be paid from the revenues and assessments pledged to such payment in the authorizing resolution sums fully sufficient to pay the principal of and interest on the bonds and to

create such reserve for contingencies as may be required by the resolution. Any resolution so authorizing bonds may contain such covenants with the future holders of the bonds as to the disposition of such revenues and assessments, the issuance of future bonds and the creation of future liens and encumbrances against the revenues and assessments and other pertinent matters deemed necessary or proper by the board to assure the merchantability of the bonds, provided such covenants and agreements are not inconsistent with the provisions of this chapter.

Any resolution, or any contract with another irrigation district, may adopt the provisions of section 43-413, Idaho Code, with respect to the providing of a safety fund with respect to any assessments levied for the repayment of the bonds or the payment of any contract obligation.

It may be provided in any such resolution that any holder of the bonds or of any of the coupons thereto attached may by appropriate legal action compel performance of all duties required of the board and the officials of the district by the provisions of title 43, Idaho Code, and the provisions of the resolution authorizing the bonds. If any bond issued hereunder is permitted to go into default, as to principal or interest, any court of competent jurisdiction may, pursuant to the application of the holder of any bond, or if applicable the trustee pursuant to a trust indenture, appoint a receiver to collect and distribute the revenues and assessments pledged to the repayment of the bonds pursuant to the provisions and requirements of the resolution and of this act and as the court may direct.

The board of any district which shall have issued any bonds under the provisions of this chapter may authorize the issuance of bonds hereunder for the purpose of refunding all or any part of such outstanding bonds. Refunding bonds may be either sold and the proceeds thereof applied to or deposited in an escrow for the retirement of the outstanding bonds or may be delivered in exchange for the outstanding bonds. The refunding bonds shall be authorized and secured in the manner herein provided for the issuance and securing of other bonds and may but shall not be required to have the same source of security and payment as the bonds refunded. No election on the issuance of refunding bonds shall be required, but if by an increase in the amount of bonds or by changes in the security, the requirements of the constitution for an election become applicable, then any such refunding bonds shall be approved at an election held and conducted pursuant to the provisions of section 43-2203, Idaho Code.

In addition to the permanent financing contemplated in this section, the board of any district may borrow money and issue interim notes in evidence thereof whenever it is deemed advisable and in the interests of the district to borrow funds temporarily for any of the purposes herein provided in advance of permanent financing. No election shall be required upon the issuance of interim notes. The board may from time to time and pursuant to appropriate resolution borrow money and issue interim notes to evidence borrowings for the purpose of obtaining funds for any of the purposes authorized in subsection (D) of section 43-2201, Idaho Code. Any resolution authorizing the issuance of such interim notes shall describe generally the purpose for which such notes are to be issued and shall specify the principal

amount, rate of interest and maturity date, which shall be the same for all interim notes and which shall be not to exceed five (5) years from the date of issue of such notes, and such other pertinent terms as may be specified in such resolution. The interim notes shall be issued from time to time by the board as funds are borrowed, in the manner the board may determine. Interest on the interim notes may be made payable semiannually, annually or at maturity. The interim notes may be made redeemable prior to maturity at the option of the board in the manner and upon the terms fixed by the resolution authorizing their issuance. Such interim notes shall be in such denominations, shall be executed in such manner, and shall be sold at such price or prices as may be determined by resolution of the board. All such interim notes and the interest thereon may be secured by a pledge of the proceeds of the revenues and assessments provided in subsection (D) of section 43-2201, Idaho Code, and shall be payable solely from such revenues and assessments and from the proceeds to be derived from the sale of any bonds for permanent financing authorized to be issued pursuant to this chapter. Contemporaneously with the issue of the bonds as provided by this chapter, all interim notes, even though they may not have then matured, shall be paid, both principal and interest and applicable premium, if any, to date of payment, from the funds derived from the sale of bonds authorized hereunder for the permanent financing, and such interim notes shall thereupon be surrendered and canceled.

The resolution authorizing the issuance of any bonds or interim notes hereunder shall, and any resolution authorizing the execution of any contract hereunder may, be published one (1) time in a newspaper of general circulation in the district. For a period of thirty (30) days from the date of such publication any person in interest may file suit in any court of competent jurisdiction to contest the regularity, formality or legality of the proceedings authorizing the bonds, the interim notes, the execution of such contract or the legality of such resolution and its provisions or of the contract or of the bonds or interim notes to be issued pursuant thereto and the provisions securing the bonds or interim notes. After the expiration of such thirty (30) day period no one shall have any right of action to contest the validity of the contract or of the bonds or interim notes or of such proceedings or of such resolution or the validity of the pledges and covenants made in such proceedings and resolution and the contract and the bonds and interim notes and the provisions for their payment shall be conclusively presumed to be legal and no court shall thereafter have authority to inquire into such matters. [I.C., § 43-2202, as added by 1974, ch. 1, § 1, p. 3.]

Compiler's notes. The "Uniform Commercial Code" referred to in this section is compiled as §§ 28-1-101 — 28-10-104.

43-2203. Election for issuing bonds — Referendum petition. — Whenever the board shall by resolution adopted by a four fifths ($\frac{4}{5}$) majority of the said board, determine that the interest of said district and the public interest or necessity demand the reconstruction, rehabilitation, replacement and improvement of any dam and other related structures and works

together with all necessary appurtenances related thereto, in order to preserve, restore, protect and maintain rights of storage, diversion and delivery of water necessary and appurtenant to the purposes for which such district and other like similarly situated districts were organized and shall set forth the amount of obligation or bonded or other indebtedness proposed to be issued by the district under the provisions of this chapter, said board shall be required to order the submission of the proposition of issuing such obligation or bonded or other indebtedness for the purposes set forth in said resolution to the vote of the qualified electors of the district as defined in section 34-104, Idaho Code, at an election to be held for that purpose only if within fifteen (15) days after the passage of such resolution a referendum petition signed by legal voters equal in number to not less than ten per cent (10%) of the electors of the district, based upon the aggregate vote cast at the general election of officers of the district next preceding the filing of such referendum petition, shall be filed with the secretary of the district requesting that an election upon the issuance of such obligation or bonded or other indebtedness be held and conducted under the provisions of this section. Any election required to be held pursuant to a referendum petition filed in accordance with this section for the purpose of submitting any proposition or propositions of incurring such obligation or indebtedness may be held separately, or may be consolidated or held concurrently with any other election authorized by law. The resolution, in addition to such declaration of public interest or necessity, shall recite the objects and purposes for which the indebtedness is proposed to be incurred, the estimated cost of the reconstruction, rehabilitation, replacement or improvement as the case may be, the amount of principal of the indebtedness to be incurred therefor, and the sources of the revenues and assessments pledged to the payment of said bonds, as enumerated in section 43-2201, (D)(1), (2), (3) and (4), Idaho Code. The separate election upon the assessments provided for in section 43-2201(D)(1), Idaho Code, shall be held at the same time as and shall be combined with any such election required to be held upon the issuance of the bonds pursuant to a referendum petition.

Any such election required to be held hereunder shall be called by resolution, which resolution shall also fix the date upon which such election shall be held, the manner of holding the same and the method of voting for or against the incurring of the indebtedness or issuance of the bonds. Such resolution shall also fix the compensation to be paid the officers of the election and shall designate the precincts and polling places and shall appoint for each polling place, from each precinct from the electors thereof, the officers of such election, which officers shall consist of three (3) judges, one (1) of whom shall act as clerk, who shall constitute a board of election for each polling place. The description of precincts may be made by reference to any order or orders of the board of county commissioners of the county or counties in which the district or any part thereof is situated, or by reference to any previous order, or resolution of the board or by detailed description of such precincts. Precincts established by the boards of the various counties may be consolidated for special elections held hereunder. In the event any such election shall be called to be held concurrently with any other election

or shall be consolidated therewith, the resolution calling the election hereunder need not designate precincts or polling places or the names of officers of election, but shall contain reference to the act or order calling such other election and fixing the precincts and polling places and appointing election officers therefrom. The resolution calling the election shall prescribe an official notice of election, which notice shall be published once a week for two (2) consecutive weeks, the last publication of which shall be at least ten (10) days prior to the date set for said election, in a newspaper of general circulation printed and published within the district, and no other or further notice of such election or publication of the names of election officers or of the precincts or polling places need be given or made.

The respective election boards shall conduct the election in their respective precincts in the manner prescribed by law for the holding of district elections to the extent the same shall apply and shall make their returns to the secretary of the district. At any regular or special meeting of the board held not earlier than five (5) days following the date of such election, the returns thereof shall be canvassed and the results thereof declared.

In the event that no referendum petition is filed, or if so filed, if it shall appear from said returns that a two thirds ($\frac{2}{3}$) majority of the qualified electors of the district who shall have voted on any proposition submitted hereunder at such election voted in favor of such proposition, the district shall thereupon be authorized to incur such indebtedness or obligations, enter into such contracts or issue and sell such bonds of the district, all for the purpose or purposes and object or objects provided for in the proposition submitted hereunder or in the resolution therefor, and in the amount so provided. Submission of the proposition of incurring such obligation or bonded or other indebtedness at such an election shall not prevent or prohibit submission of the same or other propositions at subsequent election or elections called for such purpose. [I.C., § 43-2203, as added by 1974, ch. 1, § 1, p. 3; am. 1975, ch. 48, § 1, p. 90.]

ANALYSIS

Approval of contracts.

Constitutionality.

Findings.

Notice to electorate.

Approval of Contracts.

When more than two-thirds of the landowners of the irrigation district have voted to approve the execution of contracts to repay their proportionate amount of major new capital improvements in order to assure that adequate supplies of water will be available, it cannot be said that the action of the board of directors divests those landowners who voted against the contracts of valuable property rights. *Kerner v. Johnson*, 99 Idaho 433, 583 P.2d 360 (1978).

Constitutionality.

The failure of this section to require publication of notice of the board's adoption of the resolution authorized by this section does not

violate the due process clause of Const., Art. I, § 13. *Kerner v. Johnson*, 99 Idaho 433, 583 P.2d 360 (1978).

This section does not constitute an unlawful delegation of legislative authority prohibited by Const., Art. III, § 1; rather, the board is authorized to act only for a limited purpose in a limited manner after finding that certain conditions exist. *Kerner v. Johnson*, 99 Idaho 433, 583 P.2d 360 (1978).

Findings.

The findings of the board required by this section are reviewable by the courts and § 43-2204 requires such review. *Kerner v. Johnson*, 99 Idaho 433, 583 P.2d 360 (1978).

Where board's resolution stated that dam should be replaced because its deteriorating condition resulted in loss of storage capacity and adversely affected water users, the resolution itself indicated the factual basis for the conclusion that the project to build a new dam was in the interest of the public and the

district and was necessary to further the purposes enumerated in this section; thus there was evidence supporting the board's finding that a new dam was needed. *Kerner v. Johnson*, 99 Idaho 433, 583 P.2d 360 (1978).

Notice to Electorate.

Although the board's resolution under this section may become final without some of the landowners within the district having knowledge of its adoption, the landowners will suffer no detriment and no burdens will be placed on their land until they have been given notice of the proposed contracts and assessments and have been afforded an opportunity to approve or reject the proposed actions in an election. *Kerner v. Johnson*, 99 Idaho 433, 583 P.2d 360 (1978).

Where the notices of election as to whether

irrigation district should enter into spaceholder's contract and help finance bonds to build replacement dam specifically stated that delivery of water was contingent upon the execution of the spaceholder contract and upon the continued fulfillment of the obligations under that contract, the notices were sufficient to provide reasonable notice of the chief features of the proposal. *Kerner v. Johnson*, 99 Idaho 433, 583 P.2d 360 (1978).

This section does not require notice to the electorate of the adoption by an irrigation district of a resolution imposing a bonded indebtedness upon the lands of the district, which resolution becomes final in 15 days unless a referendum petition is filed, within that time, seeking an election on the question. *Kerner v. Johnson*, 99 Idaho 433, 583 P.2d 360 (1978).

43-2204. Judicial Examination. — Except in the instance of bonds issued and sold to refund other bonds for which a confirmation proceeding pursuant to this section has already been held, the board shall file a petition in the district court of the county in which the office of the board is located, pursuant to the provisions of sections 43-406 through 43-408, Idaho Code, prior to the sale and issuance of any bonds under this chapter. Whenever any district which is required to file a petition hereunder has or proposes to enter into a contract or contracts with one or more irrigation districts pursuant to section 43-2201(D)(2), Idaho Code, and such other irrigation district or districts is authorized or required to bring a confirmation proceeding or proceedings pursuant to the provisions of section 43-406 or of section 43-1808, Idaho Code, with respect to such contracts or the levy of assessments or the apportionment of costs, the boards of each of such other irrigation districts shall join in the filing of such petition, and the district court in which such petition is filed shall have jurisdiction to hear the petition and to grant the relief prayed for therein. Each such petition shall pray for a judicial examination and determination of any power conferred hereby or by any amendment hereto or of any assessment levied or of any apportionment of costs or of any act, proceeding or contract of the district or districts, whether or not said contracts shall have been executed, including proposed contracts for the reconstruction, rehabilitation, replacement and improvement of any such dam and other related structures and works and appurtenances, falling water contracts pursuant to section 43-2201(D)(4), Idaho Code, contracts with other irrigation districts pursuant to section 43-2201(D)(2), Idaho Code, and contracts with other public and private persons, firms, corporations and associations pursuant to section 43-2201(D)(3), Idaho Code. Such petition shall set forth the facts whereon the validity of such powers, assessments, apportionments, acts, proceedings or contracts is founded. Notice of the filing of said petition shall be given by the clerk of the court by mailing, and by publication in at least one (1) newspaper published and of general circulation within the boundaries of each irrigation district joining in the petition, or if no newspaper is so published within any district, then in a newspaper published in the same

county in which any part of such irrigation district is located which is of general circulation in such irrigation district, pursuant to and in accordance with the requirements of section 43-407, Idaho Code, under the seal thereof, stating in brief outline the contents of the petition and showing where a full copy of any contract or contracts, therein mentioned, may be examined.

Any owner of property in any district joining in the petition or any other person interested in the contracts or proposed contracts may appear and answer said petition at any time prior to the date fixed for said hearing or within such further time as may be allowed by the court; and the petition shall be taken as confessed by all persons who fail so to appear. The said petition and notice shall be sufficient to give the court jurisdiction and, upon hearing, the court shall examine into and determine all matters and things affecting the question submitted, shall examine all of the proceedings of all of the irrigation districts as set forth in the petition, shall hear all objections either filed in said proceeding or brought up from the hearings before any of the boards, shall correct all errors in the assessments and apportionments of costs, shall ratify, approve and confirm all apportionments of costs and assessments levied, shall make such findings with reference thereto and render a judgment and decree thereon approving and confirming all of the powers, assessments, apportionments, acts, proceedings and contracts of each of the irrigation districts as set forth in the petition as the case warrants. Costs may be divided or apportioned among the contesting parties in the discretion of the trial court. Review of the judgment of the court may be had as in other similar cases, except that such review must be applied for within thirty (30) days after the time of the rendition of such judgment, or within such additional time as may be allowed by the court within thirty (30) days. The Idaho Rules of Civil Procedure shall govern in matters of pleading and practice where not otherwise specified herein. The court shall disregard any error, irregularity or omission which does not affect the substantial rights of the parties. Except as provided herein, the provisions of sections 43-406 through 43-408, Idaho Code, shall apply to the proceeding herein authorized.

Except as expressly provided in this section, the provisions of sections 43-406 through 43-408, Idaho Code, shall be inapplicable to refunding bonds issued under this chapter. [I.C., § 43-2204, as added by 1974, ch. 1, § 1, p. 3; am. 1975, ch. 48, § 2, p. 90; am. 1990, ch. 11, § 1, p. 21.]

Compiler's notes. Section 3 of S.L. 1975, ch. 48 declared an emergency. Approved March 14, 1975.

Section 2 of S.L. 1990, ch. 11 declared an emergency. Approved February 12, 1990.

ANALYSIS

- Changes in contracts.
- Findings of board.
- Procedure.
- Purpose.
- Scope of review.
- Sufficiency of evidence.

Changes in Contracts.

The contracts actually executed by the districts need not be identical in every respect to the contracts approved by the voters in the election; rather, the districts may make minor changes in the details of the contracts without submitting them to the voters provided such changes do not increase the obligation of any irrigation district, but if the district's obligation is increased, the modified contracts would have to be resubmitted to the voters for approval. *Kerner v. Johnson*, 99 Idaho 433, 583 P.2d 360 (1978).

Where additions made to placeholder's con-

tracts after election approving such contracts were merely procedural, clarifying the manner in which reimbursements, if any, would be made and did not impose any obligations on the spaceholders or landowners which were not already present under prior drafts, it was not necessary to submit such contracts to the voters in another election for approval. *Kerner v. Johnson*, 99 Idaho 433, 583 P.2d 360 (1978).

Findings of Board.

The findings of the board required by § 43-2203 are reviewable by the courts and this section requires such review. *Kerner v. Johnson*, 99 Idaho 433, 583 P.2d 360 (1978).

Procedure.

In confirmation proceedings prior to sale of bonds for construction of replacement dam under §§ 43-2201 — 43-2207 and the Federal Reclamation Act where, following a protracted trial, the judge issued a lengthy and detailed memorandum decision resolving pertinent issues of fact and law and requested counsel for the irrigation districts to prepare proposed findings of fact and conclusions of law consistent with the decision and where, upon the judge's reviewing of these findings and conclusions, he held a hearing on objections to the findings and conclusions, and stated that the final product was adopted as his product rather than theirs, the procedure in the trial court was proper and appropriate. *Kerner v. Johnson*, 99 Idaho 433, 583 P.2d 360 (1978).

Purpose.

The legislature, by requiring in this section the constructing district to file a confirmation petition and by requiring the other participating districts to join in the petition, intended to spare the irrigation districts the burden of duplicative and repetitious confirmation proceedings in the situation where a number of districts were participating in a joint project to replace a dam. *Kerner v. Johnson*, 99 Idaho 433, 583 P.2d 360 (1978).

Scope of Review.

Although this section directs the court to examine a broad range of matters, it does not require the court to resolve in a confirmation proceeding every legal issue which may arise

in connection with the project, particularly a project as massive and complex as the replacement of a major federal dam; rather, the district court in a confirmation proceeding pursuant to this section is only required to consider those matters which affect or are somehow pertinent to the proposed bond issue. *Kerner v. Johnson*, 99 Idaho 433, 583 P.2d 360 (1978).

It is not the function of the courts in a confirmation proceeding to review the merits of the board's decision, since those policy decisions belong to the boards of directors and the voting landowners; the court's duty is limited to determining whether the decision was made and carried out in accordance with the law. *Kerner v. Johnson*, 99 Idaho 433, 583 P.2d 360 (1978).

In suit seeking judicial review of actions prior to the sale of bonds for the construction of replacement dam under §§ 43-2201 — 43-2207 and the Federal Reclamation Act, the district court had jurisdiction over all confirmation proceedings and could consider all issues presented to it which were relevant to the confirmation proceedings without considering the issues of whether a future refusal by the United States to deliver water to users who were not participating in the bond issue would constitute abridgement of existing contracts or taking property without due process of law or whether such nonparticipating water users would have a claim against the United States, since these possible claims for compensation did not affect the confirmation proceedings, which concerned whether the participating districts had complied with the prerequisites for a valid bond issue. *Kerner v. Johnson*, 99 Idaho 433, 583 P.2d 360 (1978).

Sufficiency of Evidence.

Where board's resolution stated that dam should be replaced because its deteriorating condition resulted in loss of storage capacity and adversely affected water users, the resolution itself indicated the factual basis for the conclusion that the project to build a new dam was in the interest of the public and the district and was necessary to further the purposes enumerated in § 43-2203 and thus there was evidence supporting the board's finding that a new dam was needed. *Kerner v. Johnson*, 99 Idaho 433, 583 P.2d 360 (1978).

43-2205. Judicial proceedings to test validity. — In the event that any official required to participate in any act leading to the calling or holding of the required election, the execution of any required contract or the issuance of such bonds shall refuse to perform such act alleging as his reason illegality of the proposed election, the proposed contract or the bonds proposed to be issued, the board may institute judicial proceedings to compel such steps to be taken and legality of the election, contract or bonds to be determined. All cases in which there may arise a question of the validity of

any proceeding under this act shall be advanced as a matter of immediate public interest and concern, and heard at the earliest practicable moment. The courts shall be open at all times for the purposes of this act. [I.C., § 43-2205, as added by 1974, ch. 1, § 1, p. 3.]

Discretion of Board.

This section, which authorizes the board to institute judicial proceedings to compel an official to execute a contract, is clearly permissive, neither mandatory nor exclusive, and therefore the board of directors of an irriga-

tion district was not statutorily required to institute legal proceedings pursuant to this section, and the board did not act improperly in removing the president, reorganizing and executing the contract. *Kerner v. Johnson*, 99 Idaho 433, 583 P.2d 360 (1978).

43-2206. Tax exemption. — Bonds and interim notes, and the interest thereon, issued pursuant to the authority contained in this chapter shall be exempt from taxation under the Idaho Income Tax law. [I.C., § 43-2206, as added by 1974, ch. 1, § 1, p. 3.]

43-2207. Liberal construction. — Any restrictions, limitations or regulations relative to the issuance of such bonds or the execution of such contracts pursuant to the authority herein contained in any other act shall not apply to the bonds issued under this chapter or the execution of such contracts pursuant to the authority herein contained. Any act inconsistent herewith shall be deemed modified to conform with the provisions of this chapter for the purpose of this chapter only. This chapter being necessary to secure and preserve the public health, safety, convenience and welfare, and for the security of public and private property, it shall be liberally construed to effect the purposes of this chapter. [I.C., § 43-2207, as added by 1974, ch. 1, § 1, p. 3.]

Compiler's notes. Section 2 of S.L. 1974, ch. 1 declared an emergency. Approved February 5, 1974.

ANALYSIS

Confirmation proceedings.
Restrictions on bond issuance.

Confirmation Proceedings.

Since the legislature specifically provided in this section that the restrictions in other statutes do not apply to a district exercising the authority granted by §§ 43-2201 — 43-2207, irrigation districts, both the contracting and the constructing districts, need only comply with the requirements of said sections

with respect to confirmation proceedings and not with § 43-404A. *Kerner v. Johnson*, 99 Idaho 433, 583 P.2d 360 (1978).

Restrictions on Bond Issuance.

Since the legislature specifically provided that restrictions contained in other statutes, such as § 43-322, were not to apply to a district exercising the powers granted it by §§ 43-2201 — 43-2207 or that such restrictions were to be considered as modified to the extent they were inconsistent with the provisions of such sections, resolution for bond issue adopted under §§ 43-2201 — 43-2207 did not violate § 43-322. *Kerner v. Johnson*, 99 Idaho 433, 583 P.2d 360 (1978).

CHAPTER 23

RECONSTRUCTION OF DAMS AND RELATED APPURTENANCES —
HYDROELECTRIC FACILITIES CONSTRUCTION

SECTION.

43-2301. Reconstruction of dams, canals and other irrigation district works and related appurtenances — Hydroelectric facilities — Ex-

SECTION.

ecution of contracts — Revenues — Trusts.
43-2302. Issuance of bonds — Terms and conditions.

SECTION.

43-2303. Interim notes.

43-2304. Publication — Legal remedies.

43-2305. Election on contracts.

SECTION.

43-2306. Acts required.

43-2307. Bonds tax exempt.

43-2308. Construction.

43-2301. Reconstruction of dams, canals and other irrigation district works and related appurtenances — Hydroelectric facilities — Execution of contracts — Revenues — Trusts. — Any irrigation district organized and existing under the provisions of title 43, Idaho Code, in addition to any other powers which it might enjoy, for the purpose of preserving, restoring, protecting and maintaining rights of storage, diversion and delivery of water necessary and appurtenant to the purposes for which such district and other like similarly situated districts were organized, is hereby granted the following additional powers:

(a) To provide for or to reconstruct, rehabilitate, replace, modify or improve dams, canals and other irrigation district works, including the construction, enlargement and replacement of outlet and intake tunnels and structures, and other related structures and works together with all necessary appurtenances related thereto, whether located within or without the boundaries of the district and whether or not legal title thereto is owned by the district, including without limitation as a part thereof the reconstruction and relocation of all roads, bridges and highways made necessary by reason of such reconstruction, rehabilitation, replacement, modification or improvement, or the construction of hydroelectric generating facilities as authorized in subsection (b) of this section, and in connection therewith the acquisition of related facilities for flood control, public recreation, and fish and wildlife mitigation and enhancement purposes made necessary in order to comply with applicable state and federal requirements;

(b) To provide for or to construct hydroelectric generating facilities, properties and related structures in connection with and as a part of the reconstruction, rehabilitation, replacement, modification or improvement of a dam, a canal or other irrigation district works pursuant to subsection (a) of this section, together with all necessary equipment and appurtenances related thereto, used in or useful for the generation of electricity, including power plants, turbine generators, penstocks, transformers, electrical equipment and other facilities related to hydroelectric production plants;

(c) To enter into all necessary agreements, contracts and other legal arrangements with the United States and its agencies, other irrigation districts organized and existing under the provisions of title 43, Idaho Code, and other public and private persons, firms, corporations and associations, and irrigation districts similar to those existing under title 43, Idaho Code, but organized and existing under the laws of another state of the United States, in order to carry out or provide for the reconstruction, rehabilitation, replacement, modification or improvement of any such dam, canal or other irrigation district works and other related structures and works and appurtenances and the construction of any such hydroelectric generating facilities, the financing thereof pursuant to the provisions of this chapter, including provisions relating to the issuance of bonds or contracting indebtedness with a money-lending institution to pay the costs thereof by an

irrigation district which is a party to a contract or agreement, the sale of surplus electric energy or the sale or use of rights to falling water in such manner as shall be necessary and desirable and in the best interests of the district, and the operation and maintenance of all or any part of such dam, canal or other irrigation district works so reconstructed, rehabilitated, replaced, modified and improved and of such hydroelectric generating facilities so constructed, which agreements or contracts may provide for the reconstruction, rehabilitation, replacement, modification or improvement of any such dam, canal or other irrigation district works and other related structures and works and appurtenances, the construction of hydroelectric generation facilities, the terms governing the disposition and sale of surplus electric energy or the sale or use of rights to falling water in relation to such dam, canal or other irrigation district works and generating facilities, which terms may include a provision requiring any purchaser of the surplus electric energy or falling water to purchase all the surplus energy generated or all the rights to or use of falling water associated with such dam, canal or other irrigation district works and hydroelectric generating facilities, the conditions under which the purchaser of the surplus electric energy or rights to use of falling water shall make payments to the district issuing the bonds, the rights and remedies of the parties thereto in the event of the failure of the purchaser of the surplus electric energy or rights to or use of falling water to make the required payments thereunder and the securing of all necessary permits and licenses required in connection therewith; the creation of a committee of representatives of the parties to the agreement or contract, which committee shall have such powers not inconsistent with the provisions of this chapter;

(d) To issue bonds of the district or to contract indebtedness with a money-lending institution in the manner provided in this chapter, or to consent to the issuance of such bonds or the contracting of indebtedness with a money-lending institution by another contracting irrigation district pursuant to the provisions of subsection (c) of this section, for the purpose of paying all or part of the cost of the reconstruction, rehabilitation, replacement, modification or improvement of any such dam, canal or other irrigation district works and other related structures and works and appurtenances and the construction of hydroelectric generating facilities as further described in subsections (a), (b) and (c) above, and for the purpose of paying all expenses preliminary and incidental thereto, including all engineering, fiscal and legal expenses and costs of issuance or contracting, printing, advertising, establishment of necessary reserves and payment of interest during construction;

(e) To provide that any bond issued and sold or any indebtedness contracted pursuant to the provisions of this chapter shall be payable out of a special fund into which the district issuing the bonds shall be obligated to deposit, as from time to time received, all or a designated portion of the proceeds from the sale of electric energy generated by hydroelectric generating facilities to be so constructed or from the sale or use of rights to falling water from the dam, canal or other irrigation district works to be so reconstructed, rehabilitated, replaced, modified or improved, all pursuant to

contracts to be entered into as authorized in subsection (c) of this section; and

(f) In addition to the sources of payment for bonds or indebtedness set forth in subsection (e) of this section, the district may also:

(i) Pay such bonds or indebtedness from, or pledge for the payment of such bonds or indebtedness, any other assets, revenue or income of the district; or

(ii) Enter into agreements with financial, banking, insurance and other institutions for bond insurance, letters of credit, standby letters of credit, reimbursement agreements and remarketing, indexing and tender agent agreements to secure such bonds or indebtedness, including payment from any legally available source of fees, charges or other amounts coming due under such agreements entered into in connection with the issuance of the bonds or indebtedness.

(g) To enter into a trust indenture securing the bonds issued pursuant to the provisions hereof with a bank or trust company doing business either within or without the state of Idaho, and to assign the rights of the district to receive the payments provided for in subsection (e) of this section to such bank or trust company as trustee for and on behalf of the bondholders. [I.C., § 43-2301, as added by 1978, ch. 367, § 1, p. 959; am. 1979, ch. 294, § 1, p. 772; am. 1985, ch. 119, § 1, p. 288; am. 1993, ch. 212, § 1, p. 574.]

Compiler's notes. Section 2 of S.L. 1979, ch. 294 is compiled as § 43-2305.

Section 2 of S.L. 1985, ch. 119 is compiled as § 43-2305.

Section 2 of S.L. 1993, ch. 212 is compiled as § 43-2305.

Sec. to sec. ref. This section is referred to in §§ 43-2303, 43-2305 and 43-2308.

Opinions of Attorney General. The legislature has not given Idaho counties authority to produce and sell electric power. Therefore, Idaho counties lack authority to enter into an agreement with counties of other states to develop a joint water project for the production and sale of hydroelectric power. OAG 89-1.

43-2302. Issuance of bonds — Terms and conditions. — The board of directors is authorized to issue the bonds of the district in the manner for which provision is made in this chapter, which bonds shall be fully negotiable for all purposes of the uniform commercial code of the state of Idaho as the same may be in force from time to time.

Bonds issued hereunder shall be authorized by resolution or resolutions of the board. They shall be in coupon form but may be made registrable as to principal only or as to both principal and interest. Such bonds shall be in denominations of one hundred dollars (\$100) or a multiple thereof, shall bear interest at such rate or rates, payable annually or semiannually as the board shall elect, shall mature serially or otherwise at any time or times, shall be payable at such place or places within or without the state, may be made redeemable prior to maturity in such manner and at such premiums, shall be executed in such manner, and shall be sold in such manner and at such price or prices as may be determined by the board.

Bonds may be issued hereunder at one time or from time to time. If more than one issue or series of bonds is delivered hereunder the bonds or the respective issues or series shall have such priorities of payment as may be provided in the proceedings authorizing the bonds.

Any resolution or indenture providing for the issuance of bonds hereunder shall provide for the creation of a sinking fund into which shall be paid from the revenues pledged to such payment sums fully sufficient to pay the principal of and interest on the bonds and to create such reserves as may be required therein. Any resolution or indenture may contain such covenants with the future holders of the bonds as to the disposition of such revenues, the issuance of future bonds and the creation of future liens and encumbrances against the revenues and other pertinent matters deemed necessary or proper by the board to assure the merchantability of the bonds, provided such covenants and agreements are not inconsistent with the provisions of this chapter.

It may be provided in any such resolution or indenture that any holder of the bonds or of any of the coupons thereto attached may by appropriate legal action compel performance of all duties required of the board and the officials of the district by the provisions of title 43, Idaho Code, and the provisions of the resolution or indenture. If any bond issued hereunder is permitted to go into default, as to principal or interest, any court of competent jurisdiction may, pursuant to the application of the holder of any bond, or if applicable the trustee pursuant to a trust indenture, appoint a receiver to collect and distribute the revenues pledged to the repayment of the bonds pursuant to the provisions and requirements of the resolution or indenture and of this act and as the court may direct.

The board of any district which shall have issued any bonds under the provisions of this chapter may authorize the issuance of bonds hereunder for the purpose of refunding all or any part of such outstanding bonds. Refunding bonds may be either sold and the proceeds thereof applied to or deposited in an escrow for the retirement of the outstanding bonds or may be delivered in exchange for the outstanding bonds. The refunding bonds shall be authorized and secured in the manner herein provided for the issuance and securing of other bonds and may but shall not be required to have the same source of security and payment as the bonds refunded. [I.C., § 43-2302, as added by 1978, ch. 367, § 1, p. 959.]

Compiler's notes. The words "this act" refer to S.L. 1978, ch. 367 compiled herein as §§ 43-2301 — 43-2308.

43-2303. Interim notes. — In addition to the permanent financing contemplated in this chapter the board of any district may borrow money and issue interim notes in evidence thereof whenever it is deemed advisable and in the interests of the district to borrow funds temporarily for any of the purposes herein provided in advance of permanent financing. The board may from time to time and pursuant to appropriate resolution borrow money and issue interim notes to evidence borrowing for the purpose of obtaining funds for any of the purposes authorized in section 43-2301, Idaho Code. Any resolution authorizing the issuance of interim notes shall describe generally the purpose for which such notes are to be issued and shall specify the principal amount, rate of interest and maturity date, which shall be the same for all interim notes and which shall be not to exceed five

(5) years from the date of issue of such notes, and such other pertinent terms as may be specified in such resolution. The interim notes shall be issued from time to time by the board as funds are borrowed, in the manner the board may determine. Interest on the interim notes may be made payable semiannually, annually or at maturity. The interim notes may be made redeemable prior to maturity at the option of the board in the manner and upon the terms fixed by the resolution authorizing their issuance. Such interim notes shall be sold at such price or prices as may be determined by resolution of the board. All such interim notes and the interest thereon may be secured by a pledge of the proceeds of the revenues provided in subsection (e) of section 43-2301, Idaho Code, and shall be payable solely from such revenues and from the proceeds to be derived from the sale of any bonds for permanent financing authorized to be issued pursuant to this chapter. Contemporaneously with the issuance of the bonds as provided by this chapter, all interim notes, even though they may not have then matured, shall be paid, both principal and interest and applicable premium, if any, to date of payment, from the funds derived from the sale of bonds authorized hereunder for the permanent financing, and such interim notes shall thereupon be surrendered and canceled. [I.C., § 43-2303, as added by 1978, ch. 367, § 1, p. 959.]

43-2304. Publication — Legal remedies. — The resolution authorizing the issuance of any bonds or interim notes hereunder or any resolution authorizing the execution of any contract hereunder may be published one [1] time in a newspaper of general circulation in the district. For a period of thirty (30) days from the date of such publication, any person in interest may file suit in any court of competent jurisdiction to contest the regularity, formality or legality of the proceedings authorizing the bonds, the interim notes, the execution of such contract or the legality of such resolution and its provisions or of the contract or of the bonds or interim notes to be issued pursuant thereto and the provisions securing the bonds or interim notes. After the expiration of such thirty (30) day period no one shall have any right of action to contest the validity of the contract or of the bonds or interim notes or of such proceedings or of such resolution or the validity of the pledges and covenants made in such proceedings and resolution and the contract and the bonds and interim notes and the provisions for their payment shall be conclusively presumed to be legal and no court shall thereafter have authority to inquire into such matters. [I.C., § 43-2304, as added by 1978, ch. 367, § 1, p. 959.]

Compiler's notes. The bracketed numeral "1" was inserted by the compiler.

43-2305. Election on contracts. — Whenever the board of an irrigation district shall by resolution determine that the interest of said district and the public interest or necessity demand the reconstruction, rehabilitation, replacement, modification or improvement of any dam, canal or other irrigation district works and the construction of hydroelectric generating facilities, properties and related structures in connection and as an improve-

ment to such dam, canal or other irrigation district works and the entering into of a contract as authorized in section 43-2301(c), Idaho Code, making provision therefor, said board shall be required to order the submission of the proposition of entering into a contract as provided in section 43-2301(c), Idaho Code, to the vote of the qualified electors of the district as defined in section 34-104, Idaho Code, at an election to be held for that purpose. The resolution, in addition to such declaration of public interest or necessity, shall recite the objects and purposes for which the contract is proposed to be entered into by the irrigation district; the estimated cost of the reconstruction, rehabilitation, replacement, modification or improvement of the dam, canal or other irrigation district works and/or construction of hydroelectric generating facilities as the case may be; the method of financing the reconstruction, rehabilitation, replacement, modification or improvement of the dam, canal or other irrigation district works and construction of hydroelectric generating facilities, including the maximum amount of bonds which may be issued or of indebtedness which may be contracted by a contracting irrigation district pursuant to such election and pursuant to the provisions of section 43-2301(d), Idaho Code.

Any election required to be held hereunder shall be called by resolution, which resolution shall also fix the date upon which such election shall be held, the manner of holding the same and the method of voting for or against the execution of the contract. Such resolution shall also fix the compensation to be paid the officers of the election and shall designate the precincts and polling places and shall appoint for each polling place, from each precinct from the electors thereof, the officers of such election, which officers shall consist of three (3) judges, one (1) of whom shall act as clerk, who shall constitute a board of election for each polling place. Description of precincts may be made by reference to any order or orders of the board of county commissioners of the county or counties in which the district or any part thereof is situated, or by reference to any previous order, or resolution of the board or by detailed description of such precincts. The resolution calling the election shall prescribe an official notice of election, which notice shall be published once a week for two (2) consecutive weeks, the last publication of which shall be at least ten (10) days prior to the date set for said election, in a newspaper of general circulation printed and published in the district, and no other or further notice of such election or publication of the names of election officers or of the precincts or polling places need be given or made. The notice of election shall state that a copy or copies of the contract or contracts, in substantially the form contemplated to be entered into by the district are on file in the office of the secretary of the district for public inspection by any interested person during regular business hours.

The respective election boards shall conduct the election in their respective precincts in a manner prescribed by law for the holding of district elections to the extent the same shall apply and shall make their returns to the secretary of the district. At any regular or special meeting of the board held not earlier than five (5) days following the date of such election, the returns thereof shall be canvassed and the results thereof declared.

If it shall appear from said returns that a two-thirds ($\frac{2}{3}$) majority of the qualified electors of the district who shall have voted on any proposition

submitted hereunder at such election voted in favor of such proposition, the district shall thereupon be authorized to enter into such contracts, all for the purpose or purposes and object or objects provided for in the proposition submitted hereunder or in the resolution therefor. Submission of the proposition of entering into such contract at such an election shall not prevent or prohibit submission of the same or other propositions at subsequent election or elections called for such purpose. [I.C., § 43-2305, as added by 1978, ch. 367, § 1, p. 959; am. 1979, ch. 294, § 2, p. 772; am. 1985, ch. 119, § 2, p. 288; am. 1993, ch. 212, § 2, p. 574.]

Compiler's notes. Sections 1 and 3 of S.L. 1979, ch. 294 are compiled as §§ 43-2301 and 43-2308, respectively.

Section 1 of S.L. 1985, ch. 119 is compiled as § 43-2301.

Section 3 of S.L. 1985, ch. 119 declared an emergency. Approved March 20, 1985.

Section 1 of S.L. 1993, ch. 212 is compiled as § 32-2301.

43-2306. Acts required. — In the event that any official required to participate in any act leading to the execution of any required contract or the issuance of such bonds shall refuse to perform such act alleging as his reason illegality of the proposed contract or the bonds proposed to be issued, the board may institute judicial proceedings to compel such steps to be taken and legality of the contract or bonds to be determined. All cases in which there may arise a question of the validity of any proceeding under this act shall be advanced as a matter of immediate public interest and concern, and heard at the earliest practicable moment. The courts shall be open at all times for the purposes of this act. [I.C., § 43-2306, as added by 1978, ch. 367, § 1, p. 959.]

Compiler's notes. For words "this act" see compiler's notes, § 43-2302.

43-2307. Bonds tax exempt. — Bonds and interim notes, and the interest thereon, issued pursuant to the authority contained in this chapter shall be exempt from taxation under the Idaho income tax law. [I.C., § 43-2307, as added by 1978, ch. 367, § 1, p. 959.]

43-2308. Construction. — Any restrictions, limitations or regulations relative to the issuance of such bond or the execution of such contracts pursuant to the authority herein contained in any other act shall not apply to the bonds issued under this chapter or the execution of such contracts pursuant to the authority herein contained, it being intended that this chapter is full authority for the issuance of such bonds and the execution of such contracts. The provisions of sections 43-314, 43-406, 43-407 and 43-408, Idaho Code, shall not apply to any contract or agreement entered into by an irrigation district pursuant to the provisions of section 43-2301, Idaho Code, nor to the issuance of any bonds by an irrigation district pursuant to the provisions of section 43-2301, Idaho Code. This chapter being necessary to secure and preserve the public health, safety, convenience and welfare, and for the security of public and private property, it shall be liberally construed to effect the purposes of this chapter. [I.C.,

§ 43-2308, as added by 1978, ch. 367, § 1, p. 959; am. 1979, ch. 294, § 3, p. 772.]

Compiler's notes. Section 2 of S.L. 1979, ch. 294 is compiled as § 43-2305.

Section 2 of S.L. 1978, ch. 367 declared an

emergency. Approved March 29, 1978.

Section 4 of S.L. 1979, ch. 294 declared an emergency. Approved March 30, 1979.

CHAPTER 24

ANNEXATION OF PROPERTY FOR THE PURPOSE OF RECEIVING DOMESTIC WATER

SECTION.

43-2401. Application.

43-2402. Domestic annexation.

43-2403. Conservators and personal representatives may sign petition.

43-2404. Notice of petition.

43-2405. Hearing of petition.

43-2406. Domestic annexation fee.

43-2407. Order accepting or rejecting petition.

SECTION.

43-2408. Objections not withdrawn — Resolution of board.

43-2409. Election to determine change.

43-2410. Order changing boundaries.

43-2411. Order to be recorded — Effect.

43-2412. Subsequent annexation.

43-2401. Application. — The provisions of this chapter shall apply only to irrigation districts having a system of works and piping for the distribution of treated domestic water separate from its works and piping for the distribution of irrigation water. [I.C., § 43-2401, as added by 1979, ch. 178, § 1, p. 529.]

43-2402. Domestic annexation. — In such districts, the holder or holders of any title, or evidence of title, representing one-half ($\frac{1}{2}$) or more of any body of lands adjacent to the boundary of the irrigation district, may, in lieu of proceeding for annexation under chapter 10, title 43, Idaho Code, file with the board of directors of such district a petition in writing praying that said lands may be annexed to the district for the sole purpose of receiving domestic water therefrom. Such annexation is herein referred to as "domestic annexation." The petition shall describe the lands, and shall also describe the several parcels owned by the petitioners. [I.C., § 43-2402, as added by 1979, ch. 178, § 1, p. 529.]

43-2403. Conservators and personal representatives may sign petition. — A conservator or personal representative of an estate who was appointed as such under the laws of this state may, on behalf of his ward or the estate which he represents, sign the petition mentioned in the next preceding section for domestic annexation. [I.C., § 43-2403, as added by 1979, ch. 178, § 1, p. 529.]

43-2404. Notice of petition. — The secretary must cause the notice of the filing of such petition to be published three (3) weeks in the manner of notices of special elections. The notice shall state the filing of such petition, the names of the petitioners, a description of the lands mentioned in said petition, and that domestic annexation thereof has been requested, and it shall notify all persons interested in or that may be affected by such

domestic annexation to appear at the office of said board, at a time named in said notice, and show cause in writing, if any they have, why the petition for domestic annexation should not be granted. The petitioners shall advance to the secretary sufficient money to pay the estimated cost of all proceedings in connection with all such domestic annexations. [I.C., § 43-2404, as added by 1979, ch. 178, § 1, p. 529.]

43-2405. Hearing of petition. — The board of directors, at the time mentioned in such notice, or at such other time to which the hearing may be adjourned, shall hear the petition and all objections thereto, showing cause as aforesaid. The failure of any person to show cause as aforesaid shall be taken as an assent on his part to such domestic annexation as to the lands mentioned in the petition, or such part thereof as the board of directors shall determine. [I.C., § 43-2405, as added by 1979, ch. 178, § 1, p. 529.]

43-2406. Domestic annexation fee. — The board of directors may require, as a condition to the granting of such petition, that the petitioners shall severally pay to such district such sum as the board of directors shall determine, as a fee for such domestic annexation. [I.C., § 43-2406, as added by 1979, ch. 178, § 1, p. 529.]

43-2407. Order accepting or rejecting petition. — The board of directors, if they deem it not for the best interest of the district to grant such domestic annexation, shall order that the petition be rejected. But if they deem it for the best interest of the district, and if no person interested shall show cause why such domestic annexation should not be granted, or if having shown cause, withdraws the same, the board may order, without any election, that domestic annexation be granted as to the lands mentioned in the petition, or some part thereof. The order shall describe the lands to which domestic annexation shall be granted, and the board may cause a survey thereof to be made if deemed necessary. [I.C., § 43-2407, as added by 1979, ch. 178, § 1, p. 529.]

43-2408. Objections not withdrawn — Resolution of board. — If any person interested shall show cause as aforesaid and shall not withdraw the same, and if the board of directors shall deem it in the best interest of the district that domestic annexation be granted as to the lands described in such petition, or some part thereof, the board shall adopt a resolution to that effect. The resolution shall describe the lands for which, in the opinion of the board, domestic annexation should be granted. [I.C., § 43-2408, as added by 1979, ch. 178, § 1, p. 529.]

43-2409. Election to determine change. — Upon adoption of the resolution mentioned in the last preceding section, the board shall order that an election be held within said district to determine whether such domestic annexation shall be granted, as mentioned in said resolution, and it shall fix the time at which such election shall be held. Notice thereof shall be given and published, and the said election shall be held, and all things

pertaining thereto conducted, as nearly as may be, in the manner prescribed by title 43, Idaho Code, in case of an election to determine whether bonds of the district shall be issued. The question submitted to the voters shall be in the words “Domestic Annexation — Yes” or “Domestic Annexation — No”, or words equivalent thereto. The notice of election shall describe the lands for which domestic annexation is proposed. [I.C., § 43-2409, as added by 1979, ch. 178, § 1, p. 529.]

43-2410. Order changing boundaries. — If the majority of all votes cast at such election shall be against the granting of such domestic annexation, the board shall proceed no further in the matter. But if a majority of such votes be in favor of the granting of such domestic annexation, the board shall thereupon order the domestic annexation of the lands described in the notice of election. Any order granting such domestic annexation shall specify to which director’s division such lands shall be attached. [I.C., § 43-2410, as added by 1979, ch. 178, § 1, p. 529.]

43-2411. Order to be recorded — Effect. — Upon an order of domestic annexation being made a copy thereof, certified by the president and secretary of the board shall be filed for record in the recorder’s office of each county within which are situated any of the lands of the district. Thereupon such lands shall be entitled to receive domestic water from the district, and shall pay therefore [therefor] upon such basis as the board of directors shall direct. Such lands shall be subject to all laws, and rules and regulations of the district relating to domestic water. Such lands shall not be entitled to receive irrigation water from the district, and shall not be subject to assessment by the district. The owners of and/or residents on such lands shall be subject to the same voter qualifications and shall have the same voting rights in district elections as the owners of and/or residents on other lands within the district. [I.C., § 43-2411, as added by 1979, ch. 178, § 1, p. 529.]

Compiler’s notes. The bracketed word “therefor” in the second sentence was inserted by the compiler.

43-2412. Subsequent annexation. — The making and filing of an order of domestic annexation shall not preclude the owners of any such lands from thereafter petitioning for annexation of such lands, or some part thereof, under the provisions of chapter 10, title 43. Any annexation of such lands made under the provisions of such chapter 10, title 43, shall supersede any prior domestic annexation of such lands. [I.C., § 43-2412, as added by 1979, ch. 178, § 1, p. 529.]

CHAPTER 25

LOCAL IMPROVEMENT DISTRICTS

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43-2501. Short title. — Chapter 25, title 43, Idaho Code, shall be known and cited as the “Local Improvement District Code for Irrigation Districts.” [I.C., § 43-2501, as added by 1993, ch. 407, § 1, p. 1475.]

43-2502. Definitions. — The following words and phrases when used in this chapter shall, for the purposes of this chapter, have the meanings respectively given herein.

(1) “Board” means the board of directors of an irrigation district.

(2) “Costs and expenses” mean the contract price of all improvements, including any costs or expenses incurred for engineering, clerical, printing and legal services as well as for advertising, surveying, inspection of work,

collection of assessments, interest upon bonds or warrants, and an amount for contingencies as shall be considered necessary by the board.

(3) “District or irrigation district” means irrigation districts organized pursuant to the provisions of chapter 1, title 43, Idaho Code.

(4) “Engineer” means the official engineer of the irrigation district or one specially retained for purposes of operating under the provisions of this chapter.

(5) “Local improvement district” means a local improvement district created within the boundaries of an irrigation district or irrigation districts under the authority of this chapter.

(6) “Owner” or “owners” mean the owner of property within the limits of a local improvement district, or a proposed local improvement district; and a corporation, joint stock association, partnership, individual proprietor or other form of business enterprise owning real property, within any such district or proposed district.

(7) “Secretary,” “treasurer” or “other irrigation district officer” means the appropriate irrigation district officers with regard to irrigation district local improvement districts. [I.C., § 43-2502, as added by 1993, ch. 407, § 1, p. 1475.]

43-2503. Powers conferred. — (1) The board shall have the power to make or cause to be made any one (1) or more, or combination of, the following improvements:

(a) To acquire, construct, operate, maintain, repair and replace pumping stations and pipelines and all necessary fittings, controls, components and equipment and other water facilities for the purpose of supplying water under pressure or by gravity flow for the irrigation of a described area within the boundaries of the district.

(b) To acquire, construct, reconstruct, extend, maintain or repair parks and other recreational facilities;

(c) To remove any nonconforming existing facility or structure in the areas to be improved;

(d) To construct, reconstruct, extend, maintain or repair optional improvements;

(e) To acquire by purchase, gift, condemnation, or otherwise, any real or personal property within the limits of the district as in the judgment of the board may be necessary or convenient in order to make any of such improvements;

(f) To make any other improvements now or hereafter authorized by any other law, the cost of which in whole or in part can properly be determined to be of particular benefit to a particular area within the district;

(g) To construct and install all such structures, equipment and other items and to do all such other work and to incur any such costs and expenses as may be necessary or appropriate to complete any of such improvements in a proper manner.

(2) For the purpose of making and paying for all or a part of the cost of any of such improvements, including optional improvements, the board may create local improvement districts pursuant to this chapter within the

boundaries of the irrigation district, levy assessments on the property within such a district which is benefited by the making of the improvements and issue interim or registered warrants and local improvement bonds as provided in this chapter. [I.C., § 43-2503, as added by 1993, ch. 407, § 1, p. 1475.]

43-2504. Initiation of organization of local improvement district.

— The organization of any local improvement district herein provided for may be initiated upon a petition signed by not less than sixty percent (60%) of the owners of property subject to assessment within such local improvement district, or by resolution of the board adopted by an affirmative vote of a majority of the members of the full board at a regular or special meeting thereof. The terms of a petition shall include a description of the boundaries of a proposed local improvement district, the improvements to be made and the property to be assessed. [I.C., § 43-2504, as added by 1993, ch. 407, § 1, p. 1475.]

43-2505. Resolution of intention to create district. — Upon the filing of a petition or upon initiation of a local improvement district by board action, the board shall, at a regular or special meeting, adopt a resolution giving notice of its intention to create the local improvement district, to make the improvements and to levy assessments to pay all or a part thereof. The notice shall contain:

(1) A description of the boundaries of the local improvement district to be created and the property to be assessed, sufficient to inform the owners thereof that their property is to be assessed.

(2) A general description of the improvements contemplated, together with an estimate of the total cost and expenses of the same, and a statement of the percentage or other calculation of the total cost and expenses of the improvements which will be paid from a levy of assessments on property benefited and the percentage or calculation of the total costs and expenses, if any, which will be paid from the general funds of the district or from such other source specified in the notice.

(3) A statement that the costs and expenses of the improvements will be assessed against the lots and lands to which irrigation water shall be delivered from the main system of the district to the lots and lands benefited by such improvements and included in the local improvement district to be created according to a gross acreage method, and the board shall state the method in said notice.

(4) A statement that the local improvement district is to be an enlarged local improvement district within the meaning of this act, if the same is true, and the boundaries of such enlarged local improvement district shall be given.

(5) A statement of the time within which and the place at which protests shall be filed and of the time and place at which the board will conduct a public hearing to consider such protests. [I.C., § 43-2505, as added by 1993, ch. 407, § 1, p. 1475.]

Compiler's notes. The words "this act" refer to S.L. 1993, ch. 407, which is compiled as §§ 43-2501 — 43-2554.

43-2506. Notice of intention and hearing. — The notice of intention shall be published in the official newspaper of the district in three (3) consecutive issues if a daily newspaper, or in two (2) issues if a weekly newspaper or in case no newspaper is published in such district then by posting for five (5) days in three (3) public places within the proposed local improvement district. A copy of such notice shall be mailed to each owner of property, if known, or his agent, if known, within the limits of the proposed local improvement district, addressed to such person at his post office address if known, or if unknown, to a post office in the district where the improvement is to be made. Ownership of property shall be determined as of the date of the adoption of the resolution of intent to create. The hearing shall take place not less than ten (10) days from the date of the first of said publications or postings or the date of said mailing, whichever is later. [I.C., § 43-2506, as added by 1993, ch. 407, § 1, p. 1475.]

43-2507. Protests and hearings. — Any owner of property to be assessed in the proposed local improvement district described in the notice of intention shall have the right, in advance of the hearing, to file, in writing, a protest to the creation of the district or making any other objections in relation thereto. At the date, time and place specified in the notice of intention the board shall, in open and public session, consider all protests which have been filed in writing in advance of the hearing, and the hearing may be adjourned from time to time to a fixed future time and place for the same until all such protests have been heard. The decision of the board as to all protests shall be conclusive and final, and if it should so determine, the board may delete any improvements on any property which had originally been contemplated in the said notice. If owners of more than two-thirds ($\frac{2}{3}$) of the property to be assessed protest any of the proposed improvements which affect their property, the board shall not proceed further with the work so protested unless a majority of the members of the full board shall vote to proceed with such work. The vote on the hereinafter mentioned resolution creating the local improvement district shall constitute the vote as to whether or not the board will proceed. Any property owner who fails to file a protest within the time specified, or having filed one withdraws said protest, shall be deemed to have waived any objection to the creation of the local improvement district, the making of the improvements, and the inclusion of his property in the local improvement district. Such waiver shall not preclude his right to object to the amount of the assessment at the later hearing provided for such purpose.

In cases where written protests are filed and sixty percent (60%) of the owners or the owners of two-thirds ($\frac{2}{3}$) of the lots and lands within such proposed local improvement district have signed such protest, the board shall not be allowed to proceed with the creation of the local improvement district for a period of one hundred eighty (180) days. During this one hundred eighty (180) day period, the city council shall act as a review board

for as much of the proposed local improvement district as is situated within the boundaries of any city, and the board of county commissioners shall act as a review board for that portion of the proposed local improvement district as is situated within the unincorporated portion of the county. As a review board, the city council or board of county commissioners shall review the record of the proposal, including conformance with procedural provisions of law. The city council or board of county commissioners shall also evaluate the necessity or desirability of the proposed local improvement district, and shall take into consideration the creation of the proposed local improvement district as it relates to the financial impact of the creation and implementation of the objectives of the proposed local improvement district upon the property owners within the proposed local improvement district, especially in light of projects recently undertaken or contemplated for the near future within the district.

After its evaluation, the city council shall approve, modify or reject the proposal for the creation of a local improvement district for as much of the proposed district as is situated within the boundaries of the city, and the board of county commissioners shall approve, modify or reject the proposal for the creation of a local improvement district for as much of the proposed district as is situated within the unincorporated portion of the county. [I.C., § 43-2507, as added by 1993, ch. 407, § 1, p. 1475.]

43-2508. Resolution creating local improvement district and procedure for construction bids. — If, after the hearing on the creation of the district, the board finds that the local improvement district will be for the best interest of the property affected and the district; that there is reasonable probability that the obligations of such local improvement district will be paid; and the value of the property within the proposed local improvement district is sufficient; it shall then adopt a resolution providing for such improvements and creating a local improvement district to be called "Local Improvement District No. ... for Irrigation District, Idaho," which shall include all of the property within said local improvement district in accordance with the findings of the board, and said resolution shall set forth the boundaries of the local improvement district, provide the improvements which shall be made, and state that the total cost and expenses thereof shall be assessed according to the percentage or calculation hereinbefore mentioned on all benefited property in the local improvement district by using the gross acreage method of assessment contemplated in the notice of intention subject to any variation therefrom as a result of the board's determining that the benefits to be derived by certain lots or parcels of property warrant such variations. The board shall appoint an engineer and shall have prepared the necessary plans and specifications for the construction work ordered. Except as hereinafter otherwise provided, the board shall authorize the advertisement for bids therefor by giving notice calling for sealed bids for the construction of the work.

Notice of advertisement for bids shall be published in the official newspaper of the district in three (3) consecutive weekly issues, which notice shall contain a general description of the kind and amount of work to be

done, state that the plans and specifications for said work are on file in the office of the engineer or secretary for inspection and state the date, hour and place of the bid opening.

Each bidder shall accompany his bid with bidder's security as provided in section 43-901, Idaho Code, in the amount of ten percent (10%) of his bid. In case the contract for any such work is offered to such bidder and he fails or refuses to enter into the contract, then such security shall be forfeited to the district and placed in the local improvement fund of such district. These provisions also shall appear in said notice.

Award shall be made to the lowest responsible bidder fulfilling the requirements.

Any contract made by a district for any improvements authorized by this code shall be made by the board in the name of the district upon such terms of payment as shall be fixed by the board. The contract shall be authorized by resolution empowering the authorized officer of the district to execute the contract. The resolution need not set out the contract in full but it shall be sufficient if the resolution refers to a copy of the contract on file in the office of the secretary where it is available for public inspection.

Any provision in this local improvement district for irrigation districts code notwithstanding, if any district shall elect to exercise the powers herein granted jointly with another irrigation district or districts, or with any other public agency or agencies as authorized by the provisions of section 67-2328, Idaho Code, the improvements as contemplated within the local improvement district may be constructed jointly and as part of a larger project with such other agency or agencies upon the letting of a single contract after compliance with the required bidding procedure for any Idaho public agency jointly participating in the work. [I.C., § 43-2508, as added by 1993, ch. 407, § 1, p. 1475.] *

43-2509. Limitation on assessments against property. — No district shall order any improvement to be paid for by local assessment where the estimated costs of such improvement, if such costs are to be assessed to the property in the local improvement district, or that portion of the estimated costs to be assessed, if a portion only of said total costs are to be assessed, when added to all other outstanding and unpaid local improvement assessments against the property included in the local improvement district, excluding penalties and interest, shall exceed the actual value of the real property in the local improvement district, including the value of the improvements thereon.

The board shall provide, by resolution, the method of determining the actual value of the real property including the improvements thereon in the local improvement district and when the valuation is so determined, such valuation shall be final and conclusive in the absence of fraud or gross mistake. [I.C., § 43-2509, as added by 1993, ch. 407, § 1, p. 1475.]

43-2510. Preparation of assessment roll and notice of hearing thereon. — After the contract has been awarded and at such time as the board shall determine, the engineer shall prepare a duly certified report to

the board showing in detail the total cost and expenses of the improvements and the dollar amounts of the same payable from assessments and from other sources. The report shall also contain a form of assessment roll numbering each assessment, giving the name, if known, of the owner of each lot or parcel of property assessed, and showing the amount chargeable to each lot or parcel of property according to the method of assessment originally contemplated by the board subject to any variations therefrom as a result of the engineer's recommendation that benefits to be received by any lot or parcel of property warrant such a variation from the method chosen. Each lot or parcel of property shall be described with sufficient clearness to identify it, and if the engineer recommends any variations from the contemplated method of assessment, those variations shall be pointed out and the reasons for the same shall be given in the report.

Upon receipt of the report, the board shall cause the assessment roll contained therein to be filed in the office of the treasurer where it shall be available for public inspection. The board shall thereupon fix a time and place when and where the board will meet in open session and consider the report and the assessment roll and hear all objections to the assessment roll by the property owners of the local improvement district. [I.C., § 43-2510, as added by 1993, ch. 407, § 1, p. 1475.]

43-2511. Notice of hearing on assessment roll. — After the board fixes the time and place for said hearing on the assessment roll, the secretary of the district shall give notice by publication in the official newspaper of such district in three (3) successive issues if published in a daily newspaper, or by publication in two (2) issues if published in a weekly newspaper, the first of which publication shall be at least fifteen (15) days before the date fixed for hearing objections to said assessment roll, that such assessment roll is on file in his office. The notice shall further state the date, time and place at which the board will hear and consider objections to the assessment roll by the parties aggrieved by such assessments. The secretary shall, not less than fifteen (15) days before the date fixed for hearing objections to said assessment roll, mail a substantially similar notice to each owner of property if known, or his agent if known, within the limits of the local improvement district, addressed to such person at his post office address if known, or if unknown, to the post office in such district where the improvement is to be made. The mailed notice shall also state the amount of the individual assessment and that at the specified time and place the board will hold a hearing to hear and determine all objections to the regularity of the proceedings in making such assessment, the correctness of the assessment, and the amount levied on the particular lot or parcel in relation to the benefits accruing thereon and in relation to the proper proportionate share of the total cost of the improvements in the project. It shall further state that each owner of property within the district is given notice that in revising the assessment roll at or after the hearing, the board may increase any assessment or assessments up to twenty percent (20%) of the original amount thereof without giving further notice and holding a new hearing thereon. The owner or owners of any property which is assessed in such

assessment roll, whether named or not in such roll, may, before the date and time fixed for the hearing, file with the secretary his objections in writing to said assessment. [I.C., § 43-2511, as added by 1993, ch. 407, § 1, p. 1475.]

43-2512. Hearing objections to assessment roll and confirmation.

— At the time appointed for hearing objections to such assessment roll, the board shall consider the engineer's report and the assessment roll and shall hear and determine all objections which have been filed by any owner of property, or his agent, to the regularity of the proceedings in making such assessment, to the correctness of such assessment, to the amount levied on any particular lot or parcel of land, including the benefits accruing thereon and the proper proportionate share of the total cost of the improvements to be borne thereby and to the inclusion of any lot or parcel of land in the proposed district. The board shall have the power: to adjourn such hearing from time to time and, in its discretion, to revise, correct, conform or set aside any assessment and to order that such assessment be made de novo; and to exclude any lot or parcel of land from an assessment roll which, in the judgment of the board, it finds will not be benefited by improvements to be made. If any assessments are increased in an amount greater than twenty percent (20%) of the amount of the assessments as set out in the notice of the hearing, then a new notice of the hearing shall be given and a new hearing held as aforesaid. No new hearing shall be required in the event that any assessments are decreased in any amount or are increased in an amount up to twenty percent (20%) of the original amount. [I.C., § 43-2512, as added by 1993, ch. 407, § 1, p. 1475.]

43-2513. Confirmation of assessment roll. — After said hearing the board shall pass a resolution confirming the assessment roll as corrected by them in relation to the benefits accruing thereon as a result of the improvements being made. The resolution shall be the final determination of the regularity, validity and correctness of the assessment roll, of each assessment contained therein, and of the amount thereof levied on each lot or parcel of land, which resolution shall contain a finding that each lot or parcel of land is benefited to the amount of assessment levied thereon subject to appeal as provided herein. Upon passage of the resolution, the secretary shall certify and file the confirmed assessment roll with the treasurer of the district and the assessments therein shall be due and payable to the treasurer within thirty (30) days from the date of the adoption of the resolution. The confirmed assessment roll and the assessments made by the confirmed assessment roll shall be a lien upon the property assessed from and after the date the following notice is recorded. Immediately upon passage of the confirming resolution the secretary shall file with the county recorder a notice which shall contain the date of the confirming resolution and a description of the area or boundaries of the local improvement district. If any assessment is not paid in full within said thirty (30) day period, such assessment shall become delinquent and shall be collected in the same manner and with the same penalties and interest added thereto as hereinafter provided for delinquent assessments. The

board may, in the alternative, determine to make assessments unpaid at the end of said thirty (30) day period payable in installments and to issue and sell registered warrants or installment bonds payable from such unpaid installments as herein provided. If the board chooses to do so, it shall provide in said resolution that any property owner who has not paid his assessment in full within said thirty (30) day period will be conclusively presumed to have chosen to pay the same in installments, and the resolution shall then establish the number of years said installments shall run, the dates of payment of the same and the rate of interest that the unpaid assessments shall bear, which rate shall not be less than the rate of interest borne by the warrants or bonds payable therefrom, said interest running from the date of the passage of the assessment resolution, irrespective of the date of its official publication, and being payable at the same time and place as the installment payments of assessments. Said installments shall be due and payable in not to exceed thirty (30) years to the treasurer or other proper officer as provided by the board. The resolution shall establish the due date of the first installment payment and that the local or special assessments may be carried on the rolls of the district and collected as hereinafter provided. If any installment is not paid within twenty (20) days from the date it is due, the same shall become delinquent and the treasurer shall add a penalty of two percent (2%) thereto. In addition to any other method of collection provided in this code, the board may certify delinquent installments to the treasurer, and when so certified they shall be extended on the assessment rolls and collected as other assessments levied upon lands in the district. In the event that any property owner should choose to pay his assessment in full after such time as it has been conclusively presumed that he will pay in installments, such payment in full shall include the full amount of the unpaid assessment plus penalties and all interest payable on the same plus additional interest thereon at the rate provided in the bonds from the date of the last installment due to one (1) year after the next interest date of said bonds.

Any errors in description, ownership of property or amounts in any assessment resolution adopted pursuant to this section may be corrected by the passage of an amendatory resolution which need set forth only the corrected descriptions or amounts. The passage of such amendatory resolution shall serve only to postpone the thirty (30) day period for payment in full of the assessments actually affected by such amendatory resolution and the due dates of installments of such affected assessments shall be the same as the due dates of installments not affected. Notice of any assessments so affected shall be given in the same manner as hereinafter provided for the giving of notice of assessments. [I.C., § 43-2513, as added by 1993, ch. 407, § 1, p. 1475.]

43-2514. Notice and payment of assessments. — Upon passage of the assessment roll, the treasurer of the district shall mail a postcard or letter to each property owner assessed at his post-office address if known, or if unknown, to the post office in the district where the improvement is being made, stating the total amount of his assessment, plus the substance of the

terms of payments of the same as set out in the resolution confirming the assessment roll.

An affidavit of the mailing of the notice shall be filed, before the date of delinquency, in the office of the treasurer in the file of the local improvement district, but the failure of the treasurer to give any notice required in this section or to do any other act or thing required in this section, shall not affect the validity of the assessments or installments thereof due nor extend the time for payment, but shall subject the district to liability to a property owner for any damage sustained by the latter by reason of such failure. [I.C., § 43-2514, as added by 1993, ch. 407, § 1, p. 1475.]

43-2515. Installment docket. — Whenever any improvement bonds or warrants are issued as herein provided, the treasurer shall immediately thereafter mark on the assessment roll of such local improvement district opposite each assessment which has been paid, the word “paid” together with the date of payment, and shall immediately thereafter enter in a docket to be kept for that purpose, known as “local improvement installment docket” under separate heads for each local improvement district, all unpaid assessments as shown on such assessment roll, said docket to be made up from the assessment roll, and shall contain in separate columns the number of the assessment, the name of the owner, the description of the property, the amount of the total assessment, the amount and date when due of each annual installment with interest added, and a blank column in which shall be marked the date of payment of each installment. Such docket shall stand thereafter as a lien docket for such assessments so shown until paid. [I.C., § 43-2515, as added by 1993, ch. 407, § 1, p. 1475.]

Sec. to sec. ref. This section is referred to in § 43-2521.

43-2516. Appeal procedure — Exclusive remedy. — Any person who properly has filed objections to the assessment roll or any other person who feels aggrieved by the decision of the board in confirming the same shall have the right to appeal to the district court of any county in which the local improvement district or any portion thereof may be situated. Such appeal shall be made within thirty (30) days from the date of publication of the resolution confirming the assessment roll by filing a written notice of appeal with the secretary of the district and with the clerk of the district court aforesaid describing the property and objections of the appellant. The appellant shall also provide a bond to the district in a sum to be fixed by the court, but not less than two hundred dollars (\$200) with sureties to be approved by the court, conditioned to pay all costs to be awarded to the respondent upon such an appeal. After said thirty (30) day appeal period has run, no one shall have any cause or right of action to contest the legality, formality or regularity of said assessments for any reason whatsoever and, thereafter, said assessments and the liens thereon shall be considered valid and incontestable without limitation.

If an appeal is filed within said period, the case shall be docketed by the clerk of said court in the name of the person taking the appeal against the

district as "an appeal from assessments." Said cause shall then be at issue and have precedence over all civil cases pending in said court, except proceedings under the act relating to eminent domain by cities and actions of forcible entry and detainer. Such appeal shall be tried in said court as in the case of equitable causes except that no pleadings shall be necessary. The judgment of the court shall be either to confirm, modify or annul the assessment insofar as the same affects the property of the appellant, from which judgment an appeal may be taken to the supreme court as provided by law. In case the assessment is confirmed, the fees of the secretary of the district for copies of the record shall be taxed against the appellant with other costs. [I.C., § 43-2516, as added by 1993, ch. 407, § 1, p. 1475.]

43-2517. Additional improvements. — Whenever any assessment is levied on any property for further, separate or additional improvement under the provisions of this code or any law of this state, such assessment shall be a subsequent lien upon the property so assessed to the lien of the unpaid assessments theretofore made for the original improvement. Whenever any assessment is made for such further, separate or additional improvement on property on which an existing assessment has been levied for improvements, such further, separate or additional assessment for improvement shall not be construed or considered as for one and the same improvement, or for the same purpose or for the same benefit, or as a double assessment for improvements against the property being assessed for the payment of the cost and expense of such improvement but shall be considered and construed as a separate, distinct, single and independent improvement on and of benefit to the property so assessed. All assessments so levied or bonds or warrants issued payable from the same shall be considered and construed as assessments levied or bonds or warrants issued for separate, distinct, single and independent improvements and benefits on and to the property so assessed. [I.C., § 43-2517, as added by 1993, ch. 407, § 1, p. 1475.]

43-2518. Reassessment of benefits. — In all cases of assessments for local improvements of any kind against any property wherein said assessments have failed to be valid in whole or in part for want of form or sufficiency, informality, irregularity or nonconformance with the bylaws, resolutions or laws governing such assessments, the board shall be and is hereby authorized to reassess such assessments and to enforce their collection in accordance with the provisions of law existing at the time the reassessment is made. No mistake in description of the property or the name of the owner thereof shall affect the validity of any assessment or any lien created thereby under the provisions of this code, or any law of this state, unless such mistake or error renders it impossible to identify the property so assessed.

When for any cause, mistake or inadvertence, the amount assessed on any property is insufficient to pay the cost and expenses of the improvement made and enjoyed by the owner of such property, it shall be lawful, and the board is hereby directed and authorized, to make reassessments on said

property sufficient in amount to pay for such improvements, the reassessment to be made and collected in accordance with the provisions of law existing at the time of its levy. [I.C., § 43-2518, as added by 1993, ch. 407, § 1, p. 1475.]

43-2519. Lien of assessment — Foreclosure. — Assessments levied to pay the cost and expense of any improvement authorized by the provisions of this chapter shall constitute a lien upon and against the property upon which such assessment or assessments are made and levied from and after the date upon which the resolution levying such assessment or assessments is passed, which lien shall be superior to the lien of any mortgage or other encumbrance, whether prior in time or not, and shall constitute such lien until paid, and until paid, such lien shall not be subject to extinguishment for any reason whatsoever, including but not limited to the sale of the property assessed on account of the nonpayment of general taxes or the conveyance of such property by any means to the United States of America, or any agency thereof, the state of Idaho, or any county, city, irrigation district, school district, college district or other public body, agency or taxing unit in said state. When bonds have not been issued and said assessments made payable in installments as herein provided, such assessments shall be collected, or the property therein shall be foreclosed and sold for such assessments and costs, in a suit for that purpose by the district.

Such suit shall be in the name of the district as plaintiff and against any one (1) or more owners of property failing to pay such assessment or assessments as defendants. In any such proceedings where the court, trying the same, shall be satisfied that the improvements have been made or have been contracted for, which according to the true intent of this code would be properly chargeable to such property, a recovery shall be permitted and the lien enforced to the extent of the cost and expenses of the improvement which would be chargeable on such property notwithstanding any informality, irregularity or defect in any of the proceedings of such district or any of its officers, and such property shall be ordered sold for the payment of the assessment or assessments against it and the costs and expenses of such suit including reasonable attorney's fees to be fixed by the court and prorated to each separate piece of property to be sold. [I.C., § 43-2519, as added by 1993, ch. 407, § 1, p. 1475.]

43-2520. Segregation of assessments. — Whenever any land against which there has been levied any special assessment by any district shall have been sold in part or subdivided, the board of that district shall have the power to order a segregation of the assessment.

Any person desiring to have such a special assessment against a tract of land segregated to apply to smaller parts thereof shall apply to the district which levied the assessment. If the board determines that a segregation should be made, it shall by resolution order the treasurer to make segregation on the original assessment roll of the local improvement district as directed in the resolution and in accordance with section 43-701, Idaho

Code. The segregation shall be made as nearly as possible on the same basis as the original assessment was levied, and the total of the segregated parts of the assessment shall equal the assessment before segregation. The resolution shall describe the original tract, the amount and date of the original assessment, and shall define the boundaries of the divided parts and the amount of the assessment chargeable to each part. A certified copy of the resolution shall be filed with the county recorder. The board may require, as a condition to the order of segregation, that the person seeking the segregation pay the district the reasonable engineering and clerical costs incident to making the segregation. No segregation need be made if the board shall find that by such segregation the security of the lien for the assessment will be so jeopardized as to reduce the security for any outstanding local improvement district obligations payable from such assessment. [I.C., § 43-2520, as added by 1993, ch. 407, § 1, p. 1475.]

43-2521. Bonds — Registered warrants — Interim warrants — Election not required. — If the board determines to make assessments payable in installments as is provided in section 43-2515, Idaho Code, it shall by resolution authorize to be issued, in the name of the district, improvement bonds of the local improvement district payable from assessments levied against the property within the local improvement district. Such bonds shall be payable each year from and after the date of the bonds and shall be of such denomination and bear interest, payable annually, at such rate as is determined by the board, but in no event shall such rate of interest be greater than the rate of interest borne by the unpaid assessments.

The bonds shall be in such form and denomination as may be provided by the board and they shall mature serially over a period not exceeding thirty (30) years. The board may reserve the right to redeem any of the bonds at its option on any interest payment at such price or prices as determined by the board. The bonds shall be signed by the president of the district, and shall be countersigned by the treasurer and attested by the secretary of the district. No bond or coupon shall be invalid because an officer whose manual or facsimile signature thereon has ceased to hold office at the time of the delivery of the bonds so long as he held the office at the time such signature was placed on the bond or coupon. The coupons attached thereto shall bear the facsimile signatures of said officers and each bond shall have the seal of the district affixed thereto. Each bond shall provide that the principal thereof and the interest thereon are payable solely from the principal of and interest on the unpaid assessments levied in the local improvement district to pay the total cost and expenses of the project concerned.

In lieu of bonds, registered warrants may be issued under the same circumstances and in the same manner as bonds, such warrants to be issued in payment of any or all costs or expenses of the improvements to the amount said costs or expenses were set out in the engineer's report. The warrants shall be redeemable in numerical order and further shall be subject to all provisions of this code relating to local improvement bonds so far as the same may be applicable.

If the board shall determine to issue and sell bonds, it may for the purpose of meeting any costs and expenses of making the improvements, as the same are installed prior to the sale of the bonds, issue interim warrants of the local improvement district, payable to the contractor or other proper person upon estimates of the engineer, bearing interest at a rate provided by the board, which interim warrants together with the interest due thereon at the date of the issue of the bonds, shall be redeemed and retired from the proceeds of the sale of the bonds or prepayment of assessments.

Bonds issued hereunder shall have all the requisites of negotiable paper under the uniform commercial code, and shall not be invalid for irregularity or defect in the proceedings for their issuance, sale or delivery, and shall be incontestable in the hands of bona fide purchasers or holders for value thereof. Nothing herein contained shall prohibit any district from issuing bonds or warrants in the denomination of one hundred dollars (\$100), or an even multiple thereof, except that bond number one (1) of any issue may be of a denomination other than one hundred dollars (\$100).

No election shall be required for the approval of issuance of bonds, registered warrants or interim warrants of any local improvement district formed under the provisions of this chapter, and specifically, but not by way of limitation, districts issuing bonds or warrants under the provisions of this chapter shall not be required to comply with the election requirements contained in section 43-401, Idaho Code. [I.C., § 43-2521, as added by 1993, ch. 407, § 1, p. 1475.]

43-2522. Liability of district. — The holder of any bond, issued under the authority of this code, shall have no claim therefor against the district by which the same is issued, except to the extent of the funds created and received by assessments for the applicable bond issue against the property within any local improvement district as herein provided and to the extent of the local improvement guarantee fund for the applicable bond issue which may be established by any such district under the provisions of this code, but the district shall be held responsible for the lawful levy of all special taxes or assessments herein provided and for the faithful accounting of settlements and payments of the special taxes and assessments levied for the payment of the bonds as herein provided. The owners and holders of such bonds shall be entitled to complete enforcement of all assessments made for the payment of such bonds. A copy of this section shall be plainly written, printed or engraved on the face of each bond so issued. [I.C., § 43-2522, as added by 1993, ch. 407, § 1, p. 1475.]

43-2523. Bond and interest funds. — Once bonds are issued as provided herein, any funds paid as installment payments of assessments pledged to the payment of such bonds shall be kept in a fund known as the bond fund of the local improvement district and any funds paid as interest on said installment payments of assessments shall be kept in a fund known as the interest fund of the local improvement district. The funds shall be deposited in such bank or banks as are designated as depositories of public moneys of such irrigation districts under the laws of this state, or invested

in bonds or warrants of the district. Interest received on such funds so deposited or invested shall be placed to the credit of the fund from which it is earned. Maturing bonds shall be paid from the bond fund and the interest on the bonds, when due, shall be paid from the interest fund. If there is sufficient money in the bond fund to pay the principal of one (1) or more bonds, the treasurer may call in and pay such bonds as of the next interest payment date in such manner as may be provided by the board at the time of the issuance of the bonds. The bonds to be called shall be selected by lot and shall, in the event less than all of the outstanding bonds are to be redeemed, insofar as can be done taking into consideration the denominations of the outstanding bonds, represent an equal amount of bonds from each maturity outstanding at the time of the redemption. [I.C., § 43-2523, as added by 1993, ch. 407, § 1, p. 1475.]

43-2524. Reissue of bonds. — Where any bonds issued under this code are declared invalid or void by order or decree of court, which may be legally reissued, the board of such district shall, by resolution, provide for the reissuance thereof at the same rate of interest and in such amount as will cover the principal and interest due on said bonds, and the resolution providing for such reissue shall provide for the surrender and cancellation of such bonds upon which there has been a default or which have been declared invalid or void and the lien created by the levy of such assessment or assessments as herein provided shall not be deemed to have been lost or waived by such reissue but shall remain in full force and effect. [I.C., § 43-2524, as added by 1993, ch. 407, § 1, p. 1475.]

43-2525. Rights against assessments. — The said bonds of any local improvement district as herein provided, when sold as hereinbefore provided, shall transfer to the owner or holder of such bonds all the rights and interest of such district in and with respect to every such assessment and the lien thereby created against the property of each owner assessed as shall not have availed himself of the provisions of this chapter, in regard to the redemption of his property as aforesaid, and shall authorize owners and holders of such bonds to receive and have collected the assessment or assessments embraced in any such bonds through any of the methods provided by law for the collection of assessments for local improvements.

Whenever any installment of an assessment or the interest thereon made for the payment of principal, or interest on such bonds so issued, is not paid when due and shall become delinquent, the district may by a resolution duly adopted declare all unpaid installments against any property to pay the cost and expenses of such improvement to be immediately due, payable and delinquent, and may thereupon cause a delinquency certificate to be issued against said property for the whole of the unpaid assessment against it in the manner hereinafter provided for issuance of delinquency certificates upon any installment of such assessment(s) becoming delinquent, and any such board must pass such resolution upon the written request of the holders of one-half (½) of any such bond issue, filed with the secretary. [I.C., § 43-2525, as added by 1993, ch. 407, § 1, p. 1475.]

43-2526. Publication and conclusiveness of proceedings. — The board may provide for the publication of any resolution or other proceeding adopted by it pursuant to this code in the official newspaper of the district. For a period of thirty (30) days after such publication any person in interest shall have the right to contest the legality of such resolution or proceeding or any bonds which may be authorized thereby. No contest or proceeding to question the validity or legality of any resolution or proceeding, or any bonds which may be authorized thereby, passed or adopted under the provisions of this code shall be brought in any court by any person for any cause whatsoever, after the expiration of thirty (30) days from the date when the resolution or proceeding was published, and after such time the validity, legality and regularity of such resolution or proceeding or any bonds authorized thereby shall be conclusively presumed. If the question of validity of any bonds issued pursuant to this code is not raised within thirty (30) days from the date of publication of the resolution or proceeding issuing said bonds and fixing their terms, the authority to issue the bonds, the legality thereof and of the assessments necessary to pay the same shall be conclusively presumed and no court shall thereafter have authority to inquire into such matters. [I.C., § 43-2526, as added by 1993, ch. 407, § 1, p. 1475.]

43-2527. Consolidated local improvement districts authorized. — Solely for the purpose of issuing bonds, registered warrants or interim warrants, the board of any district may authorize the establishment of consolidated local improvement districts. The original local improvement districts so consolidated need not be contiguous. If the board orders the creation of such consolidated local improvement districts, the moneys received from the installment payment of the principal of and interest on assessments levied within the original local improvement districts shall be deposited in a consolidated local improvement district bond fund and interest fund to be used to pay the principal of and interest on the outstanding consolidated local improvement district bonds or warrants. [I.C., § 43-2527, as added by 1993, ch. 407, § 1, p. 1475.]

43-2528. Delinquent installments. — If any installment or payment is not made as provided hereinbefore and is in default, it shall then become delinquent. [I.C., § 43-2528, as added by 1993, ch. 407, § 1, p. 1475.]

43-2529. Delinquent certificates. — As soon as any assessment or installment thereof, of any local improvement district shall become delinquent, the treasurer shall, if such assessment be collected in one (1) payment, mark the same delinquent on the assessment roll, or if for an installment of an assessment, on the local improvement installment docket, and shall add to the amount shown on said assessment roll, or installment docket, a penalty of two percent (2%) thereon. Within ten (10) days thereafter the treasurer shall prepare and issue to the district in which such local improvement district is located, a delinquency certificate to the property included in each such delinquent assessment or installment, which

certificate shall have the force and effect of a sale of said property to the district for the amount of the delinquent assessment or installment plus penalty, said certificate shall bear date as of the time such assessment or installment became delinquent and shall be for the amount thereof plus the penalty charged thereon. Such certificate shall contain: the description of the property to be sold; the name of the person assessed, if known, or if unknown, that fact; the amount of the assessment or installment, plus penalty thereon; the number of the assessment and the name of the local improvement district in which assessed; and the date when such certificate will go to deed and shall bear interest from date thereof at the rate of ten percent (10%) per annum. Such certificates shall be made in duplicate, bound together in books in numerical order and filed in the office of the treasurer; provided, that after one (1) such certificate has been issued no further delinquency certificate shall be issued for subsequent installments of the same assessment, except as hereinafter provided, and whenever any subsequent installment shall thereafter become delinquent the treasurer shall so mark the same in the installment docket and add the penalty thereto, as hereinbefore provided, and the same shall draw interest at the rate of ten percent (10%) per annum from date of delinquency until the end of the month in which it is paid. [I.C., § 43-2529, as added by 1993, ch. 407, § 1, p. 1475.]

43-2530. Delinquent certificate register. — Within twenty (20) days after preparing and issuing any delinquency certificate the treasurer shall enter the same in a book to be kept by said treasurer known as “Local Improvement District Delinquency Certificate Register,” which register shall contain, in proper columns: the number of the assessment; the name of the local improvement district in which assessed; name of the person to whom assessed, if known; description of the property sold, corresponding with the description in the certificate and the assessment roll; and the amount of assessment and penalty, and the treasurer must regularly number each entry in said register on the margin of said book and put a corresponding number on each original and duplicate delinquency certificate. Such register must contain blank spaces following each entry of a delinquency certificate therein, in which may be entered the name of an assignee thereof, the date of such assignment and the amount paid the assignee, the name of a redemptioner thereof, the date of such redemption and the amount paid by such redemptioner. Such book or register shall be retained by the treasurer and become a part of the records of his office. From and after entry in such register and until two (2) years from its date, any such certificate, unless redeemed, may be purchased from the treasurer in the manner hereinafter provided. [I.C., § 43-2530, as added by 1993, ch. 407, § 1, p. 1475.]

43-2531. Assignment of delinquent certificates. — Whenever any person shall tender to the treasurer in cash the amount of any such certificate and interest thereon at the rate of ten percent (10%) per annum from date of such certificate to the end of the month in which such purchase

is made, together with any subsequent installments then due with penalties and interest thereon, the treasurer shall assign such delinquency certificate to the purchaser by making and executing for and on behalf of the district the blank assignment on both the original and duplicate thereof, and shall deliver the original certificate so assigned to the purchaser. Whenever the purchaser shall be required to pay subsequent assessments in addition to the amount of such delinquency certificate, the fact of such payment and the amount thereof including penalty and interest, shall be endorsed on the original and duplicate certificate so assigned. Thereafter the treasurer shall immediately make the proper entries showing such assignment in the local improvement district delinquency register, and in the installment docket; provided, that past due interest coupons and past due bonds of the local improvement district for which such certificate was issued shall be received by the treasurer, at par and accrued interest in payment of such certificates. Such bonds and coupons shall be forthwith cancelled by the treasurer. [I.C., § 43-2531, as added by 1993, ch. 407, § 1, p. 1475.]

43-2532. Form of assignment — Assignment by purchaser. — The assignment prescribed by the preceding section must be substantially in the following form, and endorsed on the certificate:

ASSIGNMENT BY TREASURER

State of Idaho

ss.

.....

Irrigation District

For and in consideration of the sum of \$ paid to said district, the receipt whereof is hereby acknowledged, I do hereby assign to whose post-office address is all the right, title and interest of the said district in and to the within and foregoing delinquency certificate.

In witness whereof, I have hereunto set my hand at, Idaho, this day of,

.....

Treasurer of the Irrigation District

.....

Such delinquency certificate may be assigned by the purchaser; provided, that such assignment must be attached to the original delinquency certificate and a duplicate of such assignment must be delivered to the treasurer who must attach the same to the duplicate delinquency certificate in his office.

The assignment of any delinquency certificate by the purchaser thereof or any assignee of such purchaser must be executed in duplicate and acknowledged as provided by law in the conveyance of real property and such assignment must be substantially in the following form, to wit:

“For value received, I hereby assign to whose post-office address is, all my right, title and interest in and to delinquency certificate No. issued by the treasurer of Irrigation District, Idaho, on

account of delinquent local improvement district assessments for the year
..., on the property described in said certificate.

In witness whereof, I have hereunto set my hand this day of,

(acknowledgment)

[I.C., § 43-2532, as added by 1993, ch. 407, § 1, p. 1475; am. 2002, ch. 32, § 16, p. 46.]

Compiler's notes. Sections 15 and 17 of S.L. 2002, ch. 32, are compiled as §§ 42-2973 and 45-407, respectively.

43-2533. Redemption. — At any time within two (2) years from the date of any delinquency certificate, the owner of the property described therein, or anyone on his behalf, may redeem such property by paying to the treasurer the amount stated in such certificate together with interest thereon at the rate of ten percent (10%) per annum, from date thereof to the last day of the month in which such redemption is made. Thereupon the treasurer shall issue to the redemptioner a certificate of redemption which shall state the name of the redemptioner, the date of redemption, the number of the certificate so redeemed, the description of the property contained therein, and the name of the local improvement district for which said certificate was issued. In case said certificate has not been assigned, the treasurer shall note such upon the original and duplicate delinquency certificate; if assigned upon the duplicate certificate the fact that the same has been redeemed, the date of redemption and shall note the same upon the local improvement delinquency certificate register and the local improvement installment docket; provided, that no redemption of any such certificate shall be allowed unless all assessments which have become due subsequent to the one for which said delinquency certificate shall have been issued with penalties, and interest at the rate of ten percent (10%) per annum from date of said delinquency to the end of the month in which the same is redeemed, shall be paid, which fact together with the amount paid shall be stated upon the redemption certificate. The money received from the redemption of any property described in a certificate which has been assigned shall be deposited by the treasurer to the credit of the person named in the last assignment of such certificate. The treasurer shall thereupon give notice to such person at the address shown by the record of such deposit, and such person shall thereafter be paid the same by the treasurer, without additional interest, upon surrender of such certificate to the treasurer who shall mark the same "paid" and hold it as a voucher. [I.C., § 43-2533, as added by 1993, ch. 407, § 1, p. 1475.]

43-2534. Deed. — If the property described in any delinquency certificate is not redeemed within two (2) years from the date thereof, the treasurer, after having given notice as hereinafter required, shall issue a deed thereto to the district, or if the same has been assigned as hereinbefore provided, then to the person holding the original delinquency certificate under assignment, upon request therefor, and upon the delivery to the

treasurer of such original certificate and filing proof of having given notice as required by the treasurer before making a deed to the district. Such deed shall recite substantially the matter contained in the certificate and that no person redeemed the property within the time allowed, by law, for its redemption. It shall be signed and acknowledged by the treasurer in the manner required, by law, to entitle the same to be recorded under the laws of this state; provided, that such deed shall not be issued to an assignee until he has paid all subsequent installments and assessments of the local improvement district then delinquent or due upon the property described in the delinquency certificate, together with the penalties and interest thereon. Such deed to an assignee shall be made subject to all unpaid installments not then due and subject to all regular or special assessments of the district, not related to the local improvement district. [I.C., § 43-2534, as added by 1993, ch. 407, § 1, p. 1475.]

43-2535. Notice of expiration of time of redemption. — The treasurer shall, at least one (1) month and not more than three (3) months before the expiration of the time of redemption of any property, serve or cause to be served, a written or printed, or partly written and partly printed, notice on the person or persons in the actual possession or occupancy of such land or lots, and shall also, within the same time, serve upon or mail to, the person in whose name the same stands upon the assessment records in the county assessor's office, a copy of said notice; which notice shall state when the delinquency certificate was made, in whose name the property was assessed, the description of the land or lots, the name of the local improvement district for which assessed, the amount of the assessment or installment, and when the time of redemption will expire. The treasurer shall, at the same time, send a similar notice, by mail, to each mortgagee or other holder of a recorded lien against such land, in each case where such mortgagee or lienholder has previously filed in the office of the treasurer a written request for such notice and paid the fee therefor, which request shall include the name and address of the mortgagee, the name of the reputed owner of the land, a description of the land and the date of the expiration of the mortgage or lien; no notice need be sent after the date of expiration, unless a further request therefor be duly filed. If the mortgagee or lienholder shall furnish a duplicate form of request for that purpose the treasurer shall certify thereon to the filing of the request and deliver the same to the party filing it. If there is no person in actual possession or occupancy of such land or lot and if the persons in whose name it stands, upon diligent inquiry cannot be found in the state, then the treasurer shall, within the same time, post or have posted, a copy of said notice in a conspicuous place upon said land or lots and in a substantial manner.

Whenever any notice is mailed, as herein required, the fact that the addressee does not receive it shall not in any manner invalidate or affect the proceedings herein provided. [I.C., § 43-2535, as added by 1993, ch. 407, § 1, p. 1475.]

43-2536. Proof of notice. — The treasurer shall, before issuing any deed to the district, make and file his affidavit showing a full compliance

with the requirements of the preceding section [43-2535] as to giving notice of the expiration of the period of redemption; before issuing a deed to the holder of any delinquency certificate, the treasurer shall require that affidavits be filed showing a complete compliance with the provisions of the previous section as to giving such notice. Such proof shall be filed in the office of the treasurer and remain a permanent record in such office. Any person making a false affidavit as to any fact required herein shall be guilty of perjury. [I.C., § 43-2536, as added by 1993, ch. 407, § 1, p. 1475.]

Compiler's notes. The bracketed reference "43-2535" was inserted by the compiler.

43-2537. Effect of deed as evidence. — The matters recited in the delinquency certificate must be recited in the deed and such deed duly acknowledged or proved shall be prima facie evidence:

(1) That the local improvement district was created, the assessment made and the work and improvement done in the manner provided by law;

(2) That all notices were given, all hearings were had, orders made and resolutions passed and adopted required by law, and that all the proceedings up to the execution and delivery of such deed were had and done in the manner required by law;

(3) That the assessments were not paid, the delinquency entries were properly made and delinquency certificate properly issued, as prescribed by law, and by the proper officer;

(4) That the property was not redeemed, that the notice required to be given before deed was taken was properly given as required by law, and that the person who executed the deed was the proper officer. [I.C., § 43-2537, as added by 1993, ch. 407, § 1, p. 1475.]

43-2538. Delinquency certificate for subsequent installments. — Whenever any delinquency certificate has been assigned, as hereinbefore provided, and the time for redemption has expired and there are outstanding, against the property covered by said certificate, any delinquent installments subsequent in time to the installment for which the property was sold, then the treasurer shall issue to the district a delinquency certificate for such past due installments in the same manner, as hereinbefore provided, and shall cancel the previous delinquency certificate and the same shall be of no further force and effect. Such delinquency certificate for subsequent installments may be assigned in the same manner, as hereinbefore provided, and have the same force and effect. [I.C., § 43-2538, as added by 1993, ch. 407, § 1, p. 1475.]

43-2539. Fees of treasurer. — The treasurer shall receive the following fees, which, when paid, shall be credited to the general fund of the district: for issuing any delinquency certificate ten dollars (\$10.00) to be included in the amount of the certificate; for making any deed ten dollars (\$10.00), to be paid by the person to whom made; for giving notice to a mortgagee or lienholder five dollars (\$5.00), to be paid by such person; for giving notice of expiration of period of redemption five dollars (\$5.00). In all

cases where the property is deeded to the district the fees shall be charged to the amount for which the deed is taken and shall be paid upon the sale of the property, or the sale of the delinquency certificate. [I.C., § 43-2539, as added by 1993, ch. 407, § 1, p. 1475.]

43-2540. Suit to quiet title. — Whenever the necessary costs and attorney's fees have been advanced by the holders of the bonds of the district or any prospective purchaser or other person, it shall be the duty of the board of such district to cause the attorney for the district to commence suit to quiet title to the property described in said deed in the name of the district and to secure the possession of the property; provided, that the property described in any number of tax deeds so made to the district and against any number of owners of property may be included in the same suit. [I.C., § 43-2540, as added by 1993, ch. 407, § 1, p. 1475.]

43-2541. Sale of property deeded to district. — At any time after acquiring title and possession of any property, as hereinbefore provided, the district may sell such property to any purchaser upon receiving therefor a sum not less than the amount for which the property was sold to the district and by the payment of all installments of assessments subsequent to the one (1) for which such property was sold and then due together with the penalties and interest thereon. The purchaser shall take such property subject to any unpaid general taxes and assessments and to all local improvement district installments not then due, and the district shall thereafter collect such installments in the manner provided by this code. When such purchase is made and the money paid therefor, the district shall issue a deed to the purchaser signed by the president and attested by the secretary, which deed shall be executed and acknowledged in the manner required, by law, to entitle the same to be recorded under the laws of this state.

In selling such property and in conveying title thereto the provisions of sections 43-1508 and 43-1509, Idaho Code, shall not apply and compliance with the procedures set forth in section 43-318, Idaho Code, shall not be required, but no conveyance under this section shall be valid unless it be approved by an affirmative vote of more than one-half ($\frac{1}{2}$) of the full board. [I.C., § 43-2541, as added by 1993, ch. 407, § 1, p. 1475.]

43-2542. Sale of property after maturity of bonds. — Within thirty (30) days after the maturity of the last installment of any issue of bonds of a local improvement district, if any such bonds or interest coupons shall remain unpaid, any property remaining unsold, to which the district has taken title by reason of assessment of such local improvement district, shall be appraised and immediately after said appraisement such property shall be offered for sale by giving notice of the time and place of sale thereof by publication of such notice in a newspaper published in the district for ten (10) consecutive issues if a daily paper, or in two (2) consecutive issues if a weekly paper, or if there be no newspaper published in such district then in a newspaper having general circulation therein, the date of sale to be not

less than twenty (20) days from the date of the first publication of such notice. At the time and place designated in the notice the treasurer shall offer such property for sale to the highest bidder, but no sale shall be made for less than the appraised value. If no bid be received for a sum equal to or greater than the appraised value, then the sale may be postponed for not to exceed thirty (30) days, and shall be readvertised, and at the time to which such sale was postponed shall again be offered for sale and sold to the highest bidder. Upon the sale of any property and the payment therefor, a deed shall be executed to the purchaser in the same manner, as provided for the execution of deeds in section 43-2541, Idaho Code. [I.C., § 43-2542, as added by 1993, ch. 407, § 1, p. 1475.]

43-2543. Disposition of funds. — All money received by the treasurer on account of the payment of assessments or installments thereof, the assignment or redemption of delinquency certificates, or for rents, issues and profits, or from the sale of any property, title to which is held by the district for the benefit of any local improvement district, less any expenses of securing possession of said property, or for the care and operation and sale of the same, shall be deposited to the credit of the interest fund and bond fund of the local improvement district, in the same proportion as the assessment or installments for which the property was taken. Any money left in a local improvement district interest or bond fund or any money derived from the rental or sale of any real property acquired by the district through the sale for delinquent assessments or installments shall, after all warrants, bonds and coupons of said local improvement district have been paid in full, be credited to the general fund of the district. [I.C., § 43-2543, as added by 1993, ch. 407, § 1, p. 1475.]

43-2544. Delinquent certificate not assignable during pendency of action. — No certificate of delinquency as hereinbefore provided, shall be assigned, or any property sold, to which the district has taken a deed, on account of any assessment, or installment thereof, during the pendency of any proceeding in court challenging the validity of such assessment. [I.C., § 43-2544, as added by 1993, ch. 407, § 1, p. 1475.]

43-2545. Duties of officers. — When the board shall decide that it is to the best interest of the district that the duties in this code designated to be performed by the treasurer should be done and performed by the secretary of such district, they may at their option, by resolution, duly presented and approved by such board assign such duties to the secretary of such district; provided, that the duty of receiving any funds collected by the secretary and the depositing and disbursing of such funds by order of the board shall always be and remain the duty and responsibility of the treasurer. The board shall, in said resolution, devise a proper system or plan whereby the secretary may pay to the treasurer all moneys collected by him and take receipts therefor. [I.C., § 43-2545, as added by 1993, ch. 407, § 1, p. 1475.]

43-2546. Local improvement guarantee fund — Creation of fund. — Any district may by resolution of appropriation or by levy of a tax of not

to exceed one (1) mill in any one (1) year upon the lots or lands in the local improvement district, or by appropriation from such other sources of the local improvement district as may be determined by the board, create a fund for the purpose of guaranteeing, to the extent of such fund, the payment of bonds or warrants and interest thereon, hereafter issued against any local improvements therein; provided, that such sum so levied or appropriated in any year shall be more than sufficient to pay the outstanding warrants of said fund and to establish therein a balance, which combined levy and appropriation in any one (1) year shall not exceed five percent (5%) of the outstanding obligations thereby guaranteed; provided further, that the board shall not levy any tax as herein provided when the amount of moneys in the local improvement guarantee fund equals ten percent (10%) of the total outstanding obligations thereby guaranteed. The tax levies herein authorized and directed shall be additional to and, if need be, in excess of any and all statutory limitations. The fund so created shall be designated local improvement guarantee fund. [I.C., § 43-2546, as added by 1993, ch. 407, § 1, p. 1475.]

43-2547. Bonds, warrants and coupons, when paid out of fund — Nonpayment for want of funds — Interest. — Whenever any district has established such local improvement guarantee fund, and any bond, warrant or coupon drawn against any local improvement fund is presented to the district for payment and there is not sufficient amount in said local improvement fund against which to draw to pay the same, unless otherwise requested by the holder, payment therefor shall be made by warrant drawn against the local improvement guarantee fund. Such warrants when presented to the treasurer for payment, if not paid, shall be registered and draw interest at a rate as may be fixed by the board. Neither the holder nor the owner of any bond or warrant issued under the provisions of this act shall have any claim therefor, except for payment from the special assessments made for the improvement for which said bond or warrant was issued, and except as against the local improvement guarantee fund herein provided, and the district shall not be liable to any holder or owner of such bond or warrant for any loss to the guarantee fund occurring in the lawful operation thereof by the district. [I.C., § 43-2547, as added by 1993, ch. 407, § 1, p. 1475.]

Compiler's notes. The words "this act" refer to S.L. 1993, ch. 407, which is compiled as §§ 43-2501 — 43-2554.

43-2548. Subrogation of district to rights of payee — Surplus funds — Payment into fund — Preferences. — Whenever there shall be paid out of the local improvement guarantee fund, any sum on account of principal or interest of a local improvement bond or warrant, the district, as trustee for the fund, shall be subrogated to all the rights of the holder of the bond or interest coupon or warrant so paid, and the policies thereof, or the assessment underlying the same, shall become part of the guarantee fund. There shall be paid into the guarantee fund any surplus remaining in any

local improvement fund after the payment of all outstanding bonds or warrants, payable out of such local improvement fund. Bonds or warrants guaranteed by such fund shall have no preference except in the order of presentation for payment. [I.C., § 43-2548, as added by 1993, ch. 407, § 1, p. 1475.]

43-2549. Maintenance and operation and sources of fund. — The board shall prescribe rules and regulations for the maintenance and operation of the guarantee fund not inconsistent herewith. After the creation of such fund, all money derived from the assignment of delinquency certificates, redemptions, sale of property under foreclosure for delinquent local improvement district assessments or from the rent or sale of property, title to which has been obtained by the district pursuant to this code, shall be paid into the local improvement guarantee fund, and all delinquency certificates issued and such property acquired shall be held by the district for the benefit of such guarantee fund. Money from the guarantee fund may be used to redeem property subject to local improvement assessments from general tax delinquencies, underlying bonds or warrants guaranteed by the fund, or to purchase such property at county tax sales or otherwise, from the county for the purpose of protecting the guarantee fund. After so acquiring title to real property, the district may lease or sell and convey the same for such price and on such terms as may be determined by the board, any provision of law or resolution to the contrary notwithstanding, and all proceeds resulting therefrom shall belong to and be paid into the guarantee fund, provided however, that in the event the district purchases such property at tax sale or otherwise it shall not be sold for a lesser sum than the district paid therefor. [I.C., § 43-2549, as added by 1993, ch. 407, § 1, p. 1475.]

43-2550. Replenishment of fund — Warrants — Issuance against fund — Tax levy. — Whenever there is not a sufficient amount of cash in said local improvement guarantee fund, at any time to pay any and all warrants, together with interest thereon, drawn against said fund, the board may replenish said local improvement guarantee fund by transferring or appropriating to it, moneys from the general fund of the district or other available sources, as may be determined by said board, subject however, to the limitations herein prescribed. Warrants drawing interest, as herein provided, may be issued against said local improvement guarantee fund to meet any financial liability against it; but at the time of making its next annual levy upon lots or lands in the local improvement district, the district shall provide for the levy of a sum sufficient with other resources of the guarantee fund to pay warrants so issued and outstanding, the tax for this purpose not to exceed one (1) mill, based on the market value fixed by the county assessor in any one (1) year. [I.C., § 43-2550, as added by 1993, ch. 407, § 1, p. 1475.]

43-2551. Bonds and warrants — Revenues from which payable. — The holder or owner of any local improvement bond or warrant shall have

no claim thereon against the district by which the same is issued, except to the extent of the funds created and received by assessments against the property within any local improvement district and to the extent of his pro rata share of any local improvement guarantee fund, authorized and created under the provisions of this chapter. [I.C., § 43-2551, as added by 1993, ch. 407, § 1, p. 1475.]

43-2552. Bonds payable from fund. — Whenever a district has created a local improvement guarantee fund, under the provisions of this act, any local improvement district bonds issued thereafter shall provide that the principal sum of such bonds and the interest thereon shall be payable out of the local improvement fund created for the payment of cost and expenses of the improvement or out of any local improvement guarantee fund, duly authorized and created, and not otherwise. [I.C., § 43-2552, as added by 1993, ch. 407, § 1, p. 1475.]

Compiler's notes. The words "this act" refer to S.L. 1993, ch. 407, which is compiled as §§ 43-2501 — 43-2554.

43-2553. Excess in fund — Disposition. — When a local improvement guarantee fund duly created in any district exceeds in amount of moneys held therein by ten percent (10%) of the total outstanding obligations thereby guaranteed, then the board may, by resolution, authorize the treasurer or appropriate official of said district to return and pay such said excess or any part thereof to the general fund of said district to return and pay from such said excess or any designated part thereof all or any part of local improvement district bonds of said district then issued and outstanding or to be issued. The passage of such resolution shall require the affirmative vote of at least two-thirds ($\frac{2}{3}$) of the full board. [I.C., § 43-2553, as added by 1993, ch. 407, § 1, p. 1475.]

43-2554. Reserve fund authorized. — For the purpose of securing the payment of the principal of and interest on an issue of local improvement bonds, notes, warrants or other short-term obligations, the board may create a reserve fund for each obligation in addition to or in lieu of a guarantee fund. The reserve fund shall be separate and apart from any guarantee fund and in an amount not exceeding ten percent (10%) of the principal amount of the bonds, notes or warrants issued. The cost of a reserve fund may be included in the cost and expense of any local improvement for assessment against the property in the local improvement district to pay the cost, or any part thereof. The reserve fund may be funded from the proceeds of the bonds, notes, warrants, or other short-term obligations, from special assessment payments, or from any other money legally available therefor. Reserve fund balances in excess of ten per cent [percent] (10%) of the principal amount of the bonds outstanding shall be used to reduce the annual assessments of those participants in the respective local improvement district whose prior assessments have been paid. Whenever the reserve fund is insufficient to meet claims for payment of principal and interest against

the reserve fund, the board may appropriate funds from such other legally available sources of the local improvement district as may be determined by the board. [I.C., § 43-2554, as added by 1993, ch. 407, § 1, p. 1475.]

Compiler's notes. The bracketed word "percent" in the fifth sentence was inserted by the compiler.

Section 2 of S.L. 1993, ch. 407 declared an emergency. Approved April 1, 1993.

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